COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1703-0193AC
TRIAL COURT FILE NUMBER:	1103-14112
REGISTRY OFFICE:	Edmonton
PLAINTIFF/APPLICANT:	Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon
STATUS ON APPEAL:	Appellant
DEFENDANT/RESPONDENT:	Roland Twinn, Catherine Twinn, Walter Felix Twin, Berta L'Hirondelle, and Clara Midbo, As Trustees For The 1985 Sawridge Trust (The "1985 Sawridge Trustees" Or "Trustees")
STATUS ON APPEAL:	Respondent
DEFENDANT/RESPONDENT:	Public Trustee Of Alberta ("OPGT")
STATUS ON APPEAL	Respondent
DEFENDANT/RESPONDENT:	Catherine Twinn
STATUS ON APPEAL	Respondent
DEFENDANT/RESPONDENT	Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley
STATUS ON APPEAL	Not a party to the Appeal
DOCUMENT:	**BOOK OF AUTHORITIES**

Fast Track

Appeal from the Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 5th day of July, 2017
Filed the 19th day of July, 2017

BOOK OF AUTHORITIES OF THE RESPONDENTS, THE TRUSTEES

BORDEN LADNER GERVAIS LLP
1900, 520 Third Avenue SW
Calgary, AB T2P 0R3
Solicitor: Nancy Golding, Q.C.
Telephone: (403) 232-9485
Facsimile: (403) 266-1395

Counsel for the Appellants

DENTONS LLP
2900 Manulife Place, 10180-101 Street
Edmonton, AB T5J 3V5
Solicitor: Doris Bonora, Anna Loparco
Telephone: (780) 423-7188
Facsimile: (780) 423-7276

Counsel for the Respondents
Roland Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hirondelle and Carla Midbo, as Trustees for the 1985 Trust

HUTCHISON LAW
130 Broadway Boulevard
Sherwood Park, AB T8H 2A3
Solicitor: Janet Hutchison
Telephone- (780) 417-7871
Facsimile: (780) 417-7872

Counsel for the Respondent
The Office of the Public Guardian and Trustee

Karen A. Platten, Q.C.
12220 Stony Plain Road
Edmonton, AB T4N 3Y4
Telephone : (780) 482-9278
Facsimile : (780) 482-9100

Counsel for the Respondent
Catherine Twinn

LIST OF AUTHORITIES

Tab	Authority
1.	*Ashraf v SNC Lavalin ATP Inc.*, 2017 ABCA 95, 2017 CarswellAlta 462
2.	*Lameman v Alberta*, 2013 ABCA 148, 2013 CarswellAlta 458
3.	*Korte v Deloitte, Haskins & Sells*, 36 Alta LR (3d) 56, 1995 CarswellAlta 788
4.	*Balogun v Pandher*, 2010 ABCA 40, 2010 CarswellAlta 177
5.	*Dreco Energy Services Ltd. v Wenzel*, 2008 ABCA 290, 2008 CarswellAlta 1145
6.	*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235
7.	*Alberta Rules of Court*, Alta Reg 124/2010
8.	*Amoco Canada Petroleum Co v Alberta & Southern Gas Co.*, (1993) 10 Alta LR (3d) 325, 1993 CarswellAlta 32
9.	*Castledowns Law Office Management Ltd. v FastTrack Technologies Inc.*, 2012 ABCA 219, 2012 CarswellAlta 1203
10.	*1985 Sawridge Trust (Trustees of) v Alberta (Public Trustee)*, 2015 ABQB 799, 2015 CarswellAlta 2373
11.	*Trustee Act*, RSA 2000, c T-8
12.	*Canada Trust Co. v Ontario Human Rights Commission*, 69 DLR (4th) 321, 1990 CarswellOnt 486
13.	Bruce Ziff, "Welcome the Newest Unworthy Heir", (2014) 1 ETR (4th) 76
14.	*Half Moon Lake Resort Ltd. v. Strathcona (County)*, 2001 ABCA 50, 2001 CarswellAlta 245
15.	*Babchuk v Kutz*, 2007 ABQB 88, 411 AR 181
16.	*Serdahely (Estate of)*, 2005 ABQB 861, 2005 CarswellAlta 1751
17.	*Foote Estate (Re)*, 2010 ABQB 197, 2010 CarswellAlta 513
18.	*McDonald Estate*, 2012 ABQB 704, 2012 CarswellAlta 2235
19.	*Brill v Brill*, 2017 ABCA 235, 2017 CarswellAlta 1246
20.	*British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371
21.	*Bun v Seng*, 2015 ABCA 165, 2015 CarswellAlta 854
22.	*Chisholm v Lindsay*, 2017 ABCA 21, 2017 CarswellAlta 41

TAB 1

In the Court of Appeal of Alberta

Citation: Ashraf v SNC Lavalin ATP Inc., 2017 ABCA 95

Date: 20170323
Docket: 1601-0062-AC
1601-0262-AC
Registry: Calgary

1601-0062-AC

Between:

Shidan Ashraf

Appellant
(Plaintiff)

- and -

SNC Lavalin ATP Inc.

Respondent
(Defendant)

- and -

1601-0262-AC

Between:

Shidan Ashraf

Appellant
(Plaintiff)

- and -

SNC Lavalin ATP Inc.

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Sheilah Martin
The Honourable Madam Justice Michelle Crighton

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice C.S. Anderson
Dated the 17th day of March, 2016
(Docket: 1201 09737)

Appeal from the Order by
The Honourable Madam Justice C.S. Anderson
Dated the 27th day of September, 2016
(Docket: 1201 09737)

Memorandum of Judgment

The Court:

1. Introduction

[1] The appellant, Mr. Ashraf, is a self-represented individual who sued his former employer, the respondent, for how he was treated at work. This matter has a complex history and after various decisions, including a previous judgment from this Court, the matter is now proceeding as a constructive dismissal claim. A trial is set for November 2017, so it is important that we provide necessary directions on this appeal in a timely manner.

[2] While the appellant raised many issues before us, in the context of these two appeals heard concurrently, the focus was on three decisions made by the case management judge. The first was her decision to allow the respondent to make a second summary judgment application. The second was her decision to deny the appellant's request for an adjournment of that summary judgment hearing. The third decision was the summary judgment decision itself. The appellant claims the judge erred in holding that certain claims could not proceed to trial. In this latter context, the appellant applies to place fresh evidence before this Court. He submits he was unable to put this evidence before the case management judge at the summary judgment hearing because he was unsuccessful in having it adjourned.

[3] For the reasons that follow, we conclude there is no merit to the appellant's appeals related to the first two decisions. On the third – the case management judge's decision regarding summary judgment – we find there is no basis to upset the determinations on personal damages, defamation, special damages and the absence of a restitutionary claim. However, we believe some clarification is required on the issue of physical and psychological injuries arising from the manner of the alleged constructive dismissal, and we allow the appellant's appeal with respect to the setting of the common law notice period. The application for the admission of new evidence is dismissed.

2. The Standard of Review

[4] The first two decisions being contested are case management decisions. This Court has made clear that such decisions are entitled to considerable deference. In *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253, 606 AR 291, the Court stated at para 8:

> Case management judges are owed deference. Absent an error of law, this Court will not interfere with a chambers judge's exercise of discretion unless the result was unreasonable. This is particularly so when many competing factors must be balanced: *Mikisew Cree First Nation v Canada*, 2004 ABCA 279 at para 10 (2004), 354 AR 279.

[5] The third decision goes further and deals with the merits of the summary judgment application. The standard of review for the case management judge's conclusions on this subject was described in *Dingwall v Dornan*, 2014 ABCA 89, 572 AR 106 at para 19:

> Absent an error of law, the standard of review on an appeal of a summary judgment is reasonableness, given the discretionary nature of the remedy. Questions of law are reviewed for correctness. Errors of mixed fact and law, and errors of fact alone are reviewed on the standard of palpable and overriding error, unless the error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard is one of correctness: *Condominium Corp No 0321365 v 970365 Alberta Ltd*, 2012 ABCA 26 at paras 39 and 40, 519 AR 322, see also *Hryniak v Mauldin*, 2014 SCC 7 at para 84.

3. The Decision to Allow a Second Summary Judgment Application

[6] The appellant challenges the case management judge's decision to allow the respondent to file a second application for summary judgment provided the application was heard before September 30, 2016. The following brief history explains the context for this application.

[7] The appellant was employed by the respondent as its Chief Engineer of Telecommunications in its Transmission and Distribution Division. He left that employment and sued his employer alleging the employer had failed in its duty to provide a safe and healthy work environment with the result that he had suffered mental and physical harm.

[8] The appellant's first statement of claim was broadly stated. The respondent challenged that statement of claim on the basis that it alleged workplace injuries within the exclusive jurisdiction of the Worker's Compensation Board (WCB). The Master hearing that first summary judgment application agreed and held that the claim could not proceed.

[9] The appellant appealed that finding to a Justice of the Court of Queen's Bench and, at the same time, sought to amend his pleadings to include a claim for constructive dismissal. The Justice allowed the amendment but struck the action anyway on the basis that jurisdiction to deal with the matter still lay with the WCB.

[10] The appellant appealed that finding to the Court of Appeal. This Court found the statement of claim disclosed two causes of action: damages for physical and psychological injuries sustained in the workplace, and damages for constructive dismissal. It went on to dismiss the first cause of action because it fell under the WCB's jurisdiction. It restored the claim for constructive dismissal, however, holding that this action did not fall under the WCB's jurisdiction. In restoring the claim, the court seemed to suggest it might still be open to the appellant to make a claim for physical and psychological damages provided they were causally related to the constructive dismissal action. The Court stated at p 11 of its reasons:

> If the judgment appealed from were allowed to stand, the appellant would be left without a forum to advance that claim, as would every other claimant for constructive dismissal who alleged that the workplace abuse leading to termination also caused stress or other psychological injury.

[11] On February 27, 2016, the parties agreed to a consent order setting the matter down for a 15-day trial beginning November 20, 2017. The parties agreed to appear before the case management judge on March 17, 2016 to settle the scheduling of any outstanding interlocutory applications prior to trial.

[12] The respondent advised the case management judge on that date that it wanted to bring an application for summary judgment on the remaining claim for constructive dismissal. In response, the appellant argued that the matter was *res judicata* due to this Court's previous decision restoring that cause of action. The case management judge ruled the appellant's argument about *res judicata* was more properly raised at the hearing of the summary judgment application, when the court would be considering the merits of the application should it actually be made. In the end, therefore, she ordered that the respondent could file an application for summary judgment as long as it timed the application so that it could be heard before September 30, 2016.

[13] The appellant challenges this decision on a number of grounds. His arguments dealing with events occurring after the hearing, as well as the argument regarding possible bias on the part of the case management judge, are completely baseless and need not be discussed further. The appellant, however, once again raises the issue of *res judicata*, submitting that the case management judge could not permit a further application for summary judgment because the respondent's first application for summary judgment was dealt with by the Court of Appeal.

[14] In our view, the case management judge could schedule and hear the summary judgment application and the doctrine of *res judicata* does not arise or apply in the circumstances. The *Rules of Court* provide that a summary judgment application may be taken at any time. The previous Court of Appeal decision addressed what cause of action could be asserted as a matter of law and restored the constructive dismissal claim. No other court previously considered, let alone determined, whether that particular constructive dismissal claim could survive a test of its merits. There is therefore no binding authority on the same subject matter that could operate to trigger this doctrine. The appellant's challenge of this decision, therefore, must be dismissed.

4. The Decision to Not Permit an Adjournment

[15] On September 6, 2016, at the hearing of the second summary judgment application, the appellant sought an adjournment. That application was denied. The appellant now argues it was unfair for the case management judge to deny his application and hear the summary judgment application. Once again it is necessary to set out the factual matrix to understand this submission.

[16] When the parties were in court on March 17, 2016, discussing timelines for any outstanding interlocutory applications, the respondent indicated its intention to make the second summary judgment application. It had not yet filed an application and its supporting affidavit. Even though it is a common and helpful practice for the applicant to file the application and affidavit before asking for a hearing date, no rule requires that order of events.

[17] The appellant wrote to the case management judge and opposing counsel on April 11 and 15, 2016 asking to set deadlines for the steps necessary for the September application. On April 19, 2016, the respondent wrote the judge, and the appellant, saying that no timeline was needed and that the parties should simply abide by Practice Note 2. Even so, in that letter the respondent indicated that it intended to file its application and supporting affidavit materials before the end of April.

[18] On April 21, 2016, the case management judge wrote to both parties informing them that the summary judgment application would be heard on September 6, 2016 and that they were to comply with Practice Note 2 with respect to the filing of materials. This meant that the

respondent's application, affidavits and briefs needed to be filed and served by August 19, 2016, while the appellant's materials needed to be filed and served by August 26, 2016. In the end, however, unsworn copies of materials were given to the appellant around July 18, and the respondent served and filed its originating documents on July 28, 2016, some six weeks before the hearing. Its brief was filed and served on the appellant on August 19, 2016.

[19] The appellant wrote again to the case management judge and opposing counsel on May 1, June 15 and June 16 saying that because he had not received the respondent's materials by the end of April, as promised, he did not believe he could be ready for the September hearing. He received no response from the respondent and was informed that the case management judge was not available to hear an adjournment request application. The appellant was directed to take an adjournment application before any justice in morning chambers. He did so on August 2, 2016, and the chambers judge refused to consider the merits of the application as the matter was in case management. As a result, the appellant made his adjournment application at the beginning of the September 6 summary judgment hearing before the case management judge.

[20] The appellant argued before the case management judge, and he argues before this Court, that because he had not received the respondent's application and affidavit in April, he did not know what case he had to meet. He explained to the case management judge that he had changed his previous plan to be out of the country in April and May to answer the summary judgment application. He claimed this later than promised timing prevented him from cross-examining the affiant, seeking assistance from counsel, and preparing his own response affidavit. He also told the case management judge that he had consulted with two lawyers upon receipt of the respondent's materials in August and each had told him there was insufficient time to help him prepare his response. While there was no questioning done on the respondent's affidavit, the appellant managed to place before the case management judge a brief and one affidavit.

[21] The transcript of the adjournment application was before this Court and shows that the case management judge was prepared to grant an adjournment and canvassed various possibilities with both parties. The appellant explained that he rescheduled the previously postponed business and personal trip to New Zealand into October and November. He had an unrelated trial occurring in January for which he needed some time for preparation. In his view, the earliest he could be ready for the summary judgment hearing would be April of 2017, even though the months of May and June were also discussed. Counsel for the respondent took the position that was too late and too close to the scheduled trial in November 2017. The case management judge agreed. She denied the request for an adjournment and consequently the summary judgment application went ahead, but without any further evidence from the appellant.

[22] The appellant submits this was a reviewable error that created significant unfairness and prejudice. In assessing the merit of this argument, we note that the appellant clearly conveyed his need for the materials by the promised time in April in a series of letters, and he tried to have his adjournment application heard in a timely manner. On the other hand, the respondent explains that after the case management judge directed that the deadlines would be those set out in Practice Note 2, it did not believe its previously stated intention of providing materials by the end of April was binding. The respondent points out, further, that this litigation has involved some 21 applications and multiple communications over many years, and that it did not always respond to every letter. It

argues, in any event, that the appellant suffered no prejudice because he received the unfiled materials before the deadline in Practice Note 2, and had then approximately six weeks to prepare for the hearing.

[23] In our view, while there was some potential misunderstanding about the directive that Practice Note 2 would apply, the real issue here, affecting the case management judge's decision on the adjournment, was the appellant's inability to find a reasonable date to which the summary judgment application could be adjourned. To assist the appellant in preparing for trial, the case management judge had already made it clear to the respondent that if it wanted to apply for summary judgment it had to do so before September 30, 2016. Now the appellant was coming forward and proposing that the application be deferred until well into the new year. Given the difficulties already experienced in getting this litigation to trial, we can understand the case management judge's reluctance to grant such a lengthy adjournment.

[24] We are satisfied, therefore, given the facts that were before her, that the case management judge came to a reasonable decision in dismissing the appellant's application for an adjournment. As decisions about adjournments are discretionary, and accorded a high degree of deference, we see no reason to interfere.

5. The Summary Judgment

[25] The respondent argued on the summary judgment application that the appellant's entire claim ought to be dismissed for a failure to file within the two-year limitation period. Failing that, the respondent asked the case management judge to set the applicable notice period in the constructive dismissal action, and to dismiss the appellant's remaining claims for damages for personal injury, defamation, special damages, and aggravated and punitive damages.

[26] On the limitations question, the case management judge was not satisfied she could calculate the applicable limitation period because there was some evidence before her that the appellant might have been suffering from a disability at the time he was alleging to have been constructively dismissed. She held this was a proper matter for trial. The case management judge concluded, also, that the claim for aggravated and punitive damages could not be dismissed summarily. In coming to this conclusion, she made clear that what she was referring to were the damages for injury discussed in *Honda Canada Inc v Keays*, 2008 SCC 39 – damages in the context of a wrongful dismissal claim based upon the manner of dismissal. The case management judge dismissed the appellant's other claims for personal injury, defamation and special damages and set the notice period at 10 months.

[27] The appellant submits the case management judge erred in dismissing the aforementioned claims and in setting the common law notice period rather than leaving the issue for trial. Paradoxically, however, the appellant's argument dealing with the dismissed claims revolves primarily around the decision in *Honda*. The appellant submits that under *Honda* he is entitled to claim damages for personal injury, loss of reputation and special damages, as long as there is a causal connection between the damages alleged and the manner of his dismissal. Notably, this position is consistent with the case management judge's decision with respect to aggravated and punitive damages, and is consistent with the following position taken by the respondent at paras 37 and 38 of its factum:

> The Respondent concedes that the Summary Judgment Decision left open the claim for aggravated and punitive damages pursuant to *Wallace* and *Honda* and recognizes that if the Appellant is successful in proving at trial that: (1) he was constructively dismiss[ed]; and (2) aggravated and/or punitive damages are appropriate due to the manner of dismissal, the Court may then make a determination of reasonably contemplated damages arising from the manner of dismissal.
>
> However, this is a different analysis from that relating to the claims for personal injury, further special and other damages, damages in tort and damages for defamation which were rightfully dismissed in the Summary Judgment Decision.

[28] Given this confluence of opinion, we fail to see how the case management judge erred. The judge held the appellant was entitled to claim whatever damages it could justify under the rubric of aggravated and punitive damages as described in *Honda/Wallace*. Her rejection of any other claims the appellant might be alleging for personal injury, loss of reputation, and special damage must be seen in this context, as well as in the history of the proceedings. The case management judge was well aware that the only thing now before her was an action for constructive dismissal, and she perceived, correctly, that the only damages related to such a claim. If the appellant could prove he was constructively dismissed, damages in lieu of a period of reasonable notice, and any damage the appellant could prove he was entitled to under *Honda/Wallace*, based on the manner of his dismissal, could be advanced. As the case management judge noted, and we accept, the tort of negligent infliction of mental distress does not exist in the employment context, and the defamation claim was not adequately pleaded.

[29] It follows there is no merit to this aspect of the appellant's appeal. The same cannot be said for the case management judge's decision to set the common law notice period at 10 months. In our view, this was a genuine issue for trial. The test was discussed by the Supreme Court of Canada in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at paras 49-50:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[30] We are satisfied the case management judge did not have sufficient evidence before her to make a just determination on the merits. More importantly, perhaps, we see very little judicial economy in making this decision before trial as the court will be required to determine whether there was any unjust dismissal and whether the notice period is set by the contract or by the common law. Finally, in our view, there is nothing to be gained by bifurcating the assessment of damages. The appellant has indicated he is claiming *Honda/Wallace* damages, based upon the manner of his dismissal, along with his claim for reasonable notice. The manner of dismissal may impact the length of the notice period: *Wallace* at para 95. The trial judge should be given the opportunity to make a decision on damages based on the totality of the evidence.

6. The Fresh Evidence

[31] There is no need to consider the fresh evidence. Most of the alleged new evidence was available at the time of the summary judgment application through the exercise of due diligence. Furthermore, given that most of the issues before us raised questions of law, the evidence could not be expected to have affected the result. The appellant can take some comfort from the fact that because of our decision on the common law notice period, some of what he put before us may still be relevant and admissible at trial.

7. Conclusion

[32] The case management judge's decision on the length of the common law notice period is set aside. In all other respects, the two appeals before us are dismissed.

Appeal heard on March 8, 2017

Memorandum filed at Calgary, Alberta
this 23rd day of March, 2017

Authorized to sign for: Costigan J.A.

Martin J.A.

Authorized to sign for: Crighton J.A.

Appearances:

S. Ashraf, In Person
the Appellant in both appeals

S.T. Eichler
K.M. Tereposky
for the Respondent in both appeals

TAB 2

In the Court of Appeal of Alberta

Citation: Lameman v Alberta, 2013 ABCA 148

Date: 20130430
Docket: 1203-0169-AC
1203-0170-AC
Registry: Edmonton

Appeal No: 1203-0169-AC

Between:

Alphonse Lameman on his own behalf and on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No. 6, and Beaver Lake Cree Nation

Respondents
(Plaintiffs)

- and -

Her Majesty the Queen in Right of the Province of Alberta

Appellant
(Defendant)

- and -

The Attorney General of Canada

Not a Party to the Appeal
(Defendant)

Appeal No. 1203-0170-AC

And Between:

Alphonse Lameman on his own behalf and on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No. 6, and Beaver Lake Cree Nation

Respondents
(Plaintiffs)

- and -

Her Majesty the Queen in Right of the Province of Alberta

Respondent
(Defendant)

- and -

The Attorney General of Canada

Appellant
(Defendant)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice B.A. Browne
Dated the 28th day of March, 2012
Filed on the 6th day of July, 2012
(2012 ABQB 195, Docket: 0803 06718)

Memorandum of Judgment

The Court:

Introduction

[1] The Crown in Right of Alberta ("Alberta") and the Attorney General of Canada ("Canada") each appeal from a decision of a case management judge who declined to strike certain portions of a Further Amended Statement of Claim ("the current Statement of Claim") under Rule 3.68 of the *Rules of Court*: *Lameman v Alberta*, 2012 ABQB 195.

[2] The original Statement of Claim was issued on May 14, 2008 by the respondents, the Beaver Lake Cree Nation ("BLCN"). BLCN claims to be a band within the meaning of the *Indian Act*, RSC 1985, c I-5 as amended, an Aboriginal people within the meaning of s 35 of the *Constitution Act, 1982*, and a successor to an Aboriginal group adherent to Treaty No. 6 ("the Treaty"). The Treaty was entered into on or about September 9, 1876; in it, Aboriginals ceded lands in what is now the Province of Alberta in exchange for certain benefits.

[3] The original Statement of Claim was amended on two occasions, yielding the current Statement of Claim. It claims, amongst other relief, damages for alleged breaches of obligations imposed on Alberta and Canada pursuant to the Treaty.

[4] The Treaty is alleged to impose obligations on Alberta and Canada to manage certain lands ("the core lands") within the Province of Alberta to ensure that the members of the BLCN are able to exercise their right to hunt, fish and trap. BLCN alleges that Alberta and Canada failed to discharge their responsibilities and, as such, its members can no longer exercise these rights in the manner anticipated by the Treaty.

[5] This situation is said to result from the cumulative effect of various government "authorizations" of developments related to oil and gas, forestry, mining and other activities on the core lands. That cumulative effect arose out of some 300 projects or developments in which approximately 19,000 individual authorizations were granted. Canada is alleged to have granted at least seven of those authorizations, with the balance attributed to Alberta. The core lands cover a large portion of north-east Alberta and fall outside the boundaries of any Aboriginal reserve. It includes within its territory the Cold Lake Weapons Range, an area occupied by Canada.

[6] Alberta and Canada earlier demanded and received four sets of particulars in relation to this claim; these particulars were included, in part, in the two prior amendments to the Statement of Claim. This litigation had been in case management for some time prior to the decision under appeal, though that order was the first made by its current case management judge. She also ordered that Alberta and Canada file Statements of Defence, which they have done. Otherwise, interlocutory progress has been slow.

[7] In making the order in question, the case management judge struck portions of the current Statement of Claim which sought to revoke the authorizations for developments on the core lands. No appeal is taken from that portion of her decision. She declined to strike the claim for damages arising from the granting of these authorizations, and no appeal is taken from that portion of her decision.

[8] Rather, this appeal addresses the refusal of the case management judge to strike further portions of the current Statement of Claim, including: factual allegations underlying the now-struck claims to revoke various authorizations; claims relating to the loss of the ability to hunt, fish or trap for commercial purposes; claims for injunctive relief against the Crown; claims for prospective damages; and claims for ongoing court supervision. Alberta and Canada argue that the case management judge failed to provide adequate reasons for her decision, misunderstood the nature of the fiduciary relationship between Aboriginals and the Crown, and should have ordered BLCN to produce yet further particulars. Overall, they challenge her application of Rule 3.68 – the rule relating to strike applications – to the facts of this case.

Issues on Appeal

[9] Alberta and Canada collectively raise the following issues on appeal:

1. Did the case management judge correctly state the law on striking pleadings?
2. Did the case management judge erroneously refuse to consider affidavit evidence in support of the application to strike?
3. Did the case management judge err in declining to strike the portions of the current Statement of Claim which make factual allegations relating to the granting of the challenged authorizations?
4. Should the case management judge have ordered further particulars in relation to the implicated seven Federal projects?
5. Did the case management judge err in declining to strike allegations of a treaty right to hunt, fish and trap on a commercial basis or on a basis other than for food?
6. Did the case management judge err in refusing to strike the prayers for injunctive relief against the Crown?
7. Did the case management judge err in refusing to strike the claim for damages for prospective actions?
8. Did the case management judge err in refusing to strike the claim for ongoing court supervision over the relationship and conduct of the parties?
9. Did the case management judge misinterpret the law on fiduciary duty?
10. Did the case management judge fail to provide adequate reasons for her decision?

Applicable Test and Standard of Review

[10] There is no dispute the case management judge applied the correct test as to whether there is a reasonable claim under Rule 3.68(2)(b). She variously referred to the test as being whether it is "beyond doubt" or "plain and obvious" that the claim will fail. This is in keeping with the jurisprudence, both in Alberta and elsewhere: see, for example, *Cerny v Canadian Industries Ltd.* (1972), 30 DLR (3d) 462 at 468, [1972] 6 WWR 88 (Alta SC AD); *Tottrup v Lund*, 2000 ABCA 121 at para 8, 255 AR 204; *Horseman v Horse Lake First Nation*, 2005 ABCA 15 at para 11, 361 AR 287; *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980, 74 DLR (4th) 321; *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 15, [2003] 3 SCR 263; *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para 17, [2011] 3 SCR 45.

[11] Appellate review of a case management decision will vary depending on whether that decision discloses an error of law. Interpretation of a pleading is a question of law subject to correctness: *Dixon v Canada*, 2012 ABCA 316 at para 7. Similarly, whether a pleading discloses a cause of action is likewise a question of law reviewable for correctness: *Mitten v College of Alberta Psychologists*, 2010 ABCA 159 at para 9, 487 AR 198; *Reece v Edmonton (City)*, 2011 ABCA 238 at para 131, 513 AR 199. Otherwise, a decision to strike a pleading is owed deference by this Court and will be reviewed for reasonableness: *Mitten* at para 9; *Dixon* at para 7; *Tottrup* at para 3; *Deloitte & Touche Inc. v Boychuk*, 2002 ABCA 194 at para 9, 312 AR 1; *Torrance v Alberta*, 2010 ABCA 88 at para 13, 477 AR 343.

[12] The test for striking pleadings for being an abuse of process is likewise whether it is plain and obvious the action will fail: *Reece* at paras 128-129. However, reviewing a determination of abuse of process calls for deference and will not be overturned absent palpable and overriding error: *Enron Canada Corp v Husky Oil Operations Ltd.*, 2007 ABCA 27 at para 13, 401 AR 291; *Reece* at para 10.

[13] Procedural decisions made during the course of pretrial steps in litigation are likewise afforded deference on appeal: *Beacon Hill Service (2000) Limited v Esso Petroleum Canada*, 2012 ABCA 269 at paras 4-5, 536 AR 221. Generally speaking, discretionary decisions of a chambers judge will be reviewed for reasonableness: *Decock v Alberta*, 2000 ABCA 122 at para 13, 255 AR 234; *Indian Residential Schools, Re (Doe v Canada)*, 2001 ABCA 216 at paras 17-23, 286 AR 307; *Peterson v Highwood Distillers Ltd.*, 2005 ABCA 248 at para 16, 47 Alta LR (4th) 225; *Stoddard v Montague*, 2006 ABCA 109 at para 5, 412 AR 88; *Hill v Hill*, 2007 ABCA 293 at para 8; *Yellowstone Property Consultants Corp. v Abusalim*, 2008 ABCA 348 at para 11, 440 AR 182. Deference is increased where the decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd.*, 2011 ABCA 158 at para 12, 505 AR 146; *De Lage Landen Financial Services Canada Inc. v Royal Bank of Canada*, 2010 ABCA 394 at para 13, 499 AR 198.

Analysis

Tab 3

1995 CarswellAlta 788
Alberta Court of Appeal

Korte v. Deloitte, Haskins & Sells

1995 CarswellAlta 788, [1995] A.J. No. 1149, [1996] A.W.L.D. 064,
[1996] A.J. No. 12, 36 Alta. L.R. (3d) 56, 59 A.C.W.S. (3d) 1078

JEAN C. KORTE and DONALD BLACK, on their own behalf, and on behalf of all other persons who were actual or beneficial holders of so-called investment contracts with FIRST INVESTORS CORPORATION LTD., as shown in the records of that company as of June 30, 1987, and CONRAD LECLERC and KENNETH WARK on their own behalf, and on behalf of all other persons who were actual or beneficial holders of so-called investment contracts with ASSOCIATED INVESTORS OF CANADA LTD. as shown in the records of that company as of June 30, 1987 v. DELOITTE, HASKINS & SELLS

DONALD M. CORMIE, JOHN M. CORMIE, JAMES CORMIE, EIVOR CORMIE, ALLISON CORMIE, EIVOR CORMIE JR., ROBERT E. CORMIE, BRUCE G. CORMIE, NEIL CORMIE, KENNETH N. MARLIN, CHRISTA U. PETRACCA, ROBERT PEARCE, COLLECTIVE SECURITIES INC., COLLECTIVE SECURITIES LTD., PRINCIPAL SECURITIES MANAGEMENT LTD., PRINCIPAL CONSULTANTS LTD., CORMIE RANCH INC., ESTATE LOAN & FINANCE LTD. and COUNTY INVESTMENTS LTD. (Not Parties to this Appeal)

JEAN C. KORTE and DONALD BLACK, on their own behalf, and on behalf of all other persons who were actual or beneficial holders of so-called investment contracts with FIRST INVESTORS CORPORATION LTD., as shown in the records of that company as of June 30, 1987, and CONRAD LECLERC and KENNETH WARK on their own behalf, and on behalf of all other persons who were actual or beneficial holders of so-called investment contracts with ASSOCIATED INVESTORS OF CANADA LTD. as shown in the records of that company as of June 30, 1987 v. DONALD M. CORMIE, COLLECTIVE SECURITIES LTD. and CORMIE RANCH INC.

JOHN M. CORMIE, JAMES CORMIE, EIVOR CORMIE, ALLISON CORMIE, EIVOR CORMIE JR., ROBERT E. CORMIE, BRUCE G. CORMIE, NEIL CORMIE, KENNETH N. MARLIN, CHRISTA U. PETRACCA, ROBERT PEARCE, COLLECTIVE SECURITIES INC., COLLECTIVE SECURITIES LTD., PRINCIPAL SECURITIES MANAGEMENT LTD., PRINCIPAL CONSULTANTS LTD., ESTATE LOAN & FINANCE LTD., COUNTY INVESTMENTS LTD., DELOITTE, HASKINS & SELLS and DELOITTE & TOUCHE INC. (Not Parties to this Appeal)

JEAN C. KORTE and DONALD BLACK, on their own behalf, and on behalf of all other persons who were actual or beneficial holders of so-called investment contracts with FIRST INVESTORS CORPORATION LTD., as shown in the records of that company as of June 30, 1987, and CONRAD LECLERC and KENNETH WARK on their own behalf, and on behalf of all other persons who were actual or beneficial holders of so-called investment contracts with ASSOCIATED INVESTORS OF CANADA LTD. as shown in the records of that company as of June 30, 1987 v. JOHN M. CORMIE, JAMES CORMIE and COUNTY INVESTMENTS LTD.

DONALD M. CORMIE, EIVOR CORMIE, ALLISON CORMIE, EIVOR CORMIE JR., ROBERT E. CORMIE, BRUCE G. CORMIE, NEIL CORMIE, KENNETH N. MARLIN, CHRISTA U. PETRACCA, ROBERT PEARCE, COLLECTIVE SECURITIES INC., COLLECTIVE SECURITIES LTD., PRINCIPAL CONSULTANTS LTD., CORMIE RANCH INC., ESTATE LOAN & FINANCE LTD., DELOITTE, HASKINS & SELLS and DELOITTE & TOUCHE INC. (Not Parties to this Appeal)

JEAN C. KORTE and DONALD BLACK, on their own behalf, and on behalf of all other persons who were actual or beneficial holders of so-called investment contracts with FIRST INVESTORS CORPORATION LTD., as shown in the records of that company as of June 30, 1987, and CONRAD LECLERC and KENNETH WARK on their own behalf, and on behalf of all other persons who were actual or beneficial holders of so-called investment contracts with ASSOCIATED INVESTORS OF CANADA LTD. as shown in the records of that company as of June 30, 1987 v. EIVOR CORMIE, ALLISON CORMIE, BRUCE G. CORMIE and NEIL CORMIE

DONALD M. CORMIE, JOHN M. CORMIE, JAMES CORMIE, EIVOR CORMIE JR., ROBERT E. CORMIE, KENNETH N. MARLIN, CHRISTA PETRACCA, ROBERT PEARCE, COLLECTIVE SECURITIES INC., COLLECTIVE SECURITIES LTD., PRINCIPAL CONSULTANTS LTD., CORMIE RANCH INC., ESTATE LOAN & FINANCE LTD., DELOITTE, HASKINS & SELLS and DELOITTE & TOUCHE INC. (Not Parties to this Appeal)

Foisy, McFadyen and O'Leary JJ.A.

Heard: November 28, 1995
Judgment: December 12, 1995
Docket: Docs. Edmonton Appeal 9403-0384 AC, 9403-0562 AC, 9403-0816 AC and 9503-0199 AC

Counsel: *K.H. Davidson* and *E.A. Johnson*, for appellants (plaintiffs).
B.R. Burrows, Q.C., and *K. Crang*, for respondent (defendant).
D.C. Harris, for Donald M. Cormie, Collective Securities Ltd. and Cormie Ranch Inc.
D.A. Sulyma, Q.C., for John M. Cormie, James Cormie and County Investments Ltd.
J.R. Weir, for Eivor Cormie, Allison Cormie, Bruce G. Cormie and Neil Cormie.
Eivor Cormie, Jr., Robert E. Cormie, Kenneth N. Marlin, Christa U. Petracca, Robert Pearce, Collective Securities Inc., Principal Securities Management Ltd., Principal Consultants Ltd. and Estate Loan & Finance Ltd. unrepresented.

Subject: Civil Practice and Procedure

Related Abridgment Classifications
Civil practice and procedure

XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.a General principles

Headnote
Practice --- Practice on appeal — Powers and duties of appellate court

Civil procedure — Interlocutory motions — Appeals — Case management judges in complex matters being entitled to be given discretion to resolve seemingly endless interlocutory matters and move on to trial — Court of Appeal only interfering in clearest cases of misuse of judicial discretion.

Appeal from orders of Cooke J. on interlocutory matters in complex matter. For related proceedings, see (1993), 8 Alta. L.R. (3d) 337, 15 C.P.C. (3d) 109, 135 A.R. 389, leave to appeal to S.C.C. refused (1993), 11 Alta. L.R. (3d) li, 18 C.P.C.

(3d) 48, 160 N.R. 319, 149 A.R. 159, and *Korte v. Cormie* (1994), 18 Alta. L.R. (3d) 261, 151 A.R. 153, 29 C.P.C. (3d) 284 (Q.B.).

***Per curiam* (Written memorandum of judgment):**

1 In this case the appellant appeals an order made by the case management judge in chambers relating to applications for particulars made by the respondents. The grounds which are the same in each case except as described below are:

1. No affidavit was filed with each application;

2. The chambers judge erred in finding insufficient particulars on the face of the statement of claim;

3. The chambers judge erred in ordering particulars at this stage of the proceedings;

4. In cases where statements of defence had been filed, in ordering particulars after the filing of the statement of defence.

The last ground of appeal does not apply to the respondents John Cormie and James Cormie et al. nor to Deloitte, Haskins & Sells.

2 Three respondents have cross-appealed alleging that the chambers judge erred in not ordering all particulars be provided at this stage, and in delaying the provision of some of the particulars until after examinations for discovery. The fourth respondent, while not having filed a cross-appeal, supports the arguments made by the other three respondents in this regard.

3 It is not necessary to go into each and every particular item argued. This is a very complicated lawsuit. It is subject to case management and has been since 1993. The orders made here are discretionary. We have said before, and we repeat, that case management judges in those complex matters must be given some "elbow room" to resolve endless interlocutory matters and move these cases on to trial. In some cases the case management judge will have to be innovative to avoid having the case bog down in a morass of technical matters. Only in the clearest cases of misuse of judicial discretion will we interfere. In this case the carefully crafted orders made by the case management judge display a sound knowledge of the rules and the related case law. In particular, the order contains a provision that the parties are free to return to the case management judge for relief from the imposition of any intolerable burden imposed by the order. No clear error has been shown and we decline to interfere. While there may be some inconvenience to some of the parties this does not translate into reversible error. We are not here to fine tune orders made in interlocutory proceedings, particularly in a case such as this one.

Appeal dismissed.

End of Document

TAB 4

In the Court of Appeal of Alberta

Citation: Balogun v. Pandher, 2010 ABCA 40

Date: 20100205
Docket: 0903-0144-AC
Registry: Edmonton

Between:

Alexander O. Balogun,
Esther Elizabeth Balogun (by her Next Friend, Alexander O. Balogun),
Pauline Jessica Balogun (by her Next Friend, Alexander O. Balogun),
Daniel Richard Balogun (by his Next Friend, Alexander O. Balogun) and
Alexander Otto Balogun Jr. (by his Next Friend, Alexander O. Balogun)

Appellants
(Plaintiffs)

- and -

Harbhajan Singh Pandher

Respondent
(Defendant)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice J.J. Gill
Dated the 22nd day of April, 2009
Filed on the 28th day of April, 2009
(Docket: 0303-12927)

Memorandum of Judgment

The Court:

[1] The adult appellant challenges a Court of Queen's Bench case management judge's order denying a jury trial in a motor vehicle personal injuries lawsuit. The adult appellant is a plaintiff in his own right and proceeds without counsel. He purports to represent, as next friend, his four children also as appellants. His representation of two children is problematic as those two children are no longer minors and should be represented by their own solicitor: ***Salamon v. Alberta (Minister of Education)*** (1991), 120 A.R. 298, [1991] A.J. No. 922 (QL) (C.A.), leave denied [1991] S.C.C.A. No. 535 (QL); see also ***Holland v. Marshall*** (2009), 96 B.C.L.R. (4th) 55, [2009] B.C.J. No. 1294 (QL), 2009 BCCA 311, leave denied, [2008] S.C.C.A. No. 327 (QL) and affirmed as ***Holland v. Marshall***, [2009] B.C.J. No. 2535 (QL), 2009 BCCA 582; ***Balogun v. Pandher***, [2009] A.J. No. 1339 (QL), 2009 ABCA 409. Under the circumstances of this case, however, we do not need to address this procedural concern.

[2] The case management in the Court of Queen's Bench relates to an incident on May 14, 2003 where the respondent (defendant)'s vehicle collided with the back end of a vehicle containing the appellants. The appellants' claims include general damages, loss of income earning capacity, and cost of future care. The respondent disputes the damage claims. Issues at trial will include causation and quantum of damages.

[3] The ruling under appeal dated April 22, 2009 is the second ruling during the case management process by the same judge denying a jury trial, the earlier ruling being at (2007), 430 A.R. 229, [2007] A.J. No. 1134 (QL), 2007 ABQB 615. The case management judge in the ruling under appeal held that the basis for his 2007 ruling had not changed and that there was no reason to decide differently in 2009.

[4] In his 2007 ruling, the case management judge referred to s. 17(1)(b) of the *Jury Act*, R.S.A. 2000, c. J-3, which allows for jury trials in lawsuits such as this where the amount claimed "exceeds an amount prescribed by regulation". The regulation in this instance provides that the "amount claimed" must exceed $75,000 for actions commenced after March 1, 2003: s. 4.1 of *Jury Act Regulation*, Alta. Reg. 68/83. The Statement of Claim in this instance claims an amount in excess of $75,000 for each plaintiff. By this and the other terms of s. 17 of the Act, the Legislature has set the criteria for eligibility for a civil jury trial in this province. There is no residual discretion of case management judges to order a civil jury trial on a basis not provided for by legislation: ***Purba v. Ryan*** (2006), 397 A.R. 251, [2006] A.J. No. 963 (QL), 2006 ABCA 229.

[5] A jury trial, however, can be refused where the trial involves matters that cannot "conveniently be made by a jury": s.17(2) of the *Act*. The case management judge looked at the criteria from case law for determining inconvenience under s. 17(2) of the *Act*. Those criteria include "(a) a prolonged examination of documents or accounts, or (b) a scientific or long investigation". To assess these criteria, a case management judge will consider such factors as the number of parties

and factual issues, the number of experts, the need for interpretation, the legal issues, the potential for conflicts of expert opinion, questions of causation and other factors including, in our view, what the history of the litigation suggests about the approach the parties can be expected to take. He concluded in his 2007 ruling that "this is not a case that can be conveniently heard by a jury taking into account the number of issues involved with five Plaintiffs, the length of trial time required, the amount and complexity of the expert evidence, the number of medical reports and the history of the litigation": at para. 43. No appeal was taken from that 2007 decision. As to the more recent 2009 ruling, the case management judge referred to his previous decision declining to order a jury trial and concluded that he saw "no reason to change [his] previous decision and order a jury trial."

[6] In sum, the appellants argue that the trial of this action would not be so prolonged or complex that it could not be conveniently heard by a jury. The respondent submits that the case management judge properly considered the applicable criteria in determining that the case was inappropriate for a jury trial. The respondent also submits that the case management judge properly considered whether he should re-visit his earlier ruling.

[7] The decision of the case management judge to decline to reverse his prior ruling, and his decision to find no basis to order a jury trial in this case, were both exercises of discretion. As such, the standard of review for the factual underpinnings of the exercise of discretion is deferential absent palpable and overriding error: ***L. (H.) v. Canada***, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24 (QL), 2005 SCC 25 at paras. 52 to 56. The standard of review for the exercise of discretion by a case management judge is also deferential and appellate intervention is warranted only if the case management judge has clearly misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice: see *e.g.* ***Chevron Canada Resources v. Canada (Executive Director of Indian Oil and Gas Canada)*** (2009), 457 A.R. 132, [2009] A.J. No. 496 (QL), 2009 ABCA 180 at paras. 4 to 6; ***Trigg v. Lee-Knight***, [2009] A.J. No. 653 (QL), 2009 ABCA 224, leave denied, [2009] S.C.C.A. No. 429 (QL) at para. 9; ***Balogun v. Pandher***, [2009] A.J. No. 1339 (QL), 2009 ABCA 409 at paras. 10 and 11.

[8] Here we are unable to discern any basis for intervention either on (a) the decision of the case management judge to refrain from re-considering his earlier decision (if, indeed, that is what he did since he appears to have taken a renewed look at the matter substantively) or (b) the decision of the case management judge on the merits under s. 17 of the *Act* if indeed the case management judge did re-consider the matter.

[9] As to point (a), case management would not be a very effective method for civil proceedings if rulings of case management judges could simply be re-visited as of right at the instance of an unsatisfied party to the action – even if there might have been some adjustment of the factual platform on which the earlier decision was made. Accordingly, appellate deference on the exercise of discretion is particularly appropriate as to case management decisions which decline to re-open a procedural adjudication which settled an issue for case management purposes. That high deference is not merely because of the policy resistance to fragmentation of proceedings and piecemeal appellate review, nor because it may be that a specific case management ruling may be subject to

appeal at the end of the trial if its effects can be traced through to that stage, but also because the very essence of case management is judicial supervision of the litigation process in order to provide coherence, predictability and stability to that process. We detect no error in the case management judge's decision not to re-open his earlier ruling.

[10] As to point (b), we find no error in the substantive ruling on a jury trial that is within reach of the applicable standard of review. The decision was not arbitrary, erroneous in law or fact, nor productive of injustice.

[11] The appeal is dismissed.

Appeal heard on February 1, 2010

Memorandum filed at Edmonton, Alberta
this 5th day of February, 2010

Watson J.A.

Slatter J.A.

Rowbotham J.A.

Appearances:

Appellant Alexander O. Balogun in person

B.E. Wallace
for the Respondent

TAB 5

In the Court of Appeal of Alberta

Citation: Dreco Energy Services Ltd. v. Wenzel, 2008 ABCA 290

Date: 20080826
Docket: 0803-0065-AC
Registry: Edmonton

Between:

Dreco Energy Services Ltd. And Vector Oil Tool Ltd.

Appellants (Plaintiffs)

- and -

Kenneth Hugo Wenzel, Kenneth H. Wenzel Oilfield Consulting Inc. and KW Downhole Tools Inc.

Respondents (Defendants)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Patricia Rowbotham

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice S.J. Greckol
Dated the 19th day of February, 2008
Filed on the 11th day of March, 2008
(Docket: 0203-12910)

Memorandum of Judgment

The Court:

[1] The appellants, Dreco Energy Services Ltd. ("Dreco") and Vector Oil Tool Ltd. ("Vector") appeal the case management judge's decision to set aside the interlocutory injunction previously granted to the appellants against the respondents, Kenneth Hugo Wenzel ("Wenzel"), Kenneth H. Wenzel Oilfield Consulting Inc. ("KHW Inc."), and K.W. Downhole Tools Inc. ("Downhole").

Background

[2] The parties are involved in ongoing litigation stemming from a share purchase agreement and an employment agreement (the "agreements") whereby Dreco purchased all of the shares of Vector, previously owned by Wenzel and KHW Inc., and contracted Wenzel as an employee of Vector. Both agreements contained strict non-competition clauses or restrictive covenants, which the appellants allege were breached when Wenzel incorporated Downhole following his resignation on February 21, 2002.

[3] In July 2002, the appellants commenced this action alleging breach of the restrictive covenants contained in the agreements. They also sought an interlocutory injunction, which was granted by this Court on February 26, 2004, and ordered to continue until final disposition of the lawsuit or a contrary order by a Court of Queen's Bench justice: *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABCA 95, 346 A.R. 356. Later that year, the respondents' application to narrow the terms of the injunction and to have it vacated in early 2005 was denied by the case management judge. A trial date has been set for October 2008.

[4] The restrictive covenants in the agreements were subject to a maximum term of five years following termination or expiry of the respective agreements. On June 21, 2007, the appellants sought to extend the injunction beyond five years from the date Wenzel resigned. On September 25, 2007, the respondents applied to set the interlocutory injunction aside or have it cease March 15, 2008. Both applications were heard by the case management judge, who concluded the injunction should be set aside because the basis for granting the injunction initially was no longer viable.

[5] At the time of their initial applications in 2004, the appellants had made out a strong *prima facie* case for an interlocutory injunction because of the wording of the restrictive covenants and the evidence supporting a breach. The case management judge concluded that Wenzel's termination date was March 15, 2002 and that the restrictive covenants expired five years later, on March 15, 2007. Accordingly, the first element of the applicable tripartite test for granting an injunction – a strong *prima facie* case – was no longer met. Having made this finding, she did not go on to consider the other requirements of the test for injunctive relief. She also determined that the case law did not support a judicially enforced extension of the restrictive covenants, and that doing so would effectively grant the appellants the very remedies which they seek at trial.

Contractual Provisions

[6] The relevant provisions of the agreements are attached to these reasons in Appendix A.

Issues

[7] This appeal raises four issues.

1. Did the case management judge err by failing to consider and apply the 'clean hands' doctrine?
2. Did the case management judge err in her interpretation of the restrictive covenants contained in the agreements?
3. Did the case management judge err by failing to exercise her equitable jurisdiction to extend the duration of the interlocutory injunction beyond the contractual time frame?
4. Is the test for injunctive relief satisfied?

Standard of Review

[8] The granting of, or refusal to grant, an interlocutory injunction involves the exercise of judicial discretion. Discretionary decisions of a case management judge warrant deference and will not be interfered with absent the judge proceeding arbitrarily or on wrong legal principles: *Metropolitan Life Insurance Co. v. Hover*, 1999 ABCA 123, 237 A.R. 30 at para. 10, citing *Russell Food Equipment (Calgary) Limited v. Valleyfield Investment Ltd.* (1962), 40 W.W.R. (n.s.) 292, 1962 CarswellAlta 57 at para. 9 (S.C.).

[9] The standard of review typically applied to a case management judge's decision is reasonableness: *Indian Residential Schools, Re (sub nom. Doe v. Canada)*, 2001 ABCA 216, 286 A.R. 307 at para. 23. However, on questions of law, the standard of appellate review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8.

[10] Correctness will apply where the question is whether the case management judge failed to consider an applicable legal test or principle, or failed to properly apply it. However, where a legal principle is applied to the facts, the assessment of the facts will be afforded deference: *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 363 A.R. 283; *Globex Foreign Exchange Corp. v. Kelcher*, 2005 ABCA 419, 376 A.R. 133 at para. 18.

[11] Contractual interpretation is subject to similar principles; namely, pure interpretation of contract involves issues of law, reviewable on a correctness standard: *Meyer v. Partec Lavalin Inc.*, 2001 ABCA 145, 281 A.R. 339 at para. 11, leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 453; *Jager v. Liberty Mutual Fire Insurance Co.*, 2001 ABCA 163, 281 A.R. 273 at para. 14. However, where the interpretation necessitates fact-finding, an appellate court will defer to the facts found

below, so long as there is no palpable and overriding error: see *Double N Earthmovers v. Edmonton (City)*, 2005 ABCA 104, 363 A.R. 201 at para. 16.

[12] Here, we will defer to the case management judge's fact-finding, absent something unreasonable, but will review her articulation and application of the test for interlocutory injunctions, her interpretation of the restrictive covenants, and her analysis of the question of equitable jurisdiction to continue an injunction, using a correctness standard.

Analysis

Clean Hands

[13] The appellants submit that the chambers judge failed to consider whether the respondents' litigation conduct precluded the termination of the injunction. They raise the clean hands doctrine, a doctrine which may prevent a party from obtaining relief to which it would otherwise be entitled. The clean hands doctrine does not, of itself, create a cause of action, or form the basis for granting relief. Accordingly, the issue of which party bears the onus of proof is important.

[14] The appellants initiated the motion to continue the interlocutory injunction and, in the normal course, bore the onus of establishing the test for continuation. However, the appellants say that they filed their motion in order to trigger the respondents' application to set aside the injunction, and that once the respondents' motion was before the court the appellants' motion was moot. They say that the case management judge approached the issue incorrectly. Instead of asking at para. 8: "Should the interim injunction be continued?" she should have asked: "Should the interim injunction be set aside?" The appellants contend that had she adopted the latter approach, she would have appreciated that the onus of proof lay with the respondents, and accordingly, should have applied the clean hands doctrine.

[15] We see no merit to this argument. The case management judge was alive to the order made by the Court of Appeal, the effect of which was that the interim injunction would continue subject to further order. Moreover, as the argument unfolded (as it did before us), the crucial issue was whether the interim injunction could extend beyond the contractual term of the covenant. In the result, mindful of the evidentiary and legal burden, it was not an error to ask whether the interim injunction should be extended beyond the five years specified in the agreements.

[16] Further, the case management judge was well aware of the clean hands issue and referred to the respondents' litigation conduct in her reasons. She had been the case management judge for a number of years and issued several judgments, some of which expressly address the respondents' litigation conduct.

TAB 6

Paul Housen *Appellant*

v.

Rural Municipality of Shellbrook No. 493 *Respondent*

INDEXED AS: HOUSEN *v.* NIKOLAISEN

Neutral citation: 2002 SCC 33.

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Torts — Motor vehicles — Highways — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals — Courts — Standard of appellate review — Whether Court of Appeal properly overturning trial judge's finding of negligence — Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N

Paul Housen *Appelant*

c.

Municipalité rurale de Shellbrook n° 493 *Intimée*

RÉPERTORIÉ : HOUSEN *c.* NIKOLAISEN

Référence neutre : 2002 CSC 33.

N° du greffe : 27826.

2001 : 2 octobre; 2002 : 28 mars.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Délits civils — Véhicules automobiles — Routes — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Droit municipal — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.

Appels — Tribunaux judiciaires — Norme de contrôle applicable en appel — La Cour d'appel a-t-elle eu raison d'infirmer la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — Norme de contrôle applicable à l'égard des questions mixtes de fait et de droit.

L'appelant était passager dans le véhicule conduit par N sur une route rurale située sur le territoire de la

failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

municipalité intimée. N a été incapable de prendre un virage serré et il a perdu la maîtrise de son véhicule. L'appelant est devenu quadriplégique à la suite des blessures subies dans l'accident. Les parties ont convenu avant le procès du montant des dommages-intérêts, qui ont été fixés à 2,5 millions de dollars. La question en litige était celle de savoir si la municipalité, N et l'appelant étaient responsables et, dans l'affirmative, dans quelles proportions. Le jour qui a précédé l'accident, N avait assisté à une fête à la résidence des T, non loin de la scène de l'accident. Durant la nuit, il a continué de boire à une autre fête, où il a rencontré l'appelant. Le matin, les deux hommes sont retournés en automobile à la résidence des T, où N a continué de boire, cessant de le faire quelques heures avant de prendre la route dans sa camionnette en compagnie de l'appelant. N n'était pas familier avec le chemin en question, mais il l'avait emprunté à trois reprises au cours des 24 heures qui avaient précédé l'accident pour aller et venir de la résidence des T. À l'approche de l'endroit de l'accident, la distance de visibilité était réduite en raison du rayon de courbure du virage et de la présence de broussailles poussant jusqu'au bord du chemin Une faible pluie tombait lorsque N s'est engagé sur le chemin en quittant la résidence des T. L'arrière de la camionnette a zigzagué à plusieurs reprises avant que le véhicule n'arrive aux abords du virage serré où l'accident est survenu. Selon le témoignage d'un expert, N roulait à une vitesse se situant entre 53 et 65 km/h lorsque le véhicule s'est engagé dans la courbe, soit une vitesse légèrement supérieure à celle à laquelle le virage pouvait être pris en sécurité eu égard aux conditions qui existaient au moment de l'accident.

Le chemin, qui était entretenu par la municipalité, appartenait à la catégorie des voies d'accès locales non désignées. La municipalité installe des panneaux de signalisation sur ces chemins si elle constate l'existence d'un danger ou si plusieurs accidents se produisent au même endroit. Elle n'avait installé aucune signalisation le long de cette portion du chemin. On a signalé trois autres accidents survenus de 1978 à 1987 à l'est du lieu de l'accident dont a été victime l'appelant. La juge de première instance a estimé que l'appelant était responsable de négligence concourante dans une proportion de 15 p. 100, du fait qu'il avait omis de prendre des précautions raisonnables pour assurer sa propre sécurité en acceptant de monter à bord du véhicule de N, et elle a réparti le reste de la responsabilité solidairement entre N (50 p. 100) et la municipalité (35 p. 100). La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente.

Arrêt (les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents) : Le pourvoi est accueilli et la décision de la juge de première instance est rétablie.

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and refine legal rules and ensure their universal application.

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony *viva voce*. The same degree of deference must be paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Iacobucci, Major et Arbour : Étant donné que l'appel ne constitue pas un nouveau procès, il faut se demander quelle est la norme de contrôle applicable en appel à l'égard des diverses questions que soulève le pourvoi. La norme de contrôle applicable aux pures questions de droit est celle de la décision correcte et, en conséquence, il est loisible aux cours d'appel de substituer leur opinion à celle des juges de première instance. Les cours d'appel ont besoin d'un large pouvoir de contrôle à l'égard des questions de droit pour être en mesure de s'acquitter de leur rôle premier, qui consiste à préciser et à raffiner les règles de droit et à veiller à leur application universelle.

Suivant la norme de contrôle applicable aux conclusions de fait, ces conclusions ne peuvent être infirmées que s'il est établi que le juge de première instance a commis une « erreur manifeste et dominante ». Une erreur manifeste est une erreur qui est évidente. Les diverses raisons justifiant la retenue à l'égard des conclusions de fait du juge de première instance peuvent être regroupées sous trois principes de base. Premièrement, vu la rareté des ressources dont disposent les tribunaux, le fait de limiter la portée du contrôle judiciaire a pour effet de réduire le nombre, la durée et le coût des appels. Deuxièmement, le respect du principe de la retenue envers les conclusions favorise l'autonomie et l'intégrité du procès. Enfin, ce principe permet de reconnaître l'expertise du juge de première instance et la position avantageuse dans laquelle il se trouve pour tirer des conclusions de fait, étant donné qu'il a l'occasion d'examiner la preuve en profondeur et d'entendre les témoignages de vive voix. Il faut faire preuve du même degré de retenue envers les inférences de fait, car nombre de raisons justifiant de faire preuve de retenue à l'égard des constatations de fait du juge de première instance valent autant pour toutes ses conclusions factuelles. La norme de contrôle ne consiste pas à vérifier si l'inférence peut être raisonnablement étayée par les conclusions de fait du juge de première instance, mais plutôt si ce dernier a commis une erreur manifeste et dominante en tirant une conclusion factuelle sur la base de faits admis, ce qui suppose l'application d'une norme plus stricte. Une conclusion factuelle — quelle que soit sa nature — exige nécessairement qu'on attribue un certain poids à un élément de preuve et, de ce fait, commande l'application d'une norme de contrôle empreinte de retenue. Si aucune erreur manifeste et dominante n'est décelée en ce qui concerne les faits sur lesquels repose l'inférence du juge de première instance, ce n'est que lorsque le processus inférentiel lui-même est manifestement erroné que la cour d'appel peut modifier la conclusion factuelle.

Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a finding of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising

Les questions mixtes de fait et de droit supposent l'application d'une norme juridique à un ensemble de faits. Lorsque la question mixte de fait et de droit en litige est une conclusion de négligence, il y a lieu de faire preuve de retenue à l'égard de cette conclusion en l'absence d'erreur de droit ou d'erreur manifeste et dominante. Le fait d'exiger l'application de la norme de l'« erreur manifeste et dominante » aux fins de contrôle d'une conclusion de négligence tirée par un juge ou un jury consolide les rapports qui doivent exister entre les juridictions d'appel et celles de première instance et respecte la norme de contrôle bien établie qui s'applique aux conclusions de négligence tirées par les jurys. Si la question litigieuse en appel soulève l'interprétation de l'ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l'absence d'erreur manifeste et dominante. La question de savoir si le défendeur a respecté la norme de diligence suppose l'application d'une norme juridique à un ensemble de faits, ce qui en fait une question mixte de fait et de droit. Cette question est alors assujettie à la norme de l'erreur manifeste et dominante, à moins que le juge de première instance n'ait clairement commis une erreur de principe en déterminant la norme applicable ou en appliquant cette norme, auquel cas l'erreur peut constituer une erreur de droit, qui est assujettie à la norme de la décision correcte.

En l'espèce, la norme de diligence à laquelle devait se conformer la municipalité consistait à tenir le chemin dans un état raisonnable d'entretien, de façon que ceux qui devaient l'emprunter puissent, en prenant des précautions normales, y circuler en sécurité. La juge de première instance a appliqué le bon critère juridique en concluant que la municipalité n'avait pas respecté cette norme et sa décision ne devrait pas être infirmée en l'absence d'erreur manifeste et dominante. La juge de première instance a eu à l'esprit la conduite de l'automobiliste moyen puisqu'elle a commencé son examen de la norme de diligence en formulant dès le départ le critère approprié, puis elle s'est interrogée, tant explicitement qu'implicitement, sur la façon dont conduirait l'automobiliste raisonnable en s'approchant du virage. De plus, le fait qu'elle a imputé une partie de la responsabilité à N indique qu'elle a évalué sa conduite au regard du critère du conducteur moyen, tout comme l'indique le fait qu'elle a utilisé l'expression « danger caché » et qu'elle s'est demandé à quelle vitesse les automobilistes auraient dû approcher du virage.

La conclusion de la Cour d'appel portant que la juge de première instance avait commis une erreur manifeste et dominante reposait sur la présomption erronée selon laquelle la juge aurait accepté que l'automobiliste moyen approcherait du virage à 80 km/h, alors que dans les faits

ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

The trial judge's conclusion on the cause of the accident was a finding of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual findings of the trial judge. The trial judge's factual findings on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves

elle a estimé qu'il était possible qu'un automobiliste prenant des précautions normales s'approche du virage à une vitesse supérieure à la vitesse sécuritaire pour effectuer la manœuvre. Loin de constituer une erreur manifeste et dominante, cette conclusion découlait d'une évaluation raisonnable et réaliste de l'ensemble de la preuve par la juge de première instance.

La juge de première instance n'a pas commis d'erreur en concluant que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin. Étant donné que, en l'espèce, le danger était une caractéristique permanente du chemin, il était loisible à la juge de première instance d'inférer que le conseiller municipal prudent aurait dû être au fait du danger. Dès l'instant où une telle inférence est tirée, elle demeure inchangée à moins que la municipalité ne puisse la réfuter en démontrant qu'elle a pris des mesures raisonnables pour faire cesser le danger. Les accidents survenus antérieurement sur le chemin ne constituent pas une preuve directe permettant de conclure que la municipalité connaissait l'existence du danger particulier en cause, mais ce facteur, conjugué à la connaissance du type de conducteurs utilisant le chemin, aurait dû inciter la municipalité à faire enquête à l'égard du chemin en question, ce qui lui aurait permis de prendre connaissance concrètement de l'existence du danger. Exiger du demandeur qu'il apporte la preuve concrète de la connaissance par la municipalité du mauvais état d'entretien de ses chemins revient à imposer à ce dernier un fardeau inacceptablement lourd. Il s'agit d'information relevant du domaine de connaissance de la municipalité et, selon nous, il était raisonnable que la juge de première instance infère de sa conclusion relative au mauvais état d'entretien persistant du chemin que la municipalité possédait la connaissance requise.

La conclusion de la juge de première instance quant à la cause de l'accident était une conclusion de fait assujettie à la norme de contrôle de l'« erreur manifeste et dominante ». Le caractère théorique de l'analyse de la question de savoir si N aurait aperçu un panneau de signalisation installé avant la courbe justifie de faire montre de retenue à l'égard des conclusions factuelles de la juge de première instance. Les constatations factuelles de cette dernière relativement à la causalité étaient raisonnables et la Cour d'appel n'aurait donc pas dû les modifier.

Les juges Gonthier, Bastarache, Binnie et LeBel (dissidents) : Les conclusions de fait du juge de première instance ne sont pas modifiées en l'absence d'erreur manifeste ou dominante, principalement parce qu'il est le seul à avoir l'occasion d'observer les témoins et d'entendre les témoignages de vive voix, et qu'il est, de ce fait, plus à même de choisir entre deux versions

not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly identifies this as the applicable legal standard, he or she may still err in assessing the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

Section 192 of the *Rural Municipality Act, 1989*, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident

divergentes d'un même événement. Le processus de constatation des faits exige non seulement du juge qu'il dégage le nœud factuel de l'affaire, mais également qu'il tire des inférences des faits. Bien que la norme de contrôle soit la même et pour les conclusions de fait et pour les inférences de fait, il importe néanmoins de faire une distinction analytique entre les deux. Des inférences peuvent être rejetées pour d'autres raisons que le fait que le processus qui les a produites est lui-même déficient. Une inférence peut être manifestement erronée si ses assises factuelles présentent des lacunes ou si la norme juridique appliquée aux faits est mal interprétée. Dans le contexte du droit relatif à la négligence, la question de savoir si la conduite du défendeur est conforme à la norme de diligence appropriée est une question mixte de fait et de droit. Une fois les faits établis, la décision touchant la question de savoir si le défendeur a respecté ou non la norme de diligence est, dans la plupart des cas, contrôlable selon la norme de la décision correcte, puisque le juge de première instance doit apprécier les faits au regard de la norme de diligence appropriée, question de droit qui relève autant des cours de première instance que des cours d'appel.

En l'espèce, la question de savoir si la municipalité connaissait ou aurait dû connaître le danger dont on alléguait l'existence était une question mixte de fait et de droit. Le juge de première instance doit examiner cette question eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Même en supposant que le juge de première instance détermine correctement la norme juridique applicable, il lui est encore possible de commettre une erreur lorsqu'il apprécie les faits à la lumière de cette norme juridique, processus qui implique notamment l'établissement de politiques d'intérêt général. Par exemple, il doit se demander si le fait que des accidents se soient déjà produits à d'autres endroits du chemin alerterait le conseiller municipal moyen, raisonnable et prudent de l'existence d'un danger. Il doit également se demander si ce conseiller aurait appris l'existence de l'accident antérieur par un système d'information sur les accidents, question normative qui est contrôlable selon la norme de la décision correcte. Les questions mixtes de fait et de droit ne sont pas toutes contrôlables suivant cette norme, mais elles ne commandent pas systématiquement une attitude empreinte de retenue.

Suivant la norme de diligence énoncée à l'art. 192 de la *Rural Municipality Act, 1989*, la juge de première instance devait se demander si le tronçon du chemin sur lequel s'est produit l'accident constituait un danger pour le conducteur raisonnable prenant des précautions normales. En l'espèce, la juge de première instance a omis de se demander si un tel conducteur aurait pu rouler

occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual findings of the trial judge as they are and to reassess these findings in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is

en sécurité sur le tronçon en question. Il s'agissait d'une erreur de droit. Les municipalités ont l'obligation de tenir les chemins dans un état raisonnable d'entretien de façon que ceux qui doivent les emprunter puissent, en prenant des précautions normales, y circuler en sécurité. Il s'agit d'une obligation de portée limitée, car les municipalités ne sont pas les assureurs des automobilistes qui roulent dans leurs rues. Bien que la juge de première instance ait conclu que la portion du chemin où s'est produit l'accident exposait les conducteurs à un danger caché, il n'y a rien qui indique qu'elle s'est demandé si cette portion du chemin présentait un risque pour le conducteur raisonnable prenant des précautions normales. La cour d'appel qui décèle une erreur de droit a compétence pour reprendre telles quelles les conclusions de fait du juge de première instance et les réévaluer au regard du critère juridique approprié. En l'espèce, la portion du chemin où s'est produit l'accident ne présentait pas de risque pour un conducteur raisonnable prenant des précautions normales, car l'état de ce chemin en général avertissait l'automobiliste raisonnable que la prudence s'imposait.

La juge de première instance a commis et des erreurs de droit et des erreurs de fait manifestes et dominantes en statuant que la municipalité intimée aurait dû connaître le mauvais état dans lequel se trouvait, prétendait-on, le chemin. La juge de première instance n'a pas conclu que la municipalité intimée connaissait concrètement le prétendu mauvais état du chemin, mais elle lui a plutôt prêté cette connaissance pour le motif qu'elle aurait dû connaître l'existence du danger. Sur le plan juridique, le juge de première instance doit se demander s'il y a lieu de présumer que la municipalité connaissait ce fait, eu égard aux obligations qui incombent au conseiller municipal moyen, raisonnable et prudent. Il répond ensuite à cette question en appréciant les faits de l'espèce dont il est saisi. Dans la présente affaire, la juge de première instance a fait erreur en droit en examinant la question de la connaissance requise du point de vue du spécialiste plutôt que du point de vue du conseiller municipal prudent et en ne reconnaissant pas que le fardeau de prouver que la municipalité connaissait ou aurait dû connaître le mauvais état du chemin ne cessait jamais d'incomber au demandeur. La juge de première instance a commis une erreur de fait manifeste et dominante en inférant déraisonnablement que la municipalité intimée aurait dû savoir que la partie du chemin où l'accident s'est produit était dangereuse, compte tenu de la preuve que des accidents avaient eu lieu ailleurs sur ce chemin. La municipalité n'avait aucune raison particulière d'aller inspecter cette portion du chemin pour voir s'il y existait des dangers, puisqu'elle n'avait reçu aucune plainte d'automobilistes relativement à l'absence de signalisation, à l'absence de surélévation des courbes ou à la présence d'arbres et de végétation en bordure du

a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the first curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the significance of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The finding that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her findings on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

chemin. La question de la connaissance de l'intimée est intimement liée à celle de la norme de diligence. Une municipalité est uniquement censée avoir connaissance des dangers qui présentent un risque pour le conducteur raisonnable prenant des précautions normales, puisqu'il s'agit des seuls dangers à l'égard desquels existe une obligation d'entretien. En l'espèce, on ne pouvait attendre de l'intimée qu'elle connaisse le danger qui existait à l'endroit où l'accident est survenu, puisque ce danger ne présentait tout simplement pas de risque pour le conducteur raisonnable. Il ressort implicitement des motifs de la juge de première instance que la municipalité aurait censément dû connaître l'existence des accidents grâce à un système d'information en la matière, erreur manifeste en l'absence de quelque élément de preuve indiquant ce qui aurait pu constituer un système raisonnable.

Relativement aux conclusions de la juge de première instance sur le lien de causalité, qui sont des conclusions de fait, celle-ci a fait abstraction de la preuve que le véhicule de N avait fait une embardée dans la première courbe et que ce dernier avait roulé à trois reprises sur le chemin en question au cours des 18 à 20 heures ayant précédé l'accident. La juge de première instance a également omis de tenir compte de l'importance du témoignage du spécialiste judiciaire en matière d'alcool, qui menait irrésistiblement à la conclusion que l'alcool avait été le facteur causal de l'accident, et elle a erronément invoqué une déclaration de celui-ci au soutien de sa conclusion que N aurait réagi à un panneau de signalisation. La conclusion que le résultat aurait été différent si N avait été prévenu de l'existence de la courbe ne tient pas compte du fait qu'il savait déjà qu'elle existait. Le fait que la juge de première instance ait mentionné certains éléments de preuve au soutien de ses conclusions sur le lien de causalité n'a pas pour effet de soustraire ces conclusions au pouvoir de contrôle de notre Cour. Le tribunal d'appel est habilité à se demander si le juge de première instance a clairement fait erreur en décidant comme il l'a fait sur le fondement de certains éléments de preuve alors que d'autres éléments mènent irrésistiblement à la conclusion inverse.

Indépendamment de l'approche choisie à l'égard de la question de l'obligation de diligence, il n'est que raisonnable d'attendre d'une municipalité qu'elle prévoit les accidents qui surviennent en raison de l'état du chemin, et non, comme en l'espèce, ceux qui résultent de l'état du conducteur. Élargir l'obligation d'entretien des municipalités en exigeant qu'elles tiennent compte, dans l'exécution de cette obligation, des actes des conducteurs déraisonnables ou imprudents, entraînerait une modification radicale et irréalisable de la norme actuelle.

Cases Cited

By Iacobucci and Major JJ.

Applied: *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2; *McCannell v. McLean*, [1937] S.C.R. 341; *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; **considered:** *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670; **referred to:** *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574; *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199; *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 S.C.R. 504; *Anderson v. Bessemer City*, 470 U.S. 564 (1985); *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78; *Palsky v. Humphrey*, [1964] S.C.R. 580; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Dube v. Labar*, [1986] 1 S.C.R. 649; *C.N.R. v. Muller*, [1934] 1 D.L.R. 768; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15; *Rhône (The) v. Peter A.B. Widener (The)*, [1993] 1 S.C.R. 497; *Cork v. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402; *Matthews v. MacLaren* (1969), 4 D.L.R. (3d) 557.

By Bastarache J. (dissenting)

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Partridge v. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; *Fafard v. City of Quebec* (1917), 39 D.L.R. 717; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Jaegli Enterprises Ltd. v. Taylor*, [1981] 2 S.C.R. 2, rev'g (1980), 112 D.L.R. (3d) 297 (*sub nom. Taylor v. The Queen in Right of British Columbia*), rev'g (1978), 95 D.L.R. (3d) 82; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Joseph Brant Memorial Hospital v. Koziol*, [1978] 1 S.C.R. 491; *Williams v. Town of North Battleford* (1911), 4 Sask.

Jurisprudence

Citée par les juges Iacobucci et Major

Arrêts appliqués : *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2; *McCannell c. McLean*, [1937] R.C.S. 341; *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; **arrêt examiné :** *Galaske c. O'Donnell*, [1994] 1 R.C.S. 670; **arrêts mentionnés :** *Gottardo Properties (Dome) Inc. c. Toronto (City)* (1998), 162 D.L.R. (4th) 574; *Underwood c. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199; *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504; *Ingles c. Tutkaluk Construction Ltd.*, [2000] 1 R.C.S. 298, 2000 CSC 12; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201; *Consolboard Inc. c. MacMillan Bloedel (Saskatchewan) Ltd.*, [1981] 1 R.C.S. 504; *Anderson c. Bessemer City*, 470 U.S. 564 (1985); *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78; *Palsky c. Humphrey*, [1964] R.C.S. 580; *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377; *Dube c. Labar*, [1986] 1 R.C.S. 649; *C.N.R. c. Muller*, [1934] 1 D.L.R. 768; *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15; *Rhône (Le) c. Peter A.B. Widener (Le)*, [1993] 1 R.C.S. 497; *Cork c. Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402; *Matthews c. MacLaren* (1969), 4 D.L.R. (3d) 557.

Citée par le juge Bastarache (dissident)

Canada (Directeur des enquêtes et recherches) c. Southam Inc., [1997] 1 R.C.S. 748; *Stein c. Le navire « Kathy K »*, [1976] 2 R.C.S. 802; *Toneguzzo-Norvell (Tutrice à l'instance de) c. Burnaby Hospital*, [1994] 1 R.C.S. 114; *Conseil de l'éducation de Toronto (Cité) c. F.E.E.E.S.O., district 15*, [1997] 1 R.C.S. 487; *Partridge c. Rural Municipality of Langenburg*, [1929] 3 W.W.R. 555; *Fafard c. City of Quebec* (1917), 39 D.L.R. 717; *Van de Perre c. Edwards*, [2001] 2 R.C.S. 1014, 2001 CSC 60; *Kamloops (Ville de) c. Nielsen*, [1984] 2 R.C.S. 2; *Swinamer c. Nouvelle-Écosse (Procureur général)*, [1994] 1 R.C.S. 445; *Jaegli Enterprises Ltd. c. Taylor*, [1981] 2 R.C.S. 2, inf. (1980), 112 D.L.R. (3d) 297 (*sub nom. Taylor c. The Queen in Right of British Columbia*), inf. (1978), 95 D.L.R. 82; *Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie)*, [1994] 1 R.C.S. 420; *Ryan c. Victoria (Ville)*, [1999] 1 R.C.S. 201; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Joseph Brant Memorial Hospital c. Koziol*, [1978] 1 R.C.S. 491; *Williams c. Town of North Battleford* (1911), 4 Sask.

L.R. 75; *Shupe v. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627; *Galbiati v. City of Regina*, [1972] 2 W.W.R. 40; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Moge v. Moge*, [1992] 3 S.C.R. 813; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15; *Schreiber Products Ltd. v. Currie Brothers Ltd.*, [1980] 2 S.C.R. 78; *Levey v. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764; *Diebel Estate v. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68; *R. v. Jennings*, [1966] S.C.R. 532; *County of Parkland No. 31 v. Stetar*, [1975] 2 S.C.R. 884; *Nelson v. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46.
Highway Traffic Act, S.S. 1986, c. H-3.1, ss. 33(1), 44(1).
Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192 [am. 1992, c. 63, s. 47; am. 1993, c. T-20.1, s. 7].

Authors Cited

American Bar Association. Judicial Administration Division. *Standards Relating to Appellate Courts*. Chicago: American Bar Association, 1995.
Cambridge International Dictionary of English. Cambridge: Cambridge University Press, 1996, "palpable".
Gibbens, R. D. "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445.
Goodhart, A. L. "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402.
Kerans, Roger P. *Standards of Review Employed by Appellate Courts*. Edmonton: Juriliber, 1994.
New Oxford Dictionary of English. Edited by Judy Pearsall. Oxford: Clarendon Press, 1998, "palpable".
Random House Dictionary of the English Language, 2nd ed. Edited by Stuart Berg Flexner. New York: Random House, 1987, "palpable".
Wright, Charles Alan. "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751.

APPEAL from a judgment of the Saskatchewan Court of Appeal, [2000] 4 W.W.R. 173, 189 Sask. R. 51, 9 M.P.L.R. (3d) 126, 50 M.V.R. (3d) 70, [2000] S.J. No. 58 (QL), 2000 SKCA 12, setting aside a decision of the Court of Queen's Bench, [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL). Appeal allowed, Gonthier, Bastarache, Binnie and LeBel JJ. dissenting.

L.R. 75; *Shupe c. Rural Municipality of Pleasantdale*, [1932] 1 W.W.R. 627; *Galbiati c. City of Regina*, [1972] 2 W.W.R. 40; *Just c. Colombie-Britannique*, [1989] 2 R.C.S. 1228; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Moge c. Moge*, [1992] 3 R.C.S. 813; *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606; *Bose Corp. c. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984); *St-Jean c. Mercier*, [2002] 1 R.C.S. 491, 2002 CSC 15; *Schreiber Brothers Ltd. c. Currie Products Ltd.*, [1980] 2 R.C.S. 78; *Levey c. Rural Municipality of Rodgers, No. 133*, [1921] 3 W.W.R. 764; *Diebel Estate c. Pinto Creek No. 75 (Rural Municipality)* (1996), 149 Sask. R. 68; *R. c. Jennings*, [1966] R.C.S. 532; *Comté de Parkland nº 31 c. Stetar*, [1975] 2 R.C.S. 884; *Nelson c. Waverley (Rural Municipality)* (1988), 65 Sask. R. 260.

Lois et règlements cités

Code criminel, L.R.C. 1985, ch. C-46.
Highway Traffic Act, S.S. 1986, ch. H-3.1, art. 33(1), 44(1).
Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192 [mod. 1992, ch. 63, art. 47; mod. 1993, ch. T-20.1, art. 7].

Doctrine citée

American Bar Association Judicial Administration Division. *Standards Relating to Appellate Courts*. Chicago : American Bar Association, 1995.
Gibbens, R. D. « Appellate Review of Findings of Fact » (1991-92), 13 *Advocates' Q.* 445.
Goodhart, A. L. « Appeals on Questions of Fact » (1955), 71 *L.Q.R.* 402.
Grand Larousse de la langue française, Paris : Librairie Larousse, 1975, « manifeste ».
Grand Robert de la langue française, 2e éd. Paris : Dictionnaires Le Robert, 2001, « manifeste ».
Kerans, Roger P. *Standards of Review Employed by Appellate Courts*. Edmonton : Juriliber, 1994.
Trésor de la langue française. Paris : Gallimard, 1985, « manifeste ».
Wright, Charles Alan. « The Doubtful Omniscience of Appellate Courts » (1957), 41 *Minn. L. Rev.* 751.

POURVOI contre un arrêt de la Cour d'appel de la Saskatchewan, [2000] 4 W.W.R. 173, 189 Sask. R. 51, 9 M.P.L.R. (3d) 126, 50 M.V.R. (3d) 70, [2000] S.J. No. 58 (QL), 2000 SKCA 12, qui a infirmé une décision de la Cour du Banc de la Reine, [1998] 5 W.W.R. 523, 161 Sask. R. 241, 44 M.P.L.R. (2d) 203, [1997] S.J. No. 759 (QL). Pourvoi accueilli, les juges Gonthier, Bastarache, Binnie et LeBel sont dissidents.

to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. *Standard of Review for Questions of Law*

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

les normes de contrôle se rapportant à chacune des catégories de questions suivantes : (1) les questions de droit; (2) les questions de fait; (3) les inférences de fait; (4) les questions mixtes de fait et de droit.

A. *La norme de contrôle applicable aux questions de droit*

Dans le cas des pures questions de droit, la règle fondamentale applicable en matière de contrôle des conclusions du juge de première instance est que les cours d'appel ont toute latitude pour substituer leur opinion à celle des juges de première instance. La norme de contrôle applicable à une question de droit est donc celle de la décision correcte : Kerans, *op. cit.*, p. 90. 8

Au moins deux raisons justifient l'application de la norme de la décision correcte aux questions de droit. Premièrement, le principe de l'universalité impose aux cours d'appel le devoir de veiller à ce que les mêmes règles de droit soient appliquées dans des situations similaires. Notre Cour a reconnu l'importance de ce principe dans *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515 : 9

> [TRADUCTION] Il est fondamental, pour assurer la bonne administration de la justice, que l'autorité des décisions soit scrupuleusement respectée par tous les tribunaux qui sont liées par elles. Sans cette adhésion générale et constante, l'administration de la justice sera désordonnée, le droit deviendra incertain et la confiance dans celui-ci sera ébranlée. Il importe plus que tout que le droit, tel qu'il a été énoncé, [. . .] soit accepté et appliqué comme l'exige notre tradition; et même au risque de nous tromper, tous les juges étant faillibles, nous devons préserver totalement l'intégrité des rapports entre les tribunaux.

Une deuxième raison, connexe, d'appliquer la norme de la décision correcte aux questions de droit tient au rôle qu'on reconnaît aux cours d'appel en matière de création du droit et qu'a souligné Kerans, *op. cit.*, p. 5 :

> [TRADUCTION] Le principe de l'universalité — et le rôle de création du droit qu'il emporte — exige beaucoup du tribunal de révision. Il exige de ce tribunal qu'il fasse preuve d'un certain degré d'expertise dans l'art d'élaborer une règle de droit juste et pratique, expertise qui ne revêt pas une importance aussi cruciale pour le premier tribunal. Dans les affaires où le droit n'est pas fixé, le tribunal de révision élabore des règles de droit applicables tout autant à d'éventuelles affaires qu'à celle dont il est saisi.

TAB 7

ALBERTA
RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 85/2016

VOLUME ONE

Published September, 2016

Part 1: Foundational Rules

Division 1
Purpose and Intention of These Rules

What these rules do

1.1(1) These rules govern the practice and procedure in

(a) the Court of Queen's Bench of Alberta, and

(b) the Court of Appeal of Alberta.

(2) These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer.

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Division 2
Authority of the Court

General authority of the Court to provide remedies

1.3(1) The Court may do either or both of the following:

(a) give any relief or remedy described or referred to in the *Judicature Act*;

(b) give any relief or remedy described or referred to in or under these rules or any enactment.

(2) A remedy may be granted by the Court whether or not it is claimed or sought in an action.

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 *[Purpose and intention of these rules]* the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(c) a party was incorrectly named as a party or was incorrectly omitted from being named as a party.

(2) If subrule (1) applies, a judgment entered in respect of the action is without prejudice to the rights of persons who were not parties to the action.

Subdivision 2
Changes to Parties

Adding, removing or substituting parties after close of pleadings

3.74(1) After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.

(2) On application, the Court may order that a person be added, removed or substituted as a party to an action if

(a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;

(b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party and the Court is satisfied the order should be made.

(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Information note

An order under this rule is likely to include terms, conditions and time limits. See rule 1.4(2)(e) *[Procedural orders]*.

Adding, removing or substituting parties to originating application

3.75(1) In an action started by originating application no party or person may be added or substituted as a party to the action except in accordance with this rule.

(2) On application of a party or person, the Court may order that a person be added or substituted as a party to the action

(a) in the case of a person to be added or substituted as an originating applicant, if consent of the person proposed to be added or substituted is filed with the application;

(b) in the case of an application to add or substitute a person as a respondent, or to remove or correct the name of a party, if the Court is satisfied the order should be made.

(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Action to be taken when defendant or respondent added

3.76(1) If a defendant or respondent is added to or substituted in an action, the plaintiff, originating applicant, plaintiff-by-counterclaim or third party plaintiff must, unless the Court otherwise orders,

(a) amend the commencement document, as required, to name the new party, and

(b) serve the amended commencement document on each of the other parties.

(2) Unless the Court otherwise orders,

(a) in the case of a new defendant, the new defendant has the same time period to serve a statement of defence as the defendant had under rule 3.31 *[Statement of defence]*, and

(b) the action against the new defendant or new respondent, as the case may be, starts on the date on which the new party is added to or substituted in the action.

Subsequent encumbrancers not parties in foreclosure action

3.77 A plaintiff in a foreclosure action must not make any subsequent encumbrancer a party to the claim unless possession is claimed from the subsequent encumbrancer.

Information note

In foreclosure actions, a notice of address for service may be filed and served under rule 11.24 *[Notice of address for service in foreclosure actions]*.

Ways the Court may manage action

4.11 The Court may manage an action in one or more of the following ways, in which case the responsibility of the parties to manage their dispute is modified accordingly:

(a) the Court may make a procedural order;

(b) the Court may direct a conference under rule 4.10 *[Assistance by the Court]*;

(c) on request under rule 4.12 *[Request for case management]*, or on the initiative of the Chief Justice under rule 4.13 *[Appointment of case management judge]*, the Chief Justice may appoint a case management judge for the action;

(d) the Court may make an order under a rule providing for specific direction or a remedy.

Request for case management

4.12(1) A request for a case management order must be made in writing to the Chief Justice and a copy of the request must be served on each of the other parties.

(2) The request must state

(a) the reason for the request, and

(b) whether any of the other parties agrees with the request.

(3) An action commenced or continued under the *Class Proceedings Act* must have a case management judge appointed for the action unless the Chief Justice decides otherwise, and the request for a case management judge must be made no later than the date on which the first application in respect of the class proceeding is made under section 2(2) of the *Class Proceedings Act*.

Appointment of case management judge

4.13 The Chief Justice may order that an action be subject to case management and appoint a judge as the case management judge for the action for one or more of the following reasons:

(a) to encourage the parties to participate in a dispute resolution process;

(b) to promote and ensure the fair and efficient conduct and resolution of the action;

(c) to keep the parties on schedule;

(d) to facilitate preparation for trial and the scheduling of a trial date.

Authority of case management judge

4.14(1) A case management judge, or if the circumstances require, any other judge, may

(a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute,

(b) establish, substitute or amend a complex case litigation plan and order the parties to comply with it,

(c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding,

(d) make an order to promote the fair and efficient resolution of the action by trial,

(e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial,

(f) make any procedural order that the judge considers necessary, or

(g) as a case management judge, exercise the powers that a trial judge has by adjudicating any issues that can be decided before commencement of the trial, including those related to

(i) the admissibility of evidence,

(ii) expert witnesses,

(iii) admissions, and

(iv) adverse inferences.

(2) Unless the Chief Justice or the case management judge otherwise directs, or these rules otherwise provide, the case management judge must hear every application filed with respect to the action for which the case management judge is appointed.

(3) A decision that results from the exercise of the power referred to in subrule (1)(g) is binding on the parties for the remainder of the trial, even if the judge who hears the evidence on the merits is not the same as the case management judge, unless the court is satisfied that it would not be in the interests of justice because, among other considerations, fresh evidence has been adduced.

AR 124/2010 s4.14;85/2016

Case management judge presiding at summary trial and trial

4.15 Unless every party and the judge agree, a case management judge must not hear an application for judgment by way of a summary trial or preside at the trial of the action for which the case management judge is appointed.

TAB 8

1993 CarswellAlta 32
Alberta Court of Queen's Bench

Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.

1993 CarswellAlta 32, [1993] A.W.L.D. 473, [1993] A.J. No. 317, 10 Alta. L.R. (3d) 325, 140 A.R. 244, 18 C.P.C. (3d) 275, 40 A.C.W.S. (3d) 232

AMOCO CANADA PETROLEUM COMPANY LIMITED and AMOCO CANADA RESOURCES LTD. v. ALBERTA AND SOUTHERN GAS CO. LTD. and PACIFIC GAS AND ELECTRIC COMPANY; TCPL RESOURCES LTD. and ENCOR ENERGY CORPORATION INC. (Applicants)

Virtue J.

Judgment: May 6, 1993
Docket: Doc. Calgary 9101-15026

Counsel: *Kent R. Anderson*, for applicants TCPL Resources Ltd. and Encor Energy Corporation Inc.
Murray A. Putnam, Q.C., for respondent Alberta and Southern Gas Co. Ltd.
Alan D. Hunter, Q.C., for respondent Pacific Gas and Electric Company.

Subject: Civil Practice and Procedure

Related Abridgment Classifications
Civil practice and procedure

III Parties
III.6 Adding or substituting parties
III.6.a Adding plaintiff
III.6.a.ii Miscellaneous

Headnote
Practice --- Parties — Adding or substituting parties — Adding plaintiff — General

Civil procedure — Parties — Adding or substituting parties — Court outlining test for adding parties — Plaintiff must be seeking remedy which will affect intervenor's legal rights as opposed to intervenor's commercial interests — Party only being added where issues not being effectually and completely settled unless that person is party.

The plaintiff brought action for breach of contract against the first defendant, alleging that the first defendant failed to purchase the agreed minimum amount of natural gas in each contract year. The plaintiff further alleged that the first defendant induced the second defendant to breach its contracts with the plaintiff. The applicants alleged that they had each acquired an interest in the plaintiff's contracts to sell natural gas to the first defendant. They alleged that they owned an interest in the reserves and reservoirs dedicated to the performance of the plaintiff's contracts with the first defendant. The applicants applied to be added as party plaintiffs and appealed the decision of the master dismissing the application.

Held:

Appeal dismissed.

The test for adding parties in an existing cause is whether the remedy sought by the plaintiff will directly affect the intervenor, not in its commercial interests, but in the enjoyment of its legal rights. The only reason to add a party is that the question to be settled cannot be effectually and completely settled unless that person is a party.

The question in issue was whether there had been a breach of the contract between the plaintiff and the defendants. There was no contractual relationship between the applicants and the defendants, and the applicants had nothing to bring to the resolution of the issue that could not be adduced by way of their evidence, if required.

The legal rights of the applicants existed against the plaintiff, not the defendants, and would not be altered by the outcome of the litigation. Their commercial interests were only potentially affected. The applicants had no claim which they could advance against the defendants; accordingly, the need to prevent multiplicity of actions did not arise.

Table of Authorities

Cases considered:

Amon v. Raphael Tuck & Sons Ltd., [1956] 1 Q.B. 357, [1956] 1 All E.R. 273 — *applied*

Fullwood v. Master Excavators Ltd. (1981), 25 C.P.C. 81, [1982] I.L.R. 1-1483, 34 A.R. 541 (Master) — *considered*

Gurtner v. Circuit, [1968] 2 Q.B. 587, [1968] 1 All E.R. 328 (C.A.) — *considered*

Vandervell's Trusts, Re; White v. Vandervell Trustees Ltd, [1971] A.C. 912, [1970] 3 All E.R. 16 (H.L.) — *considered*

White v. London Transport, [1971] 2 Q.B. 721, [1971] 3 All E.R. 1 (C.A.) — *considered*

Rules considered:

Alberta Rules of Court

R. 38(3)*considered*

Appeal of decision of Master Floyd dismissing application to be added as party plaintiffs.

Virtue J.:

1 TCPL Resources Ltd. ("TCPL") and Encor Energy Corporation Inc. ("Encor") seek to be added as party plaintiffs in an action which Amoco Canada Petroleum Company Limited and Amoco Canada Resources Ltd. ("Amoco") have brought against Alberta and Southern Gas Co. Ltd. ("A&S") and Pacific Gas and Electric Company ("PG&E"). The Plaintiff, Amoco, takes no position on the application.

2 The application was heard by Master Floyd on January 7th, 1993, and dismissed without written reasons. The Applicants, TCPL and Encor, appeal the decision of the Master to this Court.

3 The Applicants claim to be interested parties "under the Plaintiff Amoco", and submit that their presence as party Plaintiffs is necessary in order for the Court to effectually and completely adjudicate upon the matters raised in the Statement of Claim. They submit further that the interests of the Applicants may be materially prejudiced if they are not added as parties.

4 They also seek leave to amend the Statement of Claim so as to disclose the nature of their interest.

5 The applicants TCPL and Encor allege that each acquired a 12.5% interest in Amoco's contracts to sell natural gas to the Defendant A&S and that Encor has the right to receive 25% of the proceeds of the sale of natural gas to the Defendant A&S and that Encor has sustained 25% of the loss claimed to have been sustained by the Plaintiff Amoco due to the alleged breaches of contract by A&S. The Applicants also claim that at all material times TCPL and Encor have owned a 25% interest in the reserves and reservoirs dedicated to the performance of Amoco's contracts to supply A&S and that if the injunction sought by Amoco is not granted their interests in the reservoirs and reserves will be adversely affected.

6 In their Statement of Claim the Amoco Corporations claim that Amoco contracted with A&S, by way of a number of contracts under which the Plaintiff Amoco agreed to sell and deliver natural gas to A&S. Under these contracts A&S was obliged to purchase in each contract year, certain minimum quantities of natural gas. Amoco alleges that A&S failed to purchase these minimum amounts and that, as a result, Amoco has suffered loss and damage amounting to several millions of dollars. The Plaintiffs allege further that as a result of the fact that the fields and reservoirs which had been dedicated by Amoco to these supply contracts were not being drained to the full extent required to supply the contracts, further losses have been sustained by Amoco due to the depletion and drainage of the reserves from various causes. These additional losses, the Plaintiffs say, run into the millions of dollars.

7 Amoco further alleges that A&S has evinced an intention to continue to fail to meet the minimum purchase requirements in the future which will result in continued losses to Amoco and continuing depletion and drainage of the reserves and reservoirs.

8 With respect to the Defendant PG&E, Amoco alleges that PG&E induced A&S to breach its contracts with Amoco, or in the alternative, that the contractual obligations of A&S are those of the Defendant PG&E, who, it says, directs the purchase of natural gas by Amoco.

9 The Amoco Plaintiffs seek damages totalling $84,700,000 and an injunction requiring A&S to meet the minimum purchase requirements in the future.

10 The Defendants say that their gas purchases have been subject to the control of various regulatory agencies both in Canada and the United States which have modified the minimum purchase obligation. In the alternative the Defendants say that certain regulatory decisions, which prevented A&S from purchasing natural gas, constitute a force majeure within the meaning of that term in its contracts with the Plaintiffs. The Defendants also allege certain failure on the part of the Plaintiffs, which they say caused or contributed to the Defendants' inability to purchase natural gas from the Plaintiffs. The Defendants raise a variety of additional defences to the Plaintiffs' claims.

11 Against that background I return to the relief sought by the Applicants TCPL and Encor. In essence, they claim to be the beneficial owner of 25% of the causes of action alleged in the Statement of Claim and to own beneficially, a 25% interest in the sale and purchase contracts and the related gas and oil properties which are dedicated to the supply of those contracts. The Applicants say that they have been excluded from any participation in settlement negotiations between Amoco and A&S because of the confidential nature of those negotiations. The Applicants say further that Amoco has different commercial interests in dealing with the Defendants than do the Applicants and that the Applicants could be prejudiced unless they are made party to these proceedings and permitted to participate in the settlement negotiations.

12 The matter of adding parties in an existing cause is dealt with in the *Alberta Rules of Court*. Rule 38(3) provides in part:

> (3) The Court may ... order that the name of ... any person be added ... whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, or in order to protect the rights or interests of any person ... interested under the plaintiff ...

13 The addition of parties to actions by order of the Court is a subject which has been dealt with more extensively in the Courts of England than Canada. Some controversy still exists as to whether the proper test is a narrow or a broad one. The narrow test is best exemplified in *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357. In that case Devlin J., with painstaking thoroughness, traces the cases dealing with the English rule, and concludes that what he describes as the narrow test, is the correct interpretation of the rule. My understanding of the test enunciated by Devlin J., which, for the reasons set out below, I respectfully adopt, is this: Would the order for which the Plaintiff was asking directly affect the intervenor, not in his commercial interests, but in the enjoyment of his legal rights? And secondly, the only reason which makes it necessary that a party be added is that the question to be settled cannot be effectually and completely settled unless he is a party. Unless these tests are met the Court has no jurisdiction to add a party within the rule.

14 For those who are interested in tracing the history of English legal analysis and application of the rule the whole of Devlin J.'s reasons are commended, but I refer in particular to the expression adopted by him at pp. 378-79:

> ... that is the key to the whole section: if the court cannot decide the question without the presence of other parties, the cause is not to be defeated, but the parties are to be added so as to put the proper parties before the court.

15 At p. 380 he elaborates on this further:

> The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ... The only reason which makes it *necessary* to make a person a *party* to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party. [Emphasis in original.]

With respect to the other aspect of the test: commercial interest versus legal interests, Lord Devlin says, at p. 381:

> On the wider construction of the rule, I do not understand where the line is to be drawn — it is conceded that it must be drawn somewhere — between a commercial interest in the question involved in the case and a legal one. It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally — that is by curtailing his legal rights.

16 And finally at p. 386:

> ... the test is: "May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?"

17 In reaching the conclusion I have as to the proper test to be used in the application of R. 38(3) (which is based not only on Lord Devlin's analysis, but upon my own interpretation of the Alberta Rule), I hasten to point out that in *Gurtner v. Circuit*, [1968] 1 All E.R. 328, a case decided some 13 years after *Amon*, Lord Denning, in one of the Reasons for Judgment of the English Court of Appeal, specifically did not agree with Devlin J., and preferred to give the Rule a wider interpretation. Lord Denning's views appear at p. 332 as follows:

> That was done by DEVLIN, L., in *Amon v. Raphael Tuck & Sons, Ltd.* He thought that the rule should be given a narrow construction, and his views were followed by JOHN STEPHENSON, J., in *Fire, Auto and Marine Insurance*

> *Co. Ltd. v. Greene*. I am afraid that I do not agree with them. I prefer to give a wide interpretation to the rule, as LORD ESHER, M.R., did in *Byrne v. Brown*. It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute "to be effectually and completely determined and adjudicated upon" between all those directly concerned in the outcome. [Footnotes omitted.]

18 *Gurtner* was a case where the Motor Insurer's Bureau would be bound to pay a judgment for an uninsured defendant who had disappeared, if the plaintiff established negligence. The Court of Appeal joined the Bureau as a defendant although, in a technical sense, the Bureau was not a necessary party to the action. The rights between the plaintiff and the missing defendant could have been determined without the addition of the Bureau as a party. I have set out above Lord Denning's reasons for allowing the joinder. Lord Diplock reached his conclusion, at p. 336, on the basis that:

> ... the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.

It is difficult to disagree with Lord Diplock's conclusion on the particular facts of that case.

19 Subsequently the interpretation of the Rule was considered by the House of Lords in *Re Vandervell's Trusts; White v. Vandervell Trustees Ltd.*, [1970] 3 All E.R. 16. Viscount Dilhorne did not accept Lord Denning's interpretation and at p. 24 said:

> My difficulty about accepting Lord Denning's wide interpretation is that it appears to me wholly unrelated to the wording of the rule. I cannot construe the language of the rule as meaning that a party can be added whenever it is just or convenient to do so. That could have been simply stated if the rule was intended to mean that. However wide an interpretation is given, it must be an interpretation of the language used. The rule does not give power to add a party whenever it is just or convenient to do so. It gives power to do so only if he ought to have been joined as a party or if his presence is necessary for the effectual and complete determination and adjudication on all matters in dispute in the cause or matter.

20 (It will be remembered that Lord Devlin's interpretation in *Amon* was based upon a careful interpretation of the wording of the rule itself, to determine its true intent and meaning.)

21 Subsequently, Lord Denning had occasion to revisit the Rule in *White v. London Transport*, [1971] 3 All E.R. 1 (C.A.). His reasons in that case (where he upheld the trial judge's rejection of the application of the Motor Insurer's Bureau to be joined as a party) seem to indicate a drawing back from the position he had adopted earlier in *Gurtner*. At p. 4 Lord Denning deals with the application in this way:

> It seems to me that if the bureau were allowed to come into the action, it would be open to their counsel on the one hand to cross-examine Mrs White about contributory negligence and damages; and then, on the other hand, to cross-examine London Transport Executive's witnesses to show that they were wholly or in part to blame. Such an exceptional course might be permissible if it were *necessary* to ensure that all the matters in dispute could be effectually determined. But I do not see that it is necessary in the least. In my judgment, seeing that Mrs White is bringing the action on the discretion of the bureau, she will be bound to pursue the action with vigilance and skill against London Transport Executive, doing all she can to make them liable in part or whole. So far as London Transport Executive is concerned they will do their best to defend the action by disputing negligence, by alleging contributory negligence, and questioning the damages. So all the matters will be properly and fully investigated without the necessity of joining the bureau. Accordingly I doubt whether this joinder is "necessary" within the opening words of RSC Ord 15, r 6(2)(*b*).

22 In *Fullwood v. Master Excavators Ltd.* (1981), 34 A.R. 541, Funduk M.C. conducts an extensive review of the history of the Rule and the cases dealing with both the Alberta Rule and its English equivalent. In reaching his conclusions, the learned Master, as I have done, relies upon Devlin J.'s interpretation of the rule in *Amon* (supra), as setting out the correct tests. See especially paras. 17-21, at pp. 549-51, where Master Funduk concludes that [p. 551]:

> The rejection of a "commercial interest" as a foundation for a person becoming a party was re-affirmed by the Court of Appeal in *In re I.G. Farbenindustrie*, [1944] 1 Ch. 41.

23 Having reviewed the cases referred to me by the parties I conclude that the tests to be applied in this case are these:

24 (a) Can the question to be settled between the Plaintiff Amoco and the Defendants A&S and PG&E be effectually and completely settled without TCPL and Encor being added as Plaintiffs?

25 (b) Will the order which the Plaintiff Amoco seeks, directly affect TCPL and Encor, not in their commercial interests but in the enjoyment of their legal rights?

26 I am satisfied that the answer to the first question is that the question can be settled without the addition of those parties. The issue is whether there has been a breach of the contract between Amoco and the Defendants. Neither TCPL nor Encor have anything to bring to the resolution of that issue that cannot be adduced by way of their evidence, if required. There is no contractual relationship between those parties and the Defendants. The existence of proposed novation agreements, which are still in draft form, do not, in my view, alter this non-relationship.

27 The answer on cross-examination of Randall Findlay, vice-president of both the Applicant corporations, upon his affidavit in support of the application, is revealing. He was asked:

> Q. In terms of the litigation between Amoco and A&S and PG&E, I take it Encor has no unique or different evidence to offer the Court in respect of whether or not A&S has been in breach of its obligations under these three contracts? In other words, Amoco has whatever evidence there is in respect of A&S purchases and takes under these contracts?
>
> A. No, I don't believe we have anything unique to offer.

28 This question and answer add weight to my conclusion that the issue between Amoco and the Defendants can be effectually and completely settled without the intervention of the Applicants as parties. The issue is one between Amoco and the Defendants.

29 Insofar as the second part of the test is concerned, I am satisfied that while the Applicants' commercial interests may be affected by the outcome of the litigation, their legal rights will not be altered. Those rights exist against Amoco, not the Defendants.

30 A factor considered in some of the cases in which the rule is applied is the prevention of multiplicity of actions. That is not a factor in this case. The Applicants have no claim which they can advance against the Defendants A&S and PG&E. As they are not in a position to commence action, multiplicity is not a factor to be considered.

31 In my view the lawsuit between Amoco and the Defendants would be unnecessarily cluttered and made more difficult and expensive by the addition of the Applicants as parties. Their presence is not necessary for the determination of the issues between the Plaintiffs and the Defendants nor is their presence as parties required in order to protect their rights or interests.

32 I agree with the conclusion of the Master who dismissed the applications and I would dismiss the appeal, with costs to the Respondents, which may be spoken to in thirty days if required.

Appeal dismissed.

End of Document

TAB 9

In the Court of Appeal of Alberta

Citation: Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc., 2012 ABCA 219

Date: 20120711
Docket: 1103-0301-AC
Registry: Edmonton

Between:

Castledowns Law Office Management Ltd., 104 Street Law Office Management Ltd., Roy Nickerson, Trudy Nickerson, Westering Heights Estates Ltd., KSA Holdings Inc., David Mercer, Paul Foisy and Marianna Foisy and 1131102 Alberta Ltd.

Respondents (Plaintiffs)

- and -

FastTrack Technologies Inc.

Appellant (Defendant)

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J. Goss
Dated the 1st day of November, 2011
Filed on the 14th day of November, 2011
(Docket: 0603-14617)

Memorandum of Judgment

The Court:

OVERVIEW

[1] This appeal was dismissed at the end of oral argument, with reasons to follow. These are those reasons. They address the circumstances in which pleadings may be amended and defendants added as parties in advance of a retrial of an action, following a successful appeal of an initial trial decision. The underlying action arose because the vendor of an office building located in south Edmonton entered into agreements to sell it to two different parties; the litigation resulted from a contest between the two prospective buyers as to which had the right to the property.

[2] On the parties' last trip to this court, the underlying facts were described as follows. The vendor of the building advertised it for sale in the newspaper in August 2006. Shortly thereafter, he also listed it for sale with a commercial realtor, which agreed not to seek commissions if the property were sold to a buyer who contacted the vendor directly, as a result of the newspaper advertisement. FastTrack responded to that advertisement and entered into an agreement with the vendor to purchase the property on August 30, 2006, subject to the condition that the vendor's lawyer approve the offer before 9:00 p.m. on September 15, 2006.

[3] Shortly thereafter, the realtor informed the vendor that it had found several other interested buyers, including Castledowns. The vendor, who had not forwarded the FastTrack agreement to its lawyer for approval, elected to accept an offer from Castledowns. Castledowns offered a higher price with a much more substantial deposit than the vendor had agreed with FastTrack. The Castledowns agreement contained the following condition: "Subject to satisfactory confirmation of termination of private purchase contract dated August 30, 2006". The vendor informed Castledowns that it would try to get out of the FastTrack deal.

[4] The vendor then sent both agreements to its lawyer, instructing the lawyer to terminate the FastTrack agreement and return the deposit. That lawyer wrote to FastTrack's counsel advising that his client was not prepared to remove the "subject to" condition in the agreement. FastTrack's lawyer responded immediately, expressing in unequivocal terms its rejection of the purported termination and its intention to enforce the agreement through the courts. He filed a caveat to protect FastTrack's interest in the property.

[5] Upon receipt of this letter the vendor relented, negotiating an addendum to the purchase agreement with FastTrack. Shortly thereafter, the vendor's lawyer wrote to Castledowns stating that he was unable to confirm termination of the FastTrack agreement, so the condition to the agreement with Castledowns could not be satisfied and that the vendor considered the Castledowns agreement to be at an end.

[6] Castledowns responded by filing its own caveat and suing the vendor for specific performance. It also sued FastTrack seeking, among other things, the removal of the latter's caveat. FastTrack defended and counter-claimed for interference with contractual relations and wrongful filing of caveats, seeking damages and costs. These are the pleadings which FastTrack has sought to amend and which are the subject of the current appeal.

[7] All actions were eventually consolidated and set down for trial. FastTrack and the vendor entered into a standstill agreement. An order was obtained which severed liability from damages for the purpose of trial, and the former was tried in May 2007. The trial judge granted Castledowns' claim for specific performance, directed that FastTrack's caveat be discharged and dismissed all other claims.

[8] FastTrack appealed and in July 2007 applied, unsuccessfully, for a stay of the trial judgment pending the hearing of the appeal. At that time all parties knew that the premises were to be occupied by a certain law firm and that renovations would be carried out in anticipation of the law firm's occupancy. On August 14, 2007, the vendor sold the property to Castledowns and received the purchase price. All parties were aware of this at the time. A mortgage with a face value of approximately $1.7 million was then registered on title by Servus Credit Union Ltd.

[9] On January 8, 2008, 104 Street Law Office Management Ltd. ("104 Street Law") was incorporated. It has the same five directors and the same registered office as Castledowns. The shareholders of both companies were either identical or related to one another. On May 20, 2008, a second mortgage, with a face value of $1.2 million, was registered against the title to the property in favour of the five shareholders of 104 Street Law, as second mortgagees. On May 29, 2008 Castledowns transferred the property to 104 Street Law, by a transfer of land, which was registered with the Land Titles Office on June 25, 2008. FastTrack knew of this transfer no later than November of 2008.

[10] This court allowed FastTrack's appeal from the trial judge's decision on liability on April 23, 2009. It set aside the order of specific performance in favour of Castledowns and concluded that the agreement to sell to Castledowns had been terminated on its own terms on September 15, 2007. This court remitted the matter to the Court of Queen's Bench for resolution of any outstanding issues. The Supreme Court of Canada dismissed Castledowns' leave to appeal application on January 28, 2010.

[11] On July 21, 2010, FastTrack requested the appointment of a case management judge by correspondence which advised, for the first time, that it would be seeking to amend the counterclaim for damages that it had issued in 2006. It sought to plead events which had occurred since the first trial, to add a claim for specific performance and to have the property transferred to it. FastTrack also wished to add a number of new parties to the action, including 104 Street Law and the second mortgagees, and to add claims for wrongful interference with contractual relations, constructive trust and unjust enrichment against the proposed new parties. It also commenced a separate action in

April 2011 in which it sought specific performance. No aspect of that separate action is before this court.

[12] FastTrack's application to amend its counterclaim was dismissed by the case management judge on November 1, 2011. This is an appeal from that decision.

ISSUES

[13] 1. What are the legal tests for amending pleadings and adding parties?

2. Have the respondents established that they would suffer non-compensable prejudice if the amendments were allowed?

3. Are the proposed amendments barred through laches or the expiry of limitation periods?

STANDARD OF REVIEW

[14] The issue whether the case management judge erred in her formulation and application of the legal test for the amendment of pleadings is an extricable question of law and is reviewable on the standard of correctness; see *Hill v Hill (Family Trust)*, 2007 ABCA 293 at para 8, [2007] AJ No 1067.

[15] The issue whether the case management judge erred in deciding that to allow the proposed amendments would result in non-compensable prejudice to the respondents is a question of fact to be reviewed on a standard of palpable and overriding error; see *Housen v Nikolaisen*, 2002 SCC 33 at para 10, [2002] 2 SCR 235.

ANALYSIS OF ISSUES

1. *What is the legal test for amending pleadings and for adding parties?*

[16] Rule 3.65 of the Alberta Rules of Court grants the court considerable discretion to allow amendments after pleadings have closed. Generally, it provides that a court ought to allow an amendment, but there are various exceptions to this presumption. They include circumstances in which the proposed amendment would cause serious prejudice to the opposing party, not compensable in costs, or where it seeks to add a new party or new cause of action after the expiry of a limitation period; see *Dusty's Saloon, a division of AP Woznow & Sons Enterprises Ltd v WMI Waste Management of Canada Inc,* [2001] AJ No 108 at paras 26-28, 279 AR 187; *Dow Chemicals Canada Inc v Nova Chemicals Corp* 2010 ABQB 524 at para 21, 495 AR 338.

[17] The burden is on the party resisting the amendment to show that it would suffer non-compensable prejudice were the amendment to be allowed; see *Hodge v Carey Industrial Services Ltd* [1997] 50 Alta LR (3d) 306 at para 10, 202 AR 154.

[18] Rule 3.74(3) of the Rules of Court expressly provides that an order adding parties should not be granted if doing so would cause prejudice for a party which could not be remedied by a costs award, an adjournment or the imposition of terms.

[19] Thus, the existence of non-compensable prejudice bears on both FastTrack's application to amend the prayer for relief and to add new defendants to its counterclaim.

2. Have the respondents established that they would suffer non-compensable prejudice if the amendments were allowed?

[20] The case management judge found that non-compensable prejudice was established and for that reason refused the proposed amendments. Noting that the application to amend had not been brought until four years after the liability trial, she rejected the argument that FastTrack's failure to obtain a stay of the trial decision pending appeal precluded it from seeking to amend its pleadings earlier than it did. She also noted that FastTrack had not applied to amend its pleadings to seek anything other than damages, even though it was aware that the circumstances surrounding the property had changed during the four-year period, and in particular, that the land had been transferred for consideration and that a mortgage had been registered against its title by a third party.

[21] She found that the four-year period between the trial and FastTrack's application to amend its counterclaim had the effect that the "serious prejudice to [Castledowns] is absolute". The case management judge noted that "much has changed" and that the parties had properly relied on court decisions, court orders and Land Titles Registry proceedings in making decisions throughout the four-year period. The respondents had relied on the fact that FastTrack's original counterclaim was for monetary compensation only, a remedy which would not interfere with their ability to deal with the land as they did. The case management judge decided that to allow an amendment now to pleadings, which would seek to undo those dealings, would result in prejudice which could not be remedied through costs, an adjournment or other terms.

[22] In this appeal, FastTrack argued that the case management judge erred in principle because the only type of prejudice relevant to an application to amend pleadings is prejudice to a respondent's ability to defend its case; an example is where critical documentary evidence has disappeared due to the passage of time. However, FastTrack offered no authority to support that proposition. In the decisions in which the disappearance of evidence was found to amount to prejudice, neither the Master in *McCormick v Boychuk*, 2008 ABQB 728, [2008] AJ No 1324, nor this court in *Hunter Financial Group Ltd v Maritime Life Assurance Co,* 2009 ABCA 199, 457 AR 271, purported to limit the relevant type of prejudice to this situation.

[23] All interlocutory steps and the first trial itself were conducted on the basis that FastTrack was claiming damages only. FastTrack argued before this court that the parties "understood" that it was claiming the land itself, despite the contents of its pleadings. It submitted that the parties' knowledge of this could be inferred from their knowledge of both FastTrack's caveat and the vendor's offer to transfer title to whichever party the judge determined was entitled to it. FastTrack argued that the trial judge recognized that it was claiming to acquire the land itself, citing the first sentence of his trial decision: "[t]his action involves competing claims for specific performance..." However, FastTrack did not ask for specific performance in its pleadings and, of course, the trial judge did not grant FastTrack specific performance.

[24] A review of the facts here discloses some reason for FastTrack's failure to seek an amendment prior to trial. At the time the initial counterclaim was issued, FastTrack could not have advanced a claim for specific performance against Castledowns because title to the land was not then in Castledowns' name. That possibility first arose when the land was transferred into Castledowns' name in 2007, at the conclusion of the trial. Similarly, FastTrack now proposes to amend its counterclaim to seek an order that land now owned by 104 Street Law be transferred to it but it could not have claimed that relief against 104 Street Law before 104 Street Law acquired title in May 2008.These facts, however, do not explain why FastTrack delayed its application to amend its counterclaim until November 2011.

[25] FastTrack's main reason for the delay does not withstand scrutiny. It argued that once it had lost at trial it had no reasonable hope of successfully applying to add a claim for specific performance to its pleadings, even though it anticipated succeeding in its appeal of the trial decision. FastTrack also submitted that even if it had issued a new statement of claim seeking specific performance,that the doctrine of issue estoppel would have prevented it being successful. However, while Castledowns and other defendants could have argued issue estoppel, ultimately that argument would not have been successful at a re-trial because FastTrack succeeded in its appeal of the original trial decision. In any event, these arguments do not address the reason FastTrack failed to commence a fresh action for specific performance in 2009, upon receipt of the appeal decision, rather than wait until April 2011.

[26] Prejudice can also arise where third parties have acquired intervening interests in property, which the applicant wishes later to claim directly by amending its pleadings. An order at the next trial that the land must be transferred to FastTrack would involve undoing Castledowns' purchase of the land from the vendor, recovery of the monies it paid the vendor, payout or assumption of the Servus mortgage, and evaluation of the renovations to the lands. These would be difficult, if not impossible to achieve even assuming that the corporate veil could somehow be pierced to allow recovery against the proposed individual shareholders of 104 Street Law.

[27] FastTrack argued that it has an interest in the land which has priority over any interest that Castledowns and then 104 Street Law Office may have acquired as purchasers. It acknowledges establishing this priority would depend on proving fraud pursuant to s 60 of the *Land Titles Act*,

RSA 2000, c L-4, or the *Fraudulent Conveyances Act* (1570), 13 Eliz 1, c 5, sometimes called the *Statute of Elizabeth*. To rely on these avenues to relief, FastTrack would have to establish that the land was conveyed to Castledowns with the intent of defrauding FastTrack and was not otherwise *bona fide*, a difficult proposition to maintain in the face of the knowledge that the transfer was ordered by the Court of Queen's Bench at trial.

[28] The case management judge thus correctly determined that FastTrack did not meet the legal requirements for its requested amendments. She made no palpable and overriding error in concluding that non-compensable prejudice would arise if FastTrack were allowed to amend its counterclaim to add claims for specific performance of the purchase contract for the lands, and to add the proposed new parties.

3. Are the proposed amendments barred through laches or the expiry of limitation periods?

[29] In light of the above conclusions, it is not necessary to address this further exception to the presumption that amendments to pleadings should be allowed. That said, laches would have acted to bar the amendments, independently of whether any limitation period has expired. Laches and delay have always been an impediment to the grant of equitable remedies, such as specific performance; see *Lindsay Petroleum Co v Hurd,* (1874) LR 5 PC 221 at 239-240, 22 WR 492; *M (K) v M (H),* [1992] 3 SCR 6 at paras 97-98, 1992 CanLII 31 (SCC). After confirming these earlier authorities in *Wewaykum Indian Band v Canada,* 2002 SCC 79 at paras 109-111, [2002] 4 SCR 245, Binnie J affirmed that laches and acquiescense remain defences available against an equitable claim; see also *Harris v McNeely,* [2000] OJ No 472.

CONCLUSION

[30] This case, and the pending retrial, is about damages alone. The land was long ago sold to Castledowns, pursuant to a court order after the initial trial. In light of intervening events, the land cannot now be sold to FastTrack, despite this court's conclusion that FastTrack, rather than Castledowns, was entitled to purchase it in 2006. The case management judge rightly exercised her discretion to reject the proposed amendments. For these reasons we declined to interfere with that decision and dismissed the appeal.

Appeal heard on June 8, 2012

Memorandum filed at Edmonton, Alberta
this 11th day of July, 2012

Ritter J.A

TAB 10

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2015 ABQB 799

Date: 20151217
Docket: 1103 14112
Registry: Edmonton

In the Matter of the *Trustees Act*, RSA 2000, c T-8, as amended; and

In the Matter of The Sawridge Band *Inter Vivos* Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

Ronald Twinn, Catherine Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo, As Trustees for the 1985 Sawridge Trust

Respondents

- and -

Public Trustee of Alberta

Applicant

Reasons for Judgment
of the
Honourable Mr. Justice D.R.G. Thomas

Table of Contents

I Introduction 3

II. Background 3

III. The 1985 Sawridge Trust 5

IV. The Current Situation 6

V. Submissions and Argument 7

A. The Public Trustee 7

B. The SFN 7

C. The Sawridge Trustees 8

VI. Analysis 9

A. Rule 5.13 9

B. Refocussing the role of the Public Trustee 9

Task 1 - Arriving at a fair distribution scheme 11

Task 2 – Examining potential irregularities related to the settlement of assets to the Trust 11

Task 3 - Identification of the pool of potential beneficiaries 11

Task 4 - General and residual distributions 14

C. Disagreement among the Sawridge Trustees 15

D. Costs for the Public Trustee 15

I Introduction

[1] This is a decision on a production application made by the Public Trustee and also contains other directions. Before moving to the substance of the decision and directions, I review the steps that have led up to this point and the roles of the parties involved. Much of the relevant information is collected in an earlier and related decision, ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365 ["***Sawridge #1***"], 543 AR 90 affirmed 2013 ABCA 226, 553 AR 324 ["***Sawridge #2***"]. The terms defined in ***Sawridge #1*** are used in this decision.

II. Background

[2] On April 15, 1985, the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation [sometimes referred to as the "Band", "Sawridge Band", or "SFN"], set up the 1985 Sawridge Trust [sometimes referred to as the "Trust" or the "Sawridge Trust"] to hold some Band assets on behalf of its then members. The 1985 Sawridge Trust and other related trusts were created in the expectation that persons who had previously been excluded from Band membership by gender (or the gender of their parents) would be entitled to join the Band as a consequence of amendments to the *Indian Act*, RSC 1985, c I-5, which were being proposed to make that legislation compliant with the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*"].

[3] The 1985 Sawridge Trust is administered by the Trustees [the "Sawridge Trustees" or the "Trustees"]. The Trustees had sought advice and direction from this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust (the "Trust Amendments") and confirmation of the transfer of assets into that Trust.

[4] One consequence of the proposed amendments to the 1985 Sawridge Trust would be to affect the entitlement of certain dependent children to share in Trust assets. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that some children presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and be entitled to shares in the Trust, while other dependent children would be excluded.

[5] Representation of the minor dependent children potentially affected by the Trust Amendments emerged as an issue in 2011. At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by the Trust Amendments were not represented by independent legal counsel. This led to a number of events:

> August 31, 2011 - I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

> February 14, 2012 - The Public Trustee applied:

1. to be appointed as the litigation representative of minors interested in this proceeding;
2. for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others; and
3. for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

April 5, 2012 - the Sawridge Trustees and the SFN resisted the Public Trustee's application.

June 12, 2012 - I concluded that a litigation representative was necessary to represent the interests of the minor beneficiaries and potential beneficiaries of the 1985 Sawridge Trust, and appointed the Public Trustee in that role: ***Sawridge #1***, at paras 28-29, 33. I ordered that Public Trustee, as a neutral and independent party, should receive full and advance indemnification for its activities in relation to the Sawridge Trust (***Sawridge #1***, at para 42), and permitted steps to investigate "... the Sawridge Band membership criteria and processes because such information may be relevant and material ..." (***Sawridge #1***, at para 55).

June 19, 2013 - the Alberta Court of Appeal confirmed the award of solicitor and own client costs to the Public Trustee, as well as the exemption from unfavourable cost awards (***Sawridge #2***).

April 30, 2014 - the Trustees and the Public Trustee agreed to a consent order related to questioning of Paul Bujold and Elizabeth Poitras.

June 24, 2015 - the Public Trustee's application directed to the SFN was stayed and the Public Trustee was ordered to provide the SFN with the particulars of and the basis for the relief it claimed. A further hearing was scheduled for June 30, 2015.

June 30, 2015 - after hearing submissions, I ordered that:

- the Trustee's application to settle the Trust was adjourned;
- the Public Trustee file an amended application for production from the SFN with argument to be heard on September 2, 2015; and
- the Trustees identify issues concerning calculation and reimbursement of the accounts of the Public Trustee for legal services.

September 2/3, 2015 - after a chambers hearing, I ordered that:

- within 60 days the Trustees prepare and serve an affidavit of records, per the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"],
- the Trustees may withdraw their proposed settlement agreement and litigation plan, and
- some document and disclosure related items sought by the Public Trustee were adjourned *sine die*

("September 2/3 Order")

October 5, 2015- I directed the Public Trustee to provide more detailed information in relation to its accounts totalling $205,493.98. This further disclosure was intended to address a concern by the Sawridge Trustees concerning steps taken by the Public Trustee in this proceeding.

[6] Earlier steps have perhaps not ultimately resolved but have advanced many of the issues which emerged in mid-2015. The Trustees undertook to provide an Affidavit of Records. I have directed additional disclosure of the activities of the legal counsel assisting the Public Trustee to allow the Sawridge Trustees a better opportunity to evaluate those legal accounts. The most important issue which remains in dispute is the application by the Public Trustee for the production of documents/information held by the SFN.

[7] This decision responds to that production issue, but also more generally considers the current state of this litigation in an attempt to refocus the direction of this proceeding and the activities of the Public Trustee to ensure that it meets the dual objectives of assisting this Court in directing a fair distribution scheme for the assets of the 1985 Sawridge Trust and the representation of potential minor beneficiaries.

III. The 1985 Sawridge Trust

[8] ***Sawridge #1*** at paras 7-13 reviews the history of the 1985 Sawridge Trust. I repeat that information verbatim, as this context is relevant to the role and scope of the Public Trustee's involvement in this matter:

> [8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. [In 2012] the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.
>
> [9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.
>
> [10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.
>
> [11] At least four of the five Sawridge Trustees are beneficiaries of the Sawridge Trust. There is overlap between the Sawridge Trustees and the Sawridge Band Chief and Council. Trustee Bertha L'Hirondelle has acted as Chief; Walter Felix

Twinn is a former Band Councillor. Trustee Roland Twinn is currently the Chief of the Sawridge Band.

[12] The Sawridge Trustees have now concluded that the definition of "Beneficiaries" contained in the 1985 Sawridge Trust is "potentially discriminatory". They seek to redefine the class of beneficiaries as the present members of the Sawridge Band, which is consistent with the definition of "Beneficiaries" in another trust known as the 1986 Trust.

[13] This proposed revision to the definition of the defined term "Beneficiaries" is a precursor to a proposed distribution of the assets of the 1985 Sawridge Trust. The Sawridge Trustees indicate that they have retained a consultant to identify social and health programs and services to be provided by the Sawridge Trust to the beneficiaries and their minor children. Effectively they say that whether a minor is or is not a Band member will not matter: see the Trustee's written brief at para. 26. The Trustees report that they have taken steps to notify current and potential beneficiaries of the 1985 Sawridge Trust and I accept that they have been diligent in implementing that part of my August 31 Order.

IV. The Current Situation

[9] This decision and the June 30 and September 2/3, 2015 hearings generally involve the extent to which the Public Trustee should be able to obtain documentary materials which the Public Trustee asserts are potentially relevant to its representation of the identified minor beneficiaries and the potential minor beneficiaries. Following those hearings, some of the disagreements between the Public Trustee and the 1985 Sawridge Trustees were resolved by the Sawridge Trustees agreeing to provide a *Rules* Part V affidavit of records within 60 days of the September 2/3 Order.

[10] The primary remaining issue relates to the disclosure of information in documentary form sought by the Public Trustee from the SFN and there are also a number of additional ancillary issues. The Public Trustee seeks information concerning:

1. membership in the SFN,
2. candidates who have or are seeking membership with the SFN,
3. the processes involved to determine whether individuals may become part of the SFN,
4. records of the application processes and certain associated litigation, and
5 how assets ended up in the 1985 Sawridge Trust.

[11] The SFN resists the application of the Public Trustee, arguing it is not a party to this proceeding and that the Public Trustee's application falls outside the *Rules*. Beyond that, the SFN questions the relevance of the information sought.

V. Submissions and Argument

A. The Public Trustee

[12] The Public Trustee takes the position that it has not been able to complete the responsibilities assigned to it by me in ***Sawridge #1*** because it has not received enough information on potential, incomplete and filed applications to join the SFN. It also needs information on the membership process, including historical membership litigation scenarios, as well as data concerning movement of assets into the 1985 Sawridge Trust.

[13] It also says that, without full information, the Public Trustee cannot discharge its role in representing affected minors.

[14] The Public Trustee's position is that the Sawridge Band is a party to this proceeding, or is at least so closely linked to the 1985 Sawridge Trustees that the Band should be required to produce documents/information. It says that the Court can add the Sawridge Band as a party. In the alternative, the Public Trustee argues that *Rules* 5.13 and 9.19 provide a basis to order production of all relevant and material records.

B. The SFN

[15] The SFN takes the position that it is not a party to the Trustee's proceedings in this Court and it has been careful not to be added as a party. The SFN and the Sawridge Trustees are distinct and separate entities. It says that since the SFN has not been made a party to this proceeding, the *Rules* Part V procedures to compel documents do not apply to it. This is a stringent test: ***Trimay Wear Plate Ltd. v Way***, 2008 ABQB 601, 456 AR 371; ***Wasylyshen v Canadian Broadcasting Corp.***, [2006] AJ No 1169 (Alta QB).

[16] The only mechanism provided for in the *Rules* to compel a non-party such as the SFN to provide documents is *Rule* 5.13, and its function is to permit access to specific identified items held by the third party. That process is not intended to facilitate a 'fishing expedition' (***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co*** (1988), 94 AR 17, 63 Alta LR (2d) 189 (Alta QB)) or compel disclosure (***Gainers Inc. v Pocklington Holdings Inc.*** (1995), 169 AR 288, 30 Alta LR (3d) 273 (Alta CA)). Items sought must be particularized, and this process is not a form of discovery: ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.*** (1989), 98 AR 374, 16 ACWS (3d) 286 (Alta CA).

[17] The SFN notes the information sought is voluminous, confidential and involves third parties. It says that the Public Trustee's application is document discovery camouflaged under a different name. In any case, a document is only producible if it is relevant and material to the arguments pled: *Rule* 5.2; ***Weatherill (Estate) v Weatherill***, 2003 ABQB 69, 337 AR 180.

[18] The SFN takes the position that ***Sawridge #1*** ordered the Public Trustee to investigate two points: 1) identifying the beneficiaries of the 1985 Sawridge Trust; and 2) scrutiny of transfer of assets into the 1985 Sawridge Trust. They say that what the decision in ***Sawridge #1*** did not do was authorize interference or duplication in the SFN's membership process and its results. Much of what the Public Trustee seeks is not relevant to either issue, and so falls outside the scope of what properly may be sought under *Rule* 5.13.

[19] Privacy interests and privacy legislation are also factors: ***Royal Bank of Canada v Trang***, 2014 ONCA 885 at paras 97, 123 OR (3d) 401; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5. The Public Trustee should not have access to this information unless

the SFN's application candidates consent. Much of the information in membership applications is personal and sensitive. Other items were received by the SFN during litigation under an implied undertaking of confidentiality: ***Juman v Doucette; Doucette (Litigation Guardian of) v Wee Watch Day Care Systems,*** 2008 SCC 8, [2008] 1 SCR 157. The cost to produce the materials is substantial.

[20] The SFN notes that even though it is a target of the relief sought by the Public Trustee that it was not served with the July 16, 2015 application, and states the Public Trustee should follow the procedure in *Rule* 6.3. The SFN expressed concern that the Public Trustee's application represents an unnecessary and prejudicial investigation which ultimately harms the beneficiaries and potential beneficiaries of the 1985 Sawridge Trust. In ***Sawridge #2*** at para 29, the Court of Appeal had stressed that the order in ***Sawridge #1*** that the Public Trustee's costs be paid on a solicitor and own client basis is not a "blank cheque", but limited to activities that are "fair and reasonable". It asks that the Public Trustee's application be dismissed and that the Public Trustee pay the costs of the SFN in this application, without indemnification from the 1985 Sawridge Trust.

C. The Sawridge Trustees

[21] The Sawridge Trustees offered and I ordered in my September 2/3 Order that within 60 days the Trustees prepare and deliver a *Rule* 5.5-5.9 affidavit of records to assist in moving the process forward. This resolved the immediate question of the Public Trustee's access to documents held by the Trustees.

[22] The Trustees generally support the position taken by the SFN in response to the Public Trustee's application for Band documents. More broadly, the Trustees questioned whether the Public Trustee's developing line of inquiry was necessary. They argued that it appears to target the process by which the SFN evaluates membership applications. That is not the purpose of this proceeding, which is instead directed at re-organizing and distributing the 1985 Sawridge Trust in a manner that is fair and non-discriminatory to members of the SFN.

[23] They argue that the Public Trustee is attempting to attack a process that has already undergone judicial scrutiny. They note that the SFN's admission procedure was approved by the Minister of Indian and Northern Affairs, and the Federal Court concluded it was fair: ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253. Further, the membership criteria used by the SFN operate until they are found to be invalid: ***Huzar v Canada***, [2000] FCJ No 873 at para 5, 258 NR 246. Attempts to circumvent these findings in applications to the Canadian Human Rights Commission were rejected as a collateral attack, and the same should occur here.

[24] The 1985 Sawridge Trustees reviewed the evidence which the Public Trustee alleges discloses an unfair membership admission process, and submit that the evidence relating to Elizabeth Poitras and other applicants did not indicate a discriminatory process, and in any case was irrelevant to the critical question for the Public Trustee as identified in ***Sawridge #1***, namely that the Public Trustee's participation is to ensure minor children of Band members are treated fairly in the proposed distribution of the assets of the 1985 Sawridge Trust.

[25] Additional submissions were made by two separate factions within the Trustees. Ronald Twinn, Walter Felix Twin, Bertha L'Hoirondelle and Clara Midbo argued that an unfiled affidavit made by Catherine Twinn was irrelevant to the Trustees' disclosure. Counsel for Catherine Twinn expressed concern in relation to the Trustee's activities being transparent and that the ultimate recipients of the 1985 Sawridge Trust distribution be the appropriate beneficiaries.

VI. Analysis

[26] The Public Trustee's application for production of records/information from the SFN is denied. First, the Public Trustee has used a legally incorrect mechanism to seek materials from the SFN. Second, it is necessary to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of the assets of the 1985 Sawridge Trust. To that end, the Public Trustee may seek materials/information from the Sawridge Band, but only in relation to specific issues and subjects.

A. Rule 5.13

[27] I agree with the SFN that it is a third party to this litigation and is not therefore subject to the same disclosure procedures as the Sawridge Trustees who are a party. Alberta courts do not use proximal relationships as a bridge for disclosure obligations: ***Trimay Wear Plate Ltd. v Way***, at para 17.

[28] If I were to compel document production by the Sawridge Band, it would be via *Rule* 5.13:

> 5.13(1) On application, and after notice of the application is served on the person affected by it, the Court may order a person who is not a party to produce a record at a specified date, time and place if
>
> (a) the record is under the control of that person,
>
> (b) there is reason to believe that the record is relevant and material, and
>
> (c) the person who has control of the record might be required to produce it at trial.
>
> (2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[29] The modern *Rule* 5.13 uses language that closely parallels that of its predecessor *Alberta Rules of Court*, Alta Reg 390/1968, s 209. Jurisprudence applying *Rule* 5.13 has referenced and used approaches developed in the application of that precursor provision: ***Toronto Dominion Bank v Sawchuk***, 2011 ABQB 757, 530 AR 172; ***H.Z. v Unger***, 2013 ABQB 639, 573 AR 391. I agree with this approach and conclude that the principles in the pre-*Rule* 5.13 jurisprudence identified by the SFN apply here: ***Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co***; ***Gainers Inc. v Pocklington Holdings Inc.***; ***Esso Resources Canada Ltd. v Stearns Catalytic Ltd.***

[30] The requirement for potential disclosure is that "there is reason to believe" the information sought is "relevant and material". The SFN has argued relevance and materiality may be divided into "primary, secondary, and tertiary" relevance, however the Alberta Court of Appeal has rejected these categories as vague and not useful: ***Royal Bank of Canada v Kaddoura***, 2015 ABCA 154 at para 15, 15 Alta LR (6th) 37.

[31] I conclude that the only documents which are potentially disclosable in the Public Trustee's application are those that are "relevant and material" to the issue before the court.

B. Refocussing the role of the Public Trustee

[32] It is time to establish a structure for the next steps in this litigation before I move further into specific aspects of the document production dispute between the SFN and the Public Trustee.

A prerequisite to any document disclosure is that the information in question must be *relevant*. Relevance is tested *at the present point*.

[33] In ***Sawridge #1*** I at paras 46-48 I determined that the inquiry into membership processes was relevant because it was a subject of some dispute. However, I also stressed the exclusive jurisdiction of the Federal Court (paras 50-54) in supervision of that process. Since ***Sawridge #1*** the Federal Court has ruled in ***Stoney v Sawridge First Nation*** on the operation of the SFN's membership process.

[34] Further, in ***Sawridge #1*** I noted at paras 51-52 that in ***783783 Alberta Ltd. v Canada (Attorney General)***, 2010 ABCA 226, 322 DLR (4th) 56, the Alberta Court of Appeal had concluded this Court's inherent jurisdiction included an authority to make findings of fact and law in what would nominally appear to be the exclusive jurisdiction of the Tax Court of Canada. However, that step was based on *necessity*. More recently in ***Strickland v Canada (Attorney General)***, 2015 SCC 37, the Supreme Court of Canada confirmed the Federal Courts decision to refuse judicial review of the *Federal Child Support Guidelines*, SOR/97-175, not because those courts did not have potential jurisdiction concerning the issue, but because the provincial superior courts were better suited to that task because they "... deal day in and day out with disputes in the context of marital breakdown ...": para 61.

[35] The same is true for this Court attempting to regulate the operations of First Nations, which are 'Bands' within the meaning of the *Indian Act*. The Federal Court is the better forum and now that the Federal Court has commented on the SFN membership process in ***Stoney v Sawridge First Nation,*** there is no need, nor is it appropriate, for this Court to address this subject. If there are outstanding disputes on whether or not a particular person should be admitted or excluded from Band membership then that should be reviewed in the Federal Court, and not in this 1985 Sawridge Trust modification and distribution process.

[36] It follows that it will be useful to re-focus the purpose of the Public Trustee's participation in this matter. That will determine what is and what is not *relevant*. The Public Trustee's role is not to conduct an open-ended inquiry into the membership of the Sawridge Band and historic disputes that relate to that subject. Similarly, the Public Trustee's function is not to conduct a general inquiry into potential conflicts of interest between the SFN, its administration and the 1985 Sawridge Trustees. The overlap between some of these parties is established and obvious.

[37] Instead, the future role of the Public Trustee shall be limited to four tasks:

1. Representing the interests of minor beneficiaries and potential minor beneficiaries so that they receive fair treatment (either direct or indirect) in the distribution of the assets of the 1985 Sawridge Trust;
2. Examining on behalf of the minor beneficiaries the manner in which the property was placed/settled in the Trust; and
3. Identifying potential but not yet identified minors who are children of SFN members or membership candidates; these are potentially minor beneficiaries of the 1985 Sawridge Trust; and
4. Supervising the distribution process itself.

[38] The Public Trustee's attention appears to have expanded beyond these four objectives. Rather than unnecessarily delay distribution of the 1985 Sawridge Trust assets, I instruct the

Public Trustee and the 1985 Sawridge Trustees to immediately proceed to complete the first three tasks which I have outlined.

[39] I will comment on the fourth and final task in due course.

Task 1 - Arriving at a fair distribution scheme

[40] The first task for the 1985 Sawridge Trustees and the Public Trustee is to develop for my approval a proposed scheme for distribution of the 1985 Sawridge Trust that is fair in the manner in which it allocates trust assets between the potential beneficiaries, adults and children, previously vested or not. I believe this is a largely theoretical question and the exact numbers and personal characteristics of individuals in the various categories is generally irrelevant to the Sawridge Trustee's proposed scheme. What is critical is that the distribution plan can be critically tested by the Public Trustee to permit this Court to arrive at a fair outcome.

[41] I anticipate the critical question for the Public Trustee at this step will be to evaluate whether any differential treatment between adult beneficiaries and the children of adult beneficiaries is or is not fair to those children. I do not see that the particular identity of these individuals is relevant. This instead is a question of fair treatment of the two (or more) categories.

[42] On September 3, 2015, the 1985 Sawridge Trustees withdrew their proposed distribution arrangement. I direct the Trustees to submit a replacement distribution arrangement by January 29, 2016.

[43] The Public Trustee shall have until March 15, 2016 to prepare and serve a *Rule* 5.13(1) application on the SFN which identifies specific documents that it believes are relevant and material to test the fairness of the proposed distribution arrangement to minors who are children of beneficiaries or potential beneficiaries.

[44] If necessary, a case management meeting will be held before April 30, 2016 to decide any disputes concerning any *Rule* 5.13(1) application by the Public Trustee. In the event no *Rule* 5.13(1) application is made in relation to the distribution scheme the Public Trustee and 1985 Sawridge Band Trustees shall make their submissions on the distribution proposal at the pre-April 30 case management session.

Task 2 – Examining potential irregularities related to the settlement of assets to the Trust

[45] There have been questions raised as to what assets were settled in the 1985 Sawridge Trust. At this point it is not necessary for me to examine those potential issues. Rather, the first task is for the Public Trustee to complete its document request from the SFN which may relate to that issue.

[46] The Public Trustee shall by January 29, 2016 prepare and serve a *Rule* 5.13(1) application on the Sawridge Band that identifies specific types of documents which it believes are relevant and material to the issue of the assets settled in the 1985 Sawridge Trust.

[47] A case management hearing will be held before April 30, 2016 to decide any disputes concerning any such *Rule* 5.13(1) application by the Public Trustee.

Task 3 - Identification of the pool of potential beneficiaries

[48] The third task involving the Public Trustee is to assist in identifying potential minor beneficiaries of the 1985 Sawridge Trust. The assignment of this task recognizes that the Public Trustee operates within its Court-ordered role when it engages in inquiries to establish the pools of

individuals who are minor beneficiaries and potential minor beneficiaries. I understand that the first category of minor beneficiaries is now identified. The second category of potential minor beneficiaries is an area of legitimate investigation for the Public Trustee and involves two scenarios:

1. an individual with an unresolved application to join the Sawridge Band and who has a child; and
2. an individual with an unsuccessful application to join the Sawridge Band and who has a child.

[49] I stress that the Public Trustee's role is limited to the representation of potential child beneficiaries of the 1985 Sawridge Trust only. That means litigation, procedures and history that relate to past and resolved membership disputes are not relevant to the proposed distribution of the 1985 Sawridge Trust. As an example, the Public Trustee has sought records relating to the disputed membership of Elizabeth Poitras. As noted, that issue has been resolved through litigation in the Federal Court, and that dispute has no relation to establishing the identity of potential minor beneficiaries. The same is true of any other adult Sawridge Band members.

[50] As Aalto, J. observed in ***Poitras v Twinn***, 2013 FC 910, 438 FTR 264, "[M]any gallons of judicial ink have been spilt" in relation to the gender-based disputes concerning membership in the SFN. I do not believe it is necessary to return to this issue. The SFN's past practise of relentless resistance to admission into membership of aboriginal women who had married non-Indian men is well established.

[51] The Public Trustee has no relevant interest in the children of any parent who has an unresolved application for membership in the Sawridge Band. If that outstanding application results in the applicant being admitted to the SFN then that child will become another minor represented by the Public Trustee.

[52] While the Public Trustee has sought information relating to incomplete applications or other potential SFN candidates, I conclude that an open-ended 'fishing trip' for unidentified hypothetical future SFN members, who may also have children, is outside the scope of the Public Trustee's role in this proceeding. There needs to be minimum threshold proximity between the Public Trustee and any unknown and hypothetical minor beneficiary. As I will stress later, the Public Trustee's activities need to be reasonable and fair, and balance its objectives: cost-effective participation in this process (i.e., not unreasonably draining the Trust) and protecting the interests of minor children of SFN members. Every dollar spent in legal and research costs turning over stones and looking under bushes in an attempt to find an additional, hypothetical minor beneficiary reduces the funds held in trust for the known and existing minor children who are potential beneficiaries of the 1985 Sawridge Trust distribution and the clients of the Public Trustee. Therefore, I will only allow investigation and representation by the Public Trustee of children of persons who have, at a minimum, completed a Sawridge Band membership application.

[53] The Public Trustee also has a potential interest in a child of a Sawridge Band candidate who has been rejected or is rejected after an unsuccessful application to join the SFN. In these instances the Public Trustee is entitled to inquire whether the rejected candidate intends to appeal the membership rejection or challenge the rejection through judicial review in the Federal Court. If so, then that child is also a potential candidate for representation by the Public Trustee.

[54] This Court's function is not to duplicate or review the manner in which the Sawridge Band receives and evaluates applications for Band membership. I mean by this that if the Public Trustee's inquiries determine that there are one or more outstanding applications for Band membership by a parent of a minor child then that is not a basis for the Public Trustee to intervene in or conduct a collateral attack on the manner in which that application is evaluated, or the result of that process.

[55] I direct that this shall be the full extent of the Public Trustee's participation in any disputed or outstanding applications for membership in the Sawridge Band. This Court and the Public Trustee have no right, as a third party, to challenge a crystalized result made by another tribunal or body, or to interfere in ongoing litigation processes. The Public Trustee has no right to bring up issues that are not yet necessary and relevant.

[56] In summary, what is pertinent at this point is to identify the potential recipients of a distribution of the 1985 Sawridge Trust, which include the following categories:

1. Adult members of the SFN;
2. Minors who are children of members of the SFN;
3. Adults who have unresolved applications to join the SFN;
4. Children of adults who have unresolved applications to join the SFN;
5. Adults who have applied for membership in the SFN but have had that application rejected and are challenging that rejection by appeal or judicial review; and
6. Children of persons in category 5 above.

[57] The Public Trustee represents members of category 2 and potentially members of categories 4 and 6. I believe the members of categories 1 are 2 are known, or capable of being identified in the near future. The information required to identify persons within categories 3 and 5 is relevant and necessary to the Public Trustee's participation in this proceeding. If this information has not already been disclosed, then I direct that the SFN shall provide to the Public Trustee by January 29, 2016 the information that is necessary to identify those groups:

1. The names of individuals who have:
   a) made applications to join the SFN which are pending (category 3); and
   b) had applications to join the SFN rejected and are subject to challenge (category 5); and
2. The contact information for those individuals where available.

[58] As noted, the Public Trustee's function is limited *to representing minors*. That means the Public Trustee:

1. shall inquire of the category 3 and 5 individuals to identify if they have any children; and
2. if an applicant has been rejected whether the applicant has challenged, or intends to challenge a rejection by appeal or by judicial proceedings in the Federal Court.

[59] This information should:

1. permit the Public Trustee to know the number and identity of the minors whom it represents (category 2) and additional minors who may in the future enter into category 2 and become potential minor recipients of the 1985 Sawridge Trust distribution;

2. allow timely identification of:

   a) the maximum potential number of recipients of the 1985 Sawridge Trust distribution (the total number of persons in categories 1-6);

   b) the number of adults and minors whose potential participation in the distribution has "crystalized" (categories 1 and 2); and

   c) the number of adults and minors who are potential members of categories 1 and 2 at some time in the future (total of categories 3-6).

[60] These are declared to be the limits of the Public Trustee's participation in this proceeding and reflects the issues in respect to which the Public Trustee has an interest. Information that relates to these issues is potentially relevant.

[61] My understanding from the affidavit evidence and submissions of the SFN and the 1985 Sawridge Trustees is that the Public Trustee has already received much information about persons on the SFN's membership roll and prospective and rejected candidates. I believe that this will provide all the data that the Public Trustee requires to complete Task 3. Nevertheless, the Public Trustee is instructed that if it requires any additional documents from the SFN to assist it in identifying the current and possible members of category 2, then it is to file a *Rule* 5.13 application by January 29, 2016. The Sawridge Band and Trustees will then have until March 15, 2016 to make written submissions in response to that application. I will hear any disputed *Rule* 5.13 disclosure application at a case management hearing to be set before April 30, 2016.

Task 4 - General and residual distributions

[62] The Sawridge Trustees have concluded that the appropriate manner to manage the 1985 Sawridge Trust is that its property be distributed in a fair and equitable manner. Approval of that scheme is Task 1, above. I see no reason, once Tasks 1-3 are complete, that there is any reason to further delay distribution of the 1985 Sawridge Trust's property to its beneficiaries.

[63] Once Tasks 1-3 are complete the assets of the Trust may be divided into two pools:

Pool 1: trust property available for immediate distribution to the identified trust beneficiaries, who may be adults and/or children, depending on the outcome of Task 1; and

Pool 2: trust funds that are reserved at the present but that may at some point be distributed to:

a) a potential future successful SFN membership applicant and/or child of a successful applicant, or

b) an unsuccessful applicant and/or child of an unsuccessful applicant who successfully appeals/challenges the rejection of their membership application.

[64] As the status of the various outstanding potential members of the Sawridge Band is determined, including exhaustion of appeals, the second pool of 'holdback' funds will either:

1. be distributed to a successful applicant and/or child of the applicant as that result crystalizes; or

2. on a pro rata basis:

   a) be distributed to the members of Pool 1, and

   b) be reserved in Pool 2 for future potential Pool 2 recipients.

[65] A minor child of an outstanding applicant is a potential recipient of Trust property, depending on the outcome of Task 1. However, there is no broad requirement for the Public Trustee's direct or indirect participation in the Task 4 process, beyond a simple supervisory role to ensure that minor beneficiaries, if any, do receive their proper share.

C. Disagreement among the Sawridge Trustees

[66] At this point I will not comment on the divergence that has arisen amongst the 1985 Sawridge Trustees and which is the subject of a separate originating notice (Docket 1403 04885) initiated by Catherine Twinn. I note, however, that much the same as the Public Trustee, the 1985 Sawridge Trustees should also refocus on the four tasks which I have identified.

[67] First and foremost, the Trustees are to complete their part of Task 1: propose a distribution scheme that is fair to all potential members of the distribution pools. This is not a question of specific cases, or individuals, but a scheme that is fair to the adults in the SFN and their children, current and potential.

[68] Task 2 requires that the 1985 Sawridge Trustees share information with the Public Trustee to satisfy questions on potential irregularities in the settlement of property into the 1985 Sawridge Trust.

[69] As noted, I believe that the information necessary for Task 3 has been accumulated. I have already stated that the Public Trustee has no right to engage and shall not engage in collateral attacks on membership processes of the SFN. The 1985 Sawridge Trustees, or any of them, likewise have no right to engage in collateral attacks on the SFN's membership processes. Their fiduciary duty (and I mean all of them), is to the beneficiaries of the Trust, and not third parties.

D. Costs for the Public Trustee

[70] I believe that the instructions given here will refocus the process on Tasks 1 – 3 and will restrict the Public Trustee's activities to those which warrant full indemnity costs paid from the 1985 Sawridge Trust. While in ***Sawridge #1*** I had directed that the Public Trustee may inquire into SFN Membership processes at para 54 of that judgment, the need for that investigation is now declared to be over because of the decision in ***Stoney v Sawridge First Nation***. I repeat that inquiries into the history and processes of the SFN membership are no longer necessary or relevant.

[71] As the Court of Appeal observed in ***Sawridge #2*** at para 29, the Public Trustee's activities are subject to scrutiny by this Court. In light of the four Task scheme set out above I will not respond to the SFN's cost argument at this point, but instead reserve on that request until I evaluate the *Rule* 5.13 applications which may arise from completion of Tasks 1-3.

Heard on the 2nd and 3rd days of September, 2015.
Dated at the City of Edmonton, Alberta this 17th day of December, 2015.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Janet Hutchison
(Hutchison Law)
and
Eugene Meehan, QC
(Supreme Advocacy LLP)
for the Public Trustee of Alberta / Applicant

Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge First Nation / Respondent

Doris Bonora
(Dentons LLP)
and
Marco S. Poretti
(Reynolds Mirth Richards & Farmer)
for the 1985 Sawridge Trustees / Respondents

J.J. Kueber, Q.C.
(Bryan & Co.)
for Ronald Twinn, Walter Felix Twin,
Bertha L'Hoirondelle and Clara Midbo

Karen Platten, Q.C.
(McLennan Ross LLP)
For Catherine Twinn

TAB 11

Province of Alberta

TRUSTEE ACT

Revised Statutes of Alberta 2000
Chapter T-8

Current as of December 17, 2014

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

TRUSTEE ACT

Chapter T-8

Table of Contents

1 Definition

Investments

2 Application
3 Powers and duties with respect to investment
4 Trustee liability
5 Delegation of investment authority
6 Purchase of mutual fund units and delegation
7 Recording of trust status
8 Regulations

Appointment and Discharge

14 Substitute trustee
15 Application for discharge
16 Order appointing new trustee
17 Vesting of trust property

Purchase and Sale

18 Trust for sale
19 Conditions of sale
20 Conveyances by married woman
21 Powers conferred by court
22 Receipts effectual discharges

Various Powers and Liabilities

23 Appointment of agents
24 Insuring trust property
25 Liability of trustee
26 Breach of trust at instigation of beneficiary
27 Power of trustee to give receipts

28 Executors and trustees acting together
29 Joint trusteeship
30 Powers of attorney
31 Trustee of grain-growing property

Income from Dispositions

32 Income from dispositions

Payments from Income and Capital

33 Maintenance and education of minors
34 Payment of income
35 Accumulations
36 Sale of property to provide maintenance
37 Sale of property to provide maintenance and education
38 Creditors

Payment into Court, Relief by Court

40 Payment into court
41 Personal liability

Variation of Trusts

42 Variation of trusts
43 Application to court for advice

Allowances to Trustees, etc.

44 Allowances
45 Professional fees

Judicial Trustees

46 Judicial trust

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definition

1 In this Act, "trustee" includes

(a) an executor, an administrator or a trustee of the estate of a person,

(b) a trustee whose trust arises by construction or implication of law as well as an express trustee, and

(4) Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

RSA 1980 cT-10 s40

Personal liability

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 2000 cT-8 s42;2004 cP-44.1 s52

Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 1980 cT-10 s43

TAB 12

Most Negative Treatment: Distinguished
Most Recent Distinguished: Spence v. BMO Trust Co. | 2016 ONCA 196, 2016 CarswellOnt 3345, 346 O.A.C. 108, 395 D.L.R. (4th) 297, 14 E.T.R. (4th) 31, 263 A.C.W.S. (3d) 550, 129 O.R. (3d) 561 | (Ont. C.A., Mar 8, 2016)

1990 CarswellOnt 486
Ontario Supreme Court, Court of Appeal

Canada Trust Co. v. Ontario (Human Rights Commission)

1990 CarswellOnt 486, [1990] O.J. No. 615, 12 C.H.R.R. D/184, 20 A.C.W.S. (3d) 736, 37 O.A.C. 191, 38 E.T.R. 1, 69 D.L.R. (4th) 321, 74 O.R. (2d) 481

RE LEONARD FOUNDATION TRUST; CANADA TRUST CO. v. ONTARIO HUMAN RIGHTS COMMISSION; ROYAL ONTARIO MUSEUM et al. (intervenors)

Robins and Tarnopolsky JJ.A. and Osler J. (ad hoc)

Heard: September 7 and 8, 1989
Judgment: April 24, 1990
Docket: Doc. Nos. CA586/87 and CA622/87

Counsel: *Janet E. Minor*, for appellant Ontario Human Rights Commission.
Alan P. Shanoff and *Francy Kussner*, for intervenor-appellant Royal Ontario Museum.
H. Donald Guthrie, Q.C., and *John W.R. Day*, for respondent Canada Trust Co.
William L.N. Somerville, Q.C., *Lindsay A. Histrop*, for intervenor Class of Persons Eligible to Receive Scholarships from the Leonard Foundation.
Stan J. Sokol, for intervenor Public Trustee.

Subject: Estates and Trusts; Constitutional

Related Abridgment Classifications
Estates and trusts

II Trusts
II.2 Express trust
II.2.a Creation
II.2.a.iv Limitations on creation
II.2.a.iv.C Contrary to public policy

Estates and trusts

V Charities
V.4 Doctrine of cy-près
V.4.b When cy-près doctrine applicable
V.4.b.viii Miscellaneous

Human rights

III What constitutes discrimination
III.3 Race, ancestry or place of origin
III.3.f Miscellaneous

Headnote

Human Rights --- What constitutes discrimination — Race, ancestry or place of origin — General

Human rights — Jurisdiction of Supreme Court — Trust established to provide scholarships on discriminatory basis — Complaint filed under Human Rights Code — Trustee seeking Court's direction as to validity of trust — Court having jurisdiction to give directions — Human Rights Code, 1981, S.O. 1981, c. 53.

Trusts and trustees — Express trusts — Creation — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy.

Charities — Nature of gift — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy.

Charities — Doctrine of cy-près — When cy-près doctrine applicable — Public policy — Charitable trust established to provide scholarships — Recipients of scholarships, members of management committee and Judges from whom advice and direction might be sought restricted to white, Protestant, British subjects — Discriminatory provisions invalid, as infringing public policy — Property subject to trust applied cy-près by striking out invalid discriminatory provisions.

By an instrument made in 1923, certain trusts were established under which the income from the property subject to the trusts was to be used to provide scholarships for students attending schools and colleges in Canada and universities in Canada and Great Britain.

The first three recitals to the trust instrument expressed the settlor's reasons for certain conditions affecting the terms of the trust, and the fourth recital dealt both with the settlor's reasons for and the substance of the conditions. In particular, he expressed the intention to exclude from benefit "all who are not Christians of the White Race, and who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual." Similarly, the schools and colleges and universities at which recipients of scholarships could attend were required not to be under the control and domination of the classes of persons described in the recitals as excluded from benefits from the trust. Whereas the administration of the trust property was conducted by the trustee, various other powers, including the power to select students as recipients of the scholarships, were given to a general committee, members of which were required to possess the qualifications set out in the recitals. The instrument further and explicitly provided that, to be eligible for a scholarship, a student was required to be a "British subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned." The trust instrument empowered the trustee at the expense of the trust to apply to a judge of the Supreme Court of Ontario possessing the qualifications of a member of the general committee, as set out in the recitals, for the opinion, advice and directions of the Court.

The trust instrument further provided that the amount of income spent on providing scholarships for female students in any one year should not exceed one-fourth of the total money available for all students for such year.

The references in the trust instrument to "British Nationality", "British Parentage" and being a "British subject" had, for some time, in practice been replaced, by the general committee, by references to Canadian citizenship.

In August 1986, the Ontario Human Rights Commission filed a complaint to the effect that the provisions of the scholarships infringed the *Human Rights Code, 1981*. Because of this and because of other criticisms of the operation of the trust, the trustee sought the directions of the Court. The alleged invalidity of the trust was put on three main grounds: (1) contravention of the *Human Rights Code, 1981*; (2) contravention of the general principles of public policy; and (3) the uncertainty of some of the conditions affecting the giving of scholarships. The following preliminary issues also arose: (1) whether the Court had jurisdiction to rule on a question of discrimination alleged to be contrary to the *Human Rights Code, 1981*, and whether, in any event, the Court should entertain proceedings before the Human Rights Commission had investigated and considered the complaint; (2) how the interpretation of the instrument should be affected by the recitals to the instrument.

At first instance it was held: (1) that the Court had jurisdiction to make a determination as to the validity of the trust, including the question whether it created discrimination contrary to the *Human Rights Code, 1981*, and it was not premature for the Court to make such a determination prior to the investigation and consideration of the complaint by the Human Rights Commission; (2) in interpreting the trust instrument the Court should not have regard to the settlor's expression of motivation in the first three recitals, since the operative parts of the instrument were not ambiguous and no reference back was made to these recitals; (3) the trust instrument was not invalid since it did not contravene the *Human Rights Code, 1981* or the general principles of public policy, and the conditions affecting eligibility as recipients of a scholarship were not void for uncertainty.

The Human Rights Commission and a party who would be entitled to the property of the trust as residuary legatee of the settlor in the event of invalidity of the trust both appealed.

Held:

The appeal was allowed.

(1) For the following reasons, the Judge at first instance correctly held that the Court had jurisdiction to make a determination as to the validity of the trust and that it was not premature to make such a determination prior to the investigation and consideration of the complaint by the Human Rights Commission.

(a) The application to the Court did not involve an attempt to advance the common law by creating a new cause of action, rather it was concerned with the administration of a trust over which superior courts have had inherent jurisdiction for centuries.

(b) The determination of the complaint made under the *Human Rights Code, 1981* would not prevent the need for a determination by the Court, since the Commission's mandate to attempt a settlement was not apt in the circumstances that the trustee had no authority, in the absence of authorization by the trust instrument, legislation or court order, to enter into a settlement which would be contrary to the terms of the trust and since the remedial powers under the *Code* appeared not to give a board of enquiry power to alter the terms of the trust or to declare it void.

(c) The fact-finding role of the Commission and a board of enquiry would not be required in the circumstances of the case.

Per Robins J.A. (Osler J. (ad hoc) concurring)

(2) The recitals could be considered in deciding the issues that were raised by the application. Although the operative provisions of a trust instrument will ordinarily prevail over the recitals, where the recitals are not clearly severable from the rest of the instrument and themselves contain operative words or words intended to give meaning and definition to the operative provisions, the instrument should be viewed in its entirety. In the trust instrument under consideration, the recitals and operative parts were so linked as to be inextricably interwoven. One part could not, therefore, be divorced from the other.

In addition, even if the recitals were properly treated as going only to the matter of motive, they could not be ignored. There was a clear public aspect to the purpose and administration of the trust, and, when challenged on public-policy grounds, the reasons, explicitly stated, which motivated the establishment of the trust and gave meaning to its restrictive criteria were highly germane.

(3) The trust violated public policy. Although the freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in the law, that interest is limited by public-policy considerations. The trust was premised on notions of racism and religious superiority that contravened contemporary public policy. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society, in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced.

(4) The trust was established as a charitable trust which, when created in 1923, was not contrary to public policy and was valid. However, changing social attitudes had the result that it was no longer in the interests of the community to continue the trust on the basis predicated by the settlor: while the trust was practicable when it was created, changing times had rendered the ideas promoted by it contrary to public policy and it had, therefore, become impracticable to carry it on in the manner originally planned by the settlor. Accordingly, the trust should not fail. Rather, the Court should apply the cy-près doctrine and propound a scheme that would bring the trust into accord with public policy and permit the general charitable intent to advance education or leadership through education to be implemented by those charged with the trust's administration. This should be done by striking out the recitals and removing all restrictions with respect to race, colour, creed or religion, ethnic origin and sex, as they related to those entitled to the benefits of the trust, to the qualifications of those who may be members of the general committee or give judicial advice and to the schools, colleges or universities in which scholarships may be enjoyed.

Per Tarnopolsky J.A.

(2) The trust instrument established a charitable trust for the advancement of education.

(3) In considering whether the trust could be invalid because of uncertainty, the Court could not refer to the recitals unless the operative words were ambiguous or unless they incorporated the recitals by reference to them. The settlor's beliefs as stated in the opening recitals were evidence of his motives and were irrelevant.

(4) The definition of the persons eligible to be recipients of scholarships or to be eligible to be part of the management of the trust constituted a condition precedent. Such a condition will not fail for uncertainty if some person or persons can be established as satisfying the condition. Moreover, a charitable trust should not fail for uncertainty. Accordingly, the definition was sufficiently certain.

(5) The promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern-day Ontario, as recognized by a variety of sources including provincial and federal statutes, official

declarations of government policy, the *Constitution Act, 1982* and international conventions. The charitable trust under consideration was, accordingly, void on the ground of public policy to the extent that it discriminated on grounds of race, religion and sex. This public policy would only affect charitable trusts; it would not affect a private family trust. It is the public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination.

(6) A charitable trust which fails can be applied cy-près if the settlor had a general charitable intention. The question was, therefore, whether the settlor's paramount intention was to provide scholarships for education so that the discriminatory provisions were merely the machinery designed to effect that intention or whether he intended to provide it for specific kinds of students and would not have created it otherwise. The answer was that the settlor's intention was to promote leadership through education, and the discriminatory scheme he chose for this purpose was merely the machinery for carrying out this general charitable intention. Accordingly, the provisions of the trust which confined management, judicial advice and benefit on grounds of race, religion and sex should be deleted from the trust instrument.

Annotation

While public policy considerations surrounding the Leonard Foundation Trust are clearly important and will likely attract a good deal of academic comment, this annotation deals only with the application of the cy-près doctrine to the trust. It is concerned with the circumstances and conditions under which a court may apply trust funds cy-près when a well-established charitable purpose subsequently becomes impracticable.

The ability of the Court to apply trust funds cy-près is a part of the Court's inherent scheme-making power. Although many have attempted to define the concept, it seems to have been difficult to articulate a clear definition. In England, the Nathan Committee, (1952, Cmd 8710) reporting on the law and practice relating to charitable trusts, loosely defined it as "a device for keeping in existence a gift to charity so that it may continue as a public benefit from generation to generation." (LA. Sheridan and V.T.H. Delaney, *The Cy-près Doctrine*, 1985 at 2).

An important feature of the charitable trust is its dedication to a purpose for the public benefit. This aspect of the charitable trust has allowed the relaxation of many of the strict rules generally applicable to trusts. Most notable is the preferential treatment of the charitable trust under the rule against perpetuities. Nonetheless, the perpetual nature of charitable trusts creates difficulties that are unique to it:

Its continued existence is almost certain to produce a state of affairs in which its social utility will become impaired if not destroyed. A direction by a testator that his bounty is to be applied along narrow or eccentric lines, coupled with the passage of time, may mean that the purpose for which it was given has disappeared. Far from conferring a benefit upon the community, the continued performance of the trust may be positively detrimental to the commonweal.

[Sheridan and Delaney, supra, at 2.]

Such was the case with the Leonard Foundation Trust. This trust, which, in 1923, was clearly implemented with an element of public benefit in mind, later came to undermine the public quest for equality. The question then arose whether the funds could be applied cy-près.

The cy-près doctrine may only be applied to charitable trusts. It is not available to save a private trust that has been incompletely or improperly created. How the doctrine will be applied in any given case will depend upon whether the impossibility or impracticability of carrying out the charitable purpose is initial or supervening. Initial impossibility or impracticability arises where a donor makes a grant of property on trust for charity which cannot ever take effect in the precise terms specified. The rule in such a case is that the property will be applied cy-près only if the donor can be shown to have had a general charitable intention. If no general charitable intention can be shown, the property

will return to the donor on a resulting trust. According to Buckley L.J. in *Re Lysaght*, [1966] 1 Ch. 141, [1965] 2 AU .E.R. 288, at 202 [Ch.], a general charitable intention:

may be said to be a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation, notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his true intention — not, that is to say, part of his paramount intention.

While it is necessary to demonstrate a general charitable intention on the part of the donor where there is an initial impossibility, this is not necessary where the object of the trust is possible at the date of the gift but subsequently becomes impossible. All that is necessary in such a case is that the donor has made an exclusive dedication of the property to charity. (See D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 611-632.)

In order for a gift to be exclusively for charity, there must be no gift over of any kind. In the case of the Leonard Foundation Trust, it was found by McKeown J. and affirmed by the Court of Appeal, that this was a charitable trust. No provisions were made for a gift over. It is worth noting that the Royal Ontario Museum ("R.O.M.") in this case was not claiming on the basis that it was entitled to a gift over in the event of a failure of the trust purpose. It claimed instead that, as the trust was contrary to public policy, it should fail completely. In such a case, the R.O.M. argued, the trust fund would fall into the Leonard estate to be distributed to the residual beneficiaries, of which the R.O.M. was one.

Unfortunately for the R.O.M., however, once a trust has become vested in charity, it can never return upon a resulting trust to the donor or the donor's estate. (Waters, supra; see also S. G. Maurice & D. B. Parker, eds. *Tudor on Charities*, 7th ed. (1984)). Where the trust purpose fails at some point after the property has vested, the property will pass to the Crown as parens patriae, the ultimate protector of charities. (*Moggeridge v. Thackwell* (1803), 7 Ves. 36, 32 E.R. 15). The Crown will then submit to the court's cy-près jurisdiction, and the trust will be applied to another similar or related charitable purpose.

An analysis of the Leonard Foundation Trust on the basis of a very technical application of the cy-près doctrine would in all certainty lead to the same result as that reached by the Ontario Court of Appeal, but it would arrive at the conclusion by a different route. The appropriate question to ask, it is submitted, is not whether Colonel Leonard had a general charitable intent at the time he created the Leonard Scholarships but rather whether, in making his gift, he dedicated it exclusively to charity? The answer to this latter question, it is submitted, is that the property was dedicated to the purpose of charity alone, there being no gift over. It is this answer which triggers the application of the cy-près doctrine.

Although the doctrine, when considered in the abstract, makes a clear distinction between the need for a general charitable intention in the cases of initial impossibility and for an exclusive dedication to charity in the case of supervening impossibility, the distinction is not always so easily made in actual application of the doctrine to a particular case. It is very common to discover judicial searches for general charitable intent in cases of supervening impossibility, when in fact the question should have been, "Did the donor give the property to charity exclusively?" *Tudor on Charities*, supra. Although these two queries will often lead to the same result and may appear to be synonymous, they are not. As stated by the learned authors of *Tudor on Charities* (supra, at 268):

an intention to make an out-and-out gift may be some evidence and, in some cases, conclusive evidence of a general charitable intention; but it is submitted that the judges who have treated a mere intention to make an out-and-out gift as automatically conclusive evidence of a general charitable intention have failed to recognize and give effect to the established distinction between the two intentions.

The test contained in the phrase "general charitable intention" is a stricter test and more difficult to meet than the standard implied by the concept of "exclusive dedication to charity". Thus, it is possible that the misapplication of the general charitable intention test in a case where exclusive dedication to charity would suffice could result in

the failure of a trust that ought to have been applied cy-près. The case of *Wokingham Fire Brigade Trusts*, [1951] Ch. 373 is a good example. Sixty-six years after a public appeal was made for funds to establish a voluntary fire brigade, the National Fire Service took over the operation of the brigade. After the takeover, the trustees were left with a sum of money, and they applied to the Court for directions for the use of the funds. Danckwerts J. found that the original subscribers had donated their money with the specific intention of establishing a fire brigade and that they did not therefore have a general charitable intention. However, Danckwerts J. also concluded that the subscribers had intended to part with all of their interest in their money when they made their donations and that they had thus made an exclusive dedication to charity. He ordered that the money should be applied cy-près by means of a scheme. If, in his analysis, Danckwerts J. had stopped after concluding that the subscribers did not have any general charitable intention, the trust would have failed. It was the exclusive dedication to charity that allowed the funds to be applied cy-près.

Professor Waters has often bemoaned the confusion in the application of the doctrine. In a comment on the case of *Re Hunter; Genn v. Attorney General (British Columbia)*, [1973] 3 W.W.R. 197, 34 D.L.R. (3d) 602 (B.C. S.C.), Waters stated that:

It was irrelevant that [the testatrix] had ... no general charitable intent. The property now passed to the Crown, and a *cy-près* scheme could be put forward by the Crown from or approval. By the exclusive dedication to charity, [her] next-of-kind had been excluded forever.

However, this was not the result to which MacIntyre J. came.

. . . . .

Left to one's own devices, one is compelled to conclude that *Re Hunter* was wrongly decided.

(D. W. M. Waters, "Comment on *Re Hunter*" (1974) 52 Can. Bar Rev. 598).

In his treatise, *Law of Trusts in Canada*, Professor Waters elaborates on the confusion in Canadian courts applying the *cy-près* doctrine:

A fault with the decision, however, is that it insists on a general charitable intention in the donor before there can be a *cy-près* application, though the problem in hand is one of *supervening* impossibility or impracticability. This idea can be found repeated in a number of earlier and later Canadian cases, and it has support in earlier English authority. In *Re McDougall*, however, Kelly J. would have none of this, and his view has been supported by later English authority. It is to be hoped that Kelly J.'s view prevails in the higher Canadian Courts, because if the doctrine of exclusive dedication to charity means anything, and the Crown is prepared to waive any rights it has to the property already vested in a trust whose objects subsequently can no longer be pursued, the presence or absence of a general charitable intent in the testator or the *inter vivos* settlor is irrelevant.

[Waters, supra, at 629.]

Although it may not be doctrinally correct to look for general charitable intent in the case of supervening impossibility, as a practical matter the attempt to discover a means of applying the trust cy-près may demand an equivalent inquiry. In order to discover another purpose that is as near as possible to the original intent of the donor, it may be necessary to inquire what, generally, the donor was attempting to accomplish. Can it really be said that this question is substantially different from the search for a general charitable intent?

In the case of the Leonard Foundation Trust, the quest for the general charitable intent led the Court of Appeal to find that Colonel Leonard had a general intention to promote education and leadership.

This conclusion allowed a *cy-près* application of the trust fund to education generally. If, instead, the Court had asked whether Colonel Leonard had made and exclusive dedication to charity and concluded that he had and that

the trust funds should be applied *cy-près*, they would then have had to determine what alternate means would be as near as possible to the donor's original intent. They would, it is submitted, have applied the property in the same way. The fact that both approaches will in most cases lead to the same result perhaps explains why the application of the doctrine is in such a state of confusion. Despite the confusion, in most cases the courts still arrive at the correct result. Occasionally, in cases where the original intention is simply too narrow for any amount of judicial creativity to discover a general charitable intent, and otherwise salvageable trust will fail. This is the problem with the *cy-près* doctrine in Canada.

The confusion in this area has led to calls for legislative reform in both England and the United States. In England, the *Charities Act, 1960* (U.K.) (8 & 9 Eliz. 2, c. 58; see also *Charities Act, 1985* (U.K.), 1985, c. 20 has alleviated some confusion by expressly laying out the circumstances in which funds may be applied *cy-près*. The legislation also declares the duty of trustees to obtain a scheme whenever their trust falls within the requirements of the Act. In the United States, the doctrine is even less clear than it is here. It is not uncommon for well established trusts which have been in existence for decades to fall into the estate of their original donor long after the donor and any residuary beneficiaries have died. The funds are then lost to charity forever.

Hopefully, Canadian courts will be able to avoid the extremes encountered in the United States. In Canada, many of the strict rules applicable to private trusts are waived: as a matter of public policy we wish to encourage and facilitate charitable giving. Yet, when the original charitable purpose fails, by misapplying the *cy-près* doctrine, we allow the demise of the charitable gift. The problem has been addressed by the Law Reform Commission of Ontario (*Report on the Law of Trusts*, 1984; more specifically, the Commission is currently conducting a *Project on the Reform of the Law of Charities*). Perhaps the time is now ripe for a legislative response.

L.A. Turnbull [1]

Table of Authorities

Cases considered:

Per Robins J.A. (Osler J. (ad hoc) concurring):

Blathwayt v. Lord Cawley, [1976] A.C. 397, [1975] 3 All E.R. 625 (H.L.) — *referred to*

Dominion Students' Hall Trust, Re, [1947] Ch. 183 — *referred to*

Fitzpatrick, Re; Fidelity Trust Co. v. St. Joseph's Vocational School of Winnipeg, 16 E.T.R. 221, [1984] 3 W.W.R. 429, 6 D.L.R. (4th) 644, 27 Man. R. (2d) 285 (Q.B.) — *referred to*

Millar, Re, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 — *referred to*

National Anti-Vivisection Society v. Inland Revenue Commissioners (1947), [1948] A.C. 31 (H.L.) — *applied*

Power v. Attorney General for Nova Scotia (1903), 35 S.C.R. 182 — *referred to*

Tacon, Re; Public Trustee v. Tacon, [1958] Ch. D. 447, [1958] 1 All E.R. 163 — *referred to*

Per Tarnopolsky J.A.:

Allen, Re; Faith v. Allen, [1953] Ch. 810, [1953] 2 All E.R. 898 (C.A.), subsequent proceedings [1954] Ch. 259, [1954] 1 All E.R. 526 — *referred to*

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, [1989] 2 W.W.R. 289, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255 — *referred to*

Bell v. Ontario Human Rights Commission, [1971] S.C.R. 756, 18 D.L.R. (3d) 1 — *referred to*

Blainey v. Ontario Hockey Association (1986), 54 O.R. (2d) 513, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 21 C.R.R. 44, 26 D.L.R. (4th) 728, 14 O.A.C. 194 (C.A.), leave to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274 (headnote), 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 21 C.R.R. 44n, 72 N.R. 76 (note), 17 O.A.C. 399 (note) (S.C.C.) — *distinguished*

Christie v. York Corp., [1940] S.C.R. 139, [1940] 1 D.L.R. 81 — *referred to*

Clayton v. Ramsden, [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.) — *referred to*

Dominion Students' Hall Trust, Re, [1947] Ch. 183*applied*

Drummond-Wren, Re, [1945] O.R. 778 (H.C.) — *applied*

Gilmour v. Coats, [1949] A.C. 426, [1949] 1 All E.R. 848 (H.L.) — *referred to*

Gott, Re, [1944] Ch. 193, [1944] 1 All E.R. 293 — *referred to*

Income Tax Commissioners v. Pemsel, [1891] A.C. 531 — *referred to*

Jones v. T. Eaton Co., [1973] S.C.R. 635, 35 D.L.R. (3d) 97 — *referred to*

Levy, Re (1989), 68 O.R. (2d) 385, 33 E.T.R. 1, 58 D.L.R. (4th) 375, 33 O.A.C. 99 (C.A.) — *referred to*

Lysaght, Re; Hill v. Royal College of Surgeons of England, [1966] Ch. 191, [1965] 2 All E.R. 888 — *applied*

McGovern v. Attorney General, [1982] 1 Ch. 321, [1981] 3 All E.R. 493 — *referred to*

McPhail v. Doulton, [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.) — *referred to*

Millar, Re, [1938] S.C.R. 1, [1938] 1 D.L.R. 65 — *considered*

Ministry of Health v. Simpson, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) — *referred to*

Moon, Re; Dawes, Ex parte (1886), 17 Q.B.D. 275, 34 W.R. 753 (C.A.) — *referred to*

Noble and Wolf v. Alley, [1949] O.R. 503, [1949] 4 D.L.R. 375 (C.A.), rev'd [1951] S.C.R. 64, [1951] 1 D.L.R. 321 — *referred to*

Ontario Human Rights Commission v. Borough of Etobicoke (1982), 3 C.H.R.R. D/781, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 40 N.R. 159 (S.C.C.) — *referred to*

Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (headnote only), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. 17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (headnote only), 64 N.R. 161, 12 O.A.C. 241 — *considered*

Oppenheim v. Tobacco Securities Trust Co., [1951] A.C. 297, [1951] 1 All E.R. 31 (H.L.) — *referred to*

R. v. Tottenham and District Rent Tribunal, Ex parte Northfield (Highgate) Ltd. (1956), [1957] 1 Q.B. 103 — *referred to*

Selby's Will Trusts, Re; Donn v. Selby, [1966] 1 W.L.R. 43, [1965] 3 All E.R. 386 (Ch. D.) — *referred to*

Seneca College of Applied Arts & Technology (Board of Governors) v. Bhadauria (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. 14,003, 105 D.L.R. (3d) 707 (C.A.), rev'd [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 22 C.P.C. 130, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 124 D.L.R. (3d) 193, 37 N.R. 455 — *distinguished*

Tarnopolsk, Re; Barclay's Bank Ltd. v. Hyer, [1958] 1 W.L.R. 1157, [1958] 3 All E.R. 479 — *referred to*

Wilson, Re; Twentyman v. Simpson, [1913] 1 Ch. 314, [1911-13] All E.R. Rep. 1101 — *referred to*

Statutes considered:

Per Robins J.A. (Osler J. (ad hoc) concurring):

Human Rights Code, 1981, S.O. 1981, c. 53.

Trustee Act, R.S.O. 1980, c. 512 —

s. 60

Per Tarnopolsky J.A.:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 15

s. 27

s. 28

Charities Accounting Act, R.S.O. 1980, c. 65.

Conveyancing and Law of Property Act, R.S.O. 1980, c. 90 —

s. 13

s. 22

Human Rights Code, 1981, S.O. 1981, c. 53 —

s. 1

s. 13

s. 31(2)

s. 40(1)

Insurance Act, R.S.O. 1980, c. 218 —

s. 117

Labour Relations Act, R.S.O. 1980, c. 228 —

s. 13

Ministry of Citizenship and Culture Act, 1982, S.O. 1982, c. 6 —

s. 4

Ontario Human Rights Code, R.S.O. 1970, c. 318.

Race Relations Act (U.K.), 1968, c. 71.

Trustee Act, R.S.O. 1980, c. 512 —

s. 60

Rules considered:

Per Robins J.A. (Osler J. (ad hoc) concurring):

Ontario, Rules of Civil Procedure

r. 14.05(2)

r. 14.05(3)

Per Tarnopolsky J.A.:

Ontario, Rules of Civil Procedure

r. 14.05(2)

r. 14.05(3)

Authorities considered:

Per Robins J.A. (Osler J. (ad hoc) concurring):

Fratcher, W.F., ed., *Scott on Trusts*, 4th ed. (Boston: Little, Brown & Co., 1989).

Waters, D.W.M., *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984).

Per Tarnopolsky J.A.:

Convention on the Elimination of All Forms of Discrimination Against Women, (1979).

5 *Hals.* (4th ed., 1989), "public benefit", "the cy-près doctrine".

International Covenant on Civil and Political Rights, arts. 2, 3, 25 and 26.

International Convention on the Elimination of All Forms of Racial Discrimination, (1965).

Ontario, Debates of Legislative Assembly at 937-941 (28 May 1986).

Ontario, Legislative Assembly, Ministry of Citizenship and Culture, Race Relations Directorate, "Ontario Policy on Race Relations".

Waters, D.M.W., *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984).

APPEAL from judgment [reported (1987), 27 E.T.R. 193 (H.C.)] upholding validity of trust instrument.

***Robins J.A. (Osler J.* (ad hoc) concurring):**

1 The principal question in this appeal is whether the terms of a scholarship trust established in 1923 by the late Reuben Wells Leonard are now contrary to public policy. If they are, the question then is whether the cy-près doctrine can be applied to preserve the trust.

2 The appeal is from the order of McKeown J. [reported (1987), 27 E.T.R. 193 (H.C.)] on an application under s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512 and rr. 14.05(2) and (3) of the *Rules of Civil Procedure*, by the Canada Trust Company, as the successor trustee of a scholarship trust known as "The Leonard Foundation", for the advice, opinion and direction of the Court upon certain questions arising in the administration of the trust. The questions put before the Court are as follows:

> 1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the 'Indenture') set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of
>
> (i) public policy as declared in the *Human Rights Code*, 1981 (the '*Code*');
>
> (ii) other public policy, if any;
>
> (iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap of otherwise; or
>
> (iv) uncertainty?
>
> 2. If the answer to any of the questions propounded above is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?
>
> 3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-près?

4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/or the General Committee and other committees referred to in the Indenture administer the trust?

5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite the infringement of rights under Part 1 of the *Code*?

6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honourary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honourary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

3 McKeown J. found that the trust provisions were not invalid for any of the reasons set out in Question 1, which made it unnecessary for him to answer Questions 2, 3 and 4. He answered Question 5 in the negative, which made it unnecessary to answer Question 6.

4 The order has been appealed by two of the parties to the proceedings. The first appellant, the Ontario Human Rights Commission, takes the position that the learned Weekly Court Judge should have declined to answer Questions 1(i), 1(iii) and 5 on the ground that these questions concern the applicability of the *Human Rights Code, 1981*, S.O. 1981, c. 53, and relate to matters within the exclusive primary jurisdiction of the Commission and, therefore, are not properly before the Court.

5 The appellant, the Royal Ontario Museum (the "ROM"), has status in these proceedings as one of the charitable institutions named in the last will of Reuben Wells Leonard. Under this will, any amount that falls to be administered in the residuary estate is to be divided among certain individuals and charitable institutions as set out by the testator. The ROM's position on this appeal is that the scholarship trust violates public policy and fails completely. In its submission, the Judge erred in not holding that the trust fund falls into the Leonard estate and must be distributed to the residual beneficiaries, including the ROM, in accordance with the provisions of the will.

6 The Public Trustee and the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation are intervenors in the case. They both support the judgment below and ask that the appeal be dismissed. However, should the Court find that the terms of the scholarship trust violate public policy, the Public Trustee submits that the trust nonetheless has a valid charitable purpose and should not fail but should be applied cy-près, without the offending conditions. On the other hand, counsel for the Class of Persons Eligible to Receive Scholarships takes the position that if the trust violates public policy, it fails completely and is incapable of being applied cy-près.

7 The respondent, Canada Trust Company (the "trustee"), takes no position other than to suggest that: (1) the Court below had jurisdiction to hear the application and (2) the Indenture in 1923 created a valid charitable trust, and should this Court determine by reason of the *Human Rights Code, 1981*, or other grounds of public policy that the conditions are now void then either (a) such conditions are merely malum prohibitum and the Court should strike them out and leave the charitable trust to operate freed therefrom or (b) a reference should be directed to apply the fund cy-près.

The Issues

8 The preliminary issue as to jurisdiction, raised by the Ontario Human Rights Commission, can be disposed of very briefly. In my opinion, this application is properly before the Court. I agree with McKeown J. and Tarnopolsky J.A. in this regard and have nothing to add to their reasons. On the remaining issues, while I agree with Tarnopolsky J.A. that the appeal must be allowed, my reasons for reaching that conclusion differ from those of my learned colleague.

9 The remaining issues, in my view, reduce themselves to these questions:

10 1. Do the provisions of the trust contravene public policy or are they void for uncertainty?

11 2. If the answer to that question is in the affirmative, can the doctrine of cy-près be applied to save the trust?

12 Before considering these issues, I think it important to examine the trust and review the circumstances that compelled the trustee to launch this application for advice and direction.

The Facts

A. The Trust Document

13 By Indenture dated December 28, 1923, (the "Indenture" or "trust document") Reuben Wells Leonard (the "settlor") created a trust to be known as "The Leonard Foundation" (the "trust" or the "scholarship trust" or the "Foundation"). He directed that the income from the property transferred and assigned by him to the trust (the "trust property" or "trust fund") be used for the purpose of educational scholarships, to be called "The Leonard Scholarships". The Canada Trust Company has been appointed successor trustee of the Foundation.

14 The Indenture opens with four recitals which relate to the race, religion, citizenship, ancestry, ethnic origin and colour of the class of persons eligible to receive scholarships. These recitals read as follows:

> WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:
>
> AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion:
>
> AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:
>
> AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian [sic] persons of British Nationality who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.

15 The schools, colleges and universities in which the scholarships may be granted are described in the body of the Indenture in these terms:

> 2. The Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, *but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out*, and to the further conditions that any School, College or University so selected *shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to*, whom the settlor intends shall be excluded from the management of or benefits in the said Foundation:
>
> . . . . .

> PROVIDED further and as an addition to the class or type of schools above designated or in the Schedule 'A' hereto attached, the term 'School' may for the purposes of Scholarships hereunder, include Public Schools and Public Collegiate Institutes and High Schools in Canada of the class or type commonly known as such in the Province of Ontario as distinguished from Public Schools and Collegiate Institutes and High Schools (if any) *under the control and domination of the class or classes of persons hereinbefore referred to as intended to be excluded from the management of or benefits in said Foundation*, and shall also include a Protestant Separate School, Protestant Collegiate Institute or Protestant High School in the Province of Quebec.
>
> PROVIDED further that in the selection of Schools, Colleges and Universities, as herein mentioned, preference must always be given by the Committee to the School, College or University, which, being otherwise in the opinion of the Committee eligible, prescribes physical training for female students and physical and military or naval training for male students.

[Emphasis added.]

16 The management and administration of the Foundation is vested in a permanent committee known as the General Committee. The Committee consists of 25 members, all of whom must be possessed of the qualifications set out in the Indenture's recitals:

> The administration and management of the said Foundation is hereby vested in a permanent Committee to be known as the General Committee, consisting of twenty-five members, men and women *possessed of the qualifications hereinbefore in recital set out*.

[Emphasis added.]

17 The General Committee is given, inter alia, the following power:

> (c) *Power* to select students or pupils *of the classes or types hereinbefore and hereinafter described* as recipients of the said Scholarship or for the enjoyment of same, as the Committee in its discretion may decide.

[Emphasis added.]

18 The class of students eligible to receive scholarships is described as follows:

> *SUBJECT to the provisions and qualifications hereinbefore and hereinafter contained*, a student or pupil to be eligible for a Scholarship shall be a British Subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned. Preference in the selection of students or pupils for Scholarships shall be given to the sons and daughters respectively of the *following classes or descriptions of persons who are not of the classes or types of persons whom the Settlor intends to exclude from the management or benefit of the said Foundation as in the preamble or recital more particularly referred to*, but regardless of the order of priority in which they are designated herein, namely:
>
> (a) Clergymen,
>
> (b) School Teachers,
>
> (c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,
>
> (d) Graduates of the Royal Military College of Canada,
>
> (e) Members of the Engineering Institute of Canada,

(f) Members of the Mining & Metalurgical [sic] Institute of Canada.

PROVIDED further that in the selection, if any, of female students or pupils in any year under the provisions of this Indenture, the amount of income to be expended on such female students or pupils from and out of the moneys available for Scholarships under the terms hereof, shall not exceed one-fourth of the total moneys available for Scholarships for male and female students and pupils for such year.

[Emphasis added.]

19 The settlor expressed the wish that:

[T]he students or pupils who have enjoyed the benefits of a scholarship ... will form a Club or association for the purpose of

. . . . .

(b) Encouraging each other when the occasion arises and circumstances will permit, to personally afford financial assistance to pupils and students of *similar classes as in recital hereinbefore described* to obtain the blessings and benefits of education.

[Emphasis added.]

20 The trustee is empowered at the expense of the trust to apply to a Judge of the Supreme Court of Ontario, possessing the qualifications set out in the recitals, for the opinion, advice and direction of the Court: "9. The Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario *possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out*, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared." [Emphasis added.] I should perhaps note that no challenge was put forth on this basis in either this Court or the Court below.

21 The Leonard Scholarships have been available for more than 65 years to eligible students across Canada and elsewhere, and are tenable at eligible schools, colleges and universities in Canada and Great Britain. Application forms are available upon request from members of the General Committee. An applicant submits the application through a member of the General Committee, who conducts a personal interview of the applicant, completes the nomination and recommendation and forwards the application to the General Committee.

22 The Committee on Scholarships meets in April or May of each year to consider all of the applications and to make recommendations to the General Committee. Finally, the General Committee meets and, after consideration of the recommendations of the Committee on Scholarships, approves the awards for the following academic year.

B. The Circumstances Leading Up to the Application

23 The circumstances leading up to this application are described in the affidavit of Jack Cummings McLeod, a trust officer with Canada Trust Company who has been the secretary of the General Committee since 1975. In light of the public policy aspects of the application, the circumstances described by Mr. McLeod become significant.

24 Mr. McLeod deposes that, since 1975, he, as secretary, and various members of the General Committee have received correspondence from students, parents and academics expressing concerns and complaints with regard to the terms of eligibility for scholarships under the trust. Since 1956, numerous press articles, news reports and letters to the editor have appeared in the daily and university press of Canada commenting on or reporting on comments about the eligibility conditions. Mr. McLeod is aware of approximately 30 such articles, all generally critical of the eligibility requirements. The tenor of these articles is evident from their headings, which include "A Sorry Anachronism", "Act Now on Racist Funding" and "Whites Only Scholarship is Labelled 'Repugnant'."

25 Since 1971, the Human Rights Commissions of Alberta and Ontario and the Human Rights Branch of the Department of Labour of British Columbia have complained to the trustee and officials of the General Committee about the conditions of eligibility. Other bodies, such as the Saskatoon Legal Assistance Clinic and units of the Anglican Church of Canada, have made similar complaints.

26 Over the years 1975 to 1982, various schools and universities, including the University of Toronto, the University of Western Ontario and the University of British Columbia, have also complained, without success, to the Foundation about the eligibility requirements. In 1982, the University of Toronto discontinued publication of the Leonard Scholarships and refused to continue processing award payments because of the University's policy with respect to awards containing discriminatory or irrelevant criteria. The University of Alberta has taken similar action.

27 In January 1986, the chairman of the Ontario Human Rights Commission advised the Foundation that the terms of the scholarships appear to "run contrary to the public policy of the Province of Ontario" and requested "appropriate action to have the terms of the trust changed." In response, the Foundation took the position that it was administering a private trust whose provisions did not offend the *Human Rights Code, 1981.*

28 At various times over the past 25 years, members of the General Committee and officials of the trustee have themselves expressed concern about the eligibility criteria. The matter has been considered internally and, it appears, has been the subject of "divisive" debate at meetings of the General Committee.

29 In April 1986, the Most Reverend Edward W. Scott, then Primate of the Anglican Church of Canada, the church of which the late Colonel Leonard was a prominent member, wrote to the Foundation expressing his "deep concerns" about the trust. He recorded, in strong terms, his view that the eligibility criteria are discriminatory and against public policy and not "in keeping with the spirit and intent of the Canadian Charter of Rights." He urged the Committee to apply to the courts to have the offensive terms "read out of the trust deed ... with the ultimate result that effect will continue to be given to the trust deed and gift as a whole." He concluded his letter stating:

> I have every confidence that if the kind benefactor of this Trust were living in 1986, rather than those many years ago, there would be agreement that the scope of possible recipients be widened bringing the document in line with standards of public acceptance of today. There is every reason why the good works of the generous benefactor of the Foundation should live on in perpetuity but, in my view, they must be in keeping with the society of today just as what was written those many years ago was, no doubt, although regretfully, in keeping with the society of that day.

30 In August 1986, the Ontario Human Rights Commission, not satisfied with the response to its earlier letter, filed a formal complaint against the Leonard Foundation, alleging that the trust contravened the *Human Rights Code, 1981.* This prompted the trustee to seek the advice and direction of the Court. In his affidavit, Mr. McLeod explains the Trustee's position in bringing the application as follows:

> 21. ... the Trustee has been advised that it is, and has hitherto seen it to be its duty to support, maintain and administer the trusts which were accepted by the original Trustee until such time as a Court of competent jurisdiction determines that the trust is illegal or void. This the Trustee and its predecessor corporations have done for upwards of 63 years since the inception of the trust, without serious difficulty or opposition until the more recent of the events described in paragraphs 14 to 20 hereof.
>
> 22. The inquiries from the press, complaints of universities, schools, Human Rights Commissions and similar agencies, academics, members of the public and certain members of the General Committee, as well as the Complaint referred to in paragraph 17 hereof, the press articles and reports referred to in paragraphs 14 and 18 hereof, the divisive effect of the motion and vote referred to in paragraph 20 hereof, and other similar recent events have, in my view, had an unsettling effect and have interfered with the due administration of the trusts declared by the Indenture and the ability of the Trustee to carry on such administration effectively. They have also impacted and

can be expected to continue to impact unfavourably on the efficient administration of the scholarship programme by the General Committee, its Committee on Scholarships and its officials.

23. Although there has not to date been any serious difficulty experienced by the General Committee in identifying and making awards to students who fulfil the eligibility requirements of the Indenture, there have obviously been great changes in Canadian society and in the British Empire that have occurred in the 63 years since the inception of the Foundation. It may become more difficult than in the past to interpret and apply such eligibility terms as 'British Nationality', 'British Parentage', 'allegiance to any Foreign Government, Prince, Pope or Potentate', 'Christians of the White Race', 'British Subject' and 'of the Christian Religion in its Protestant Form'. The Trustee has received an opinion of its counsel that a charitable trust is exempt from the requirement of certainty of objects and cannot fail for uncertainty so long as there are some eligible persons who are with certainty within the ambit of the qualifications. Nevertheless, in the context of modern Canadian life and society, the increasingly multi-cultural makeup of Canada and the attention which has now been focused on the eligibility requirements of the Indenture, these difficulties may be expected to increase.

24. The Trustee accordingly believes that it requires the opinion, advice and direction of this Honourable Court as to the essential validity of the Indenture under which it operates, pursuant to the provisions of section 60 of the *Trustee Act* and the Court's inherent jurisdiction to supervise charitable trusts.

The Public Policy Issue

A. Can the Recitals Be Considered in Deciding this Issue?

31 In holding that the provisions of the trust did not violate either the *Human Rights Code, 1981* or public policy, McKeown J. took into account only the operative clauses of the trust document and the second sentence of the fourth recital. In his view, the balance of the recitals were merely expressions of the settlor's motive and, hence, irrelevant to a determination of the issues before him. While he found the motives offensive to today's general community, he concluded that these recitals could play no part in interpreting the trust document or in resolving the question of whether the trust contravened public policy.

32 In my opinion, the recitals cannot be isolated from the balance of the trust document and disregarded by the Court in giving the advice and direction sought by the trustee in this case. The document must be read as a whole. While the operative provisions of an instrument of this nature will ordinarily prevail over its recitals, where the recitals are not clearly severable from the rest of the instrument and themselves contain operative words or words intended to give meaning and definition to the operative provisions, the instrument should be viewed in its entirety. That, in my opinion, is the situation in the case of this trust document.

33 The recitals here in no way contradict or conflict with the operative provisions. The settlor made constant reference to them throughout the operative part of the document. He restricted the class of persons entitled to the benefits of the trust by reference to the recitals; he set the qualification for those who might administer the trust and give judicial advice thereon by reference to the recitals, and he stipulated the universities and colleges which might be attended by scholarship winners by reference to the recitals.

34 Moreover, the recitals were intended to give guidance and direction to the General Committee in awarding scholarships. They go beyond the restriction in the second sentence of the fourth recital excluding "all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual" from benefits in the Foundation. They indicate that not all white Protestants of British parentage should be eligible for the benefits of the trust but, rather, only those "whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire" and "who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or

authority is outside the British Empire." Those statements were intended as standards which, if not binding, were meant to be taken into account in the making of awards. I would not regard them as irrelevant. Nor would I regard any other of the recitals as irrelevant. The operative provisions were intended to be administered in accordance with the concepts articulated in the recitals. As this document is framed, its two parts are so linked as to be inextricably interwoven. In my opinion, one part cannot be divorced from the other.

35 Furthermore and perhaps more fundamentally, even if the recitals are properly treated as going only to the matter of motive, I would not think they can be ignored on an application of this nature in which a trustee seeks advice with respect to public-policy issues. While the Foundation may have been privately created, there is a clear public aspect to its purpose and administration. In awarding scholarships to study at publicly supported educational institutions to students whose application is solicited from a broad segment of the public, the Foundation is effectively acting in the public sphere. Operating in perpetuity as a charitable trust for educational purposes, as it has now for over half a century since the settlor's death, the Foundation has, in realistic terms, acquired a public or, at the least, a quasi-public character. When challenged on public-policy grounds, the reasons, explicitly stated, which motivated the Foundation's establishment and give meaning to its restrictive criteria are highly germane. To consider public-policy issues of the kind in question by sterilizing the document and treating the recitals as though they did not exist is to proceed on an artificial basis. In my opinion, the Court cannot close its eyes to any of this trust document's provisions.

B. Does the Trust Violate Public Policy?

36 Viewing this trust document as a whole, does it violate public policy? In answering that question, I am not unmindful of the adage that "public policy is an unruly horse" or of the admonition that public policy " 'should be invoked only in clear cases, in which harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds' ": *Re Millar*, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, at 7 [S.C.R.]. I have regard also to the observation of Professor Waters in his text on the *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), at 240 to the effect that:

> The courts have always recognized that to declare a disposition of property void on the ground that the object is intended to contravene, or has the effect of contravening public policy, is to take a serious step. There is the danger that the judge will tend to impose his own values rather than those values which are commonly agreed upon in society and, while the evolution of the common law is bound to reflect contemporary ideas on the interests of society, the courts also feel that it is largely the duty of the legislative body to enact law in such matters, proceeding as such a body does by the process of debate and vote.

Nonetheless, there are cases where the interests of society require the court's intervention on the grounds of public policy. This, in my opinion, is manifestly such a case.

37 The freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in our law: *Blathwayt v. Lord Cawley*, [1976] A.C. 397, [1975] 3 All E.R. 625 (H.L.). That interest must, however, be limited in the case of this trust by public-policy considerations. In my opinion, the trust is couched in terms so at odds with today's social values as to make its continued operation in its present form inimical to the public interest.

38 According to the document establishing the Leonard Foundation, the Foundation must be taken to stand for two propositions: first, that the white race is best qualified by nature to be entrusted with the preservation, development and progress of civilization along the best lines, and second, that the attainment of the peace of the world and the advancement of civilization are best promoted by the education of students of the white race, of British nationality and of the Christian religion in its Protestant form.

39 To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society, in which equality rights are

constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.

40 To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

41 Given this conclusion, it becomes unnecessary to decide whether the trust is invalid by reason of uncertainty or to consider the questions raised in this regard in para. 23 of Mr. McLeod's affidavit, which I reproduced earlier. Nor is it necessary to make any determination as to whether other educational scholarships may contravene public policy.

42 On the material before the Court, it appears that many scholarships are currently available to students at colleges and universities in Ontario and elsewhere in Canada which restrict eligibility or grant preference on the basis of such factors as an applicant's religion, ethnic origin, sex, or language. None, however, so far as the material reveals, is rooted in concepts in any way akin to those articulated here which proclaim, in effect, some students, because of their colour or their religion, less worthy of education or less qualified for leadership than others. I think it inappropriate and indeed unwise to decide in the context of the present case and in the absence of any proper factual basis whether these other scholarships are contrary to public policy or what approach is to be adopted in determining their validity should the issue arise. The Court's intervention on public-policy grounds in this case is mandated by the, hopefully, unique provisions in the trust document establishing the Leonard Foundation.

The Cy-Près Issue

43 On this issue, I agree with the learned Weekly Court Judge that the trust established by the Indenture is a charitable trust. I am persuaded that the settlor intended the trust property to be wholly devoted to the furtherance of a charitable object whose general purpose is the advancement of education or the advancement of leadership through education.

44 It must not be forgotten that when the trust property initially vested in 1923 the terms of the Indenture would have been held to be certain, valid and not contrary to any public policy which rendered the trust void or illegal or which detracted from the settlor's general intention to devote the property to charitable purposes. However, with changing social attitudes, public policy has changed. The public policy of the 1920s is not the public policy of the 1990s. As a result, it is no longer in the interest of the community to continue the trust on the basis predicated by the settlor. Put another way, while the trust was practicable when it was created, changing times have rendered the ideas promoted by it contrary to public policy, and hence it has become impracticable to carry it on in the manner originally planned by the settlor.

45 In these circumstances, the trust should not fail. It is appropriate and only reasonable that the Court apply the cy-près doctrine and invoke its inherent jurisdiction to propound a scheme that will bring the trust into accord with public policy and permit the general charitable intent to advance education or leadership through education to be implemented by those charged with the trust's administration.

46 The observations of Lord Simonds in *National Anti-Vivisection Society v. Inland Revenue Commissioners* (1947), [1948] A.C. 31 (H.L.), are apposite to this case. At 74 he said:

> A purpose regarded in one age as charitable may in another be regarded differently. I need not repeat what was said by Jessel M.R. in *In re Compton Charities* (1). A bequest in the will of a testator dying in 1700 might be held valid on the evidence then before the court but on different evidence held invalid if he died in 1900. So, too, I conceive that an anti-vivisection society might at different times be differently regarded. *But this is not to say that a charitable trust, when it has once been established can ever fail. If by a change in social habits and needs, or, it may be, by a change*

> *in the law the purpose of an established charity becomes superfluous or even illegal, or if with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the court or in suitable cases* to the charity commissioners or in educational charities to the Minister of Education *and ask that a cy-près scheme may be established ... A charity once established does not die, though its nature may be changed.*

[Emphasis added.]

47 Reference might also be made to *Scott on Trusts* [W.F. Fratcher ed.], 4th ed., vol. IVA (Boston: Little, Brown & Co., 1989), where, at 535-536, the following comment appears:

> The result of a too strict adherence to the words of the testator often means the defeat rather than the accomplishment of his ultimate purpose. He intends to make the property useful to mankind, and to render it useless is to defeat his intention. Said John Stuart Mill,
>
> > Under the guise of fulfilling a bequest, this is making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow. ... No reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found.
>
> Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. *He is permitted to devote his property in perpetuity to charitable purposes only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity that by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity that shall be forever exempt from modification.*

[Emphasis added.] See, generally, Waters, op. cit, at 611-632; *Power v. Attorney General for Nova Scotia* (1903), 35 S.C.R. 182; *Re Fitzpatrick; Fidelity Trust Co. v. St. Joseph's Vocational School of Winnipeg*, 16 E.T.R. 221, [1984] 3 W.W.R. 429, 6 D.L.R. (4th) 644, 27 Man. R. (2d) 285 (Q.B.); *Re Tacon; Public Trustee v. Tacon*, [1958] Ch. D. 447, [1958] 1 All E.R. 163; and *Re Dominion Students' Hall Trust*, [1947] Ch. 183.

Disposition

48 To give effect to these reasons, I would strike out the recitals and remove all restrictions with respect to race, colour, creed or religion, ethnic origin and sex as they relate to those entitled to the benefits of the trust and as they relate to the qualifications of those who may be members of the General Committee or give judicial advice and, as well, as they relate to the schools, universities or colleges in which scholarships may be enjoyed. (The provision according preferences to sons and daughters of members of the classes of persons specified in the trust document remains unaffected by this decision.) I would answer the questions posed as follows.

49 Q.1(ii) — Yes, the provisions of the trust which confine management, judicial advice, schools, universities and colleges and benefits on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

50 Q.1(i), (iii) and (iv) — It is not necessary to answer these questions.

51 Q.2 — No.

52 Q.3 — Yes.

53 Q.4 — As before, but with the deletion of the discriminatory restrictions mentioned in the answer to Q.1(ii).

54 Q.5 and 6 — The application form should be changed in accordance with this decision.

55 In the result, I would allow the appeal, set aside the order of McKeown J. and issue judgment as aforesaid. The costs of the appeal and of the application before McKeown J. shall be paid to the parties on a solicitor-and-client basis out of the corpus of the trust.

***Tarnopolsky J.A.*:**

I. The Judicial History and the Issues

56 This case concerns appeals from the judgment of McKeown J., dated August 10, 1987, upon an application, under s. 60 of the *Trustee Act*, R.S.O. 1980, c. 512 and rr. 14.05(2) and (3) of the *Rules of Civil Procedure*, by The Canada Trust Company, as the successor trustee under an Indenture made on December 28, 1923, between one Reuben Wells Leonard, the settlor, and the Toronto General Trusts Corporation, the Trustee, for advice and direction upon the following questions arising out of the administration of the trust created by the Indenture:

> 1. Are any of the provisions of, or the policy established under the Indenture made the 28th day of December, 1923 between Reuben Wells Leonard, Settlor of the First Part, and The Toronto General Trusts Corporation, Trustee of the Second Part (the 'Indenture') set out in Schedule A hereunder void or illegal or not capable of being lawfully administered by the applicant The Canada Trust Company, successor trustee thereunder, and/or the General Committee and other committees referred to in the Indenture, by reason of
>
> (i) public policy as declared in the *Human Rights Code*, 1981 (the '*Code*');
>
> (ii) other public policy, if any;
>
> (iii) discrimination because of race, creed, citizenship, ancestry, place of origin, colour, ethnic origin, sex, handicap or otherwise; or
>
> (iv) uncertainty?
>
> 2. If the answer to any of the questions propounded above is in the affirmative with respect to any of the said clauses or policy, does the trust created by the Indenture fail in whole or in part and if so, who is entitled to the trust fund under the Indenture?
>
> 3. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 2 is in the negative, is there a general charitable intention expressed in and by the Indenture such that the Court in the exercise of its inherent jurisdictions in matters of charitable trusts will direct that the trust be administered cy-près?
>
> 4. If the answer to any of the questions propounded in paragraph 1 above is in the affirmative with respect to any of the said clauses or policy, but the answer to question 3 above is also in the affirmative, how should the Trustee and/or the General Committee and other committees referred to in the Indenture administer the trust?
>
> 5. Does the application form as employed in the administration of the trust constitute a publication, display or other similar representation that indicates the intention of the Trustee or of the General Committee or other committees administering the trust to infringe or to incite the infringement of rights under Part 1 of the *Code*?
>
> 6. If the answer to question 5 is in the affirmative, how should the Committee on Scholarships of The Leonard Foundation and its Honorary Secretary carry out the provisions of the Indenture which require an official application form to be submitted to the Honorary Secretary by a member of the General Committee on behalf of an applicant for a Leonard Scholarship?

57 The answers given by McKeown J. were as follows:

58 Question 1

59

(i): No.

(ii): No.

(iii): No.

(iv): No.

60 Questions 2, 3 and 4: The answers given to the previous questions make it unnecessary to answer questions 2, 3 and 4.

61 Question 5: No.

62 Question 6: The answer given to the previous question makes it unnecessary to answer this one.

63 One appellant is the Royal Ontario Museum, which was one of several charitable institutions which were, by order of the Associate Chief Justice of Ontario, dated December 3, 1986, required to be served, as residuary legatees of the settlor, with notice of the application of the trustee. This appellant asks that the appeal be allowed in part and that positive answers be given to Questions 1(ii), 1(iii), 1(iv), and to Question 2, with the added declaration that the residual beneficiaries are entitled to the trust fund, and also that the answer to Question 3 be in the negative.

64 The other appellant is the Ontario Human Rights Commission, which had, pursuant to s. 31(2) of the *Human Rights Code, 1981*, S.O. 1981, c. 53, (hereafter "*Human Rights Code*"), initiated a formal complaint with itself against the trustee on August 12, 1986, alleging discrimination in the provision of services and facilities and in contracting on grounds of race, creed, colour, citizenship, ancestry, place of origin and ethnic origin. Subsequent to being informed of this complaint, the trustee applied to the High Court for directions and the Commission was added as the respondent. The Commission appeals that part of the decision of McKeown J. in which he provides answers to Questions 1(i), 1(iii) and 5, on the ground that they concerned the applicability of the *Human Rights Code* and so are matters within the exclusive primary jurisdiction of the Commission and any board of inquiry appointed under the *Code*.

65 There are two intervenors in this appeal. The first is "the Class of Persons Eligible to Receive Scholarships from the Leonard Foundation," added by the order of the Associate Chief Justice of the High Court referred to earlier. On behalf of this class, it was argued that the appeal should be dismissed but that, if the answer to Question 1 is answered in the affirmative, then the answers to Questions 2, 3 and 4 should be that the trust fails and is incapable of being applied cy-près, and the trust fund results to the settlor's estate, to be distributed according to his will.

66 In his order of December 3, 1986, mentioned above, the Associate Chief Justice of the High Court also ordered that notice of the application be served on the Public Trustee, rather than upon the Official Guardian, as set out in clause 9 of the Indenture. The Public Trustee also argued that the appeal should be dismissed. However, in the alternative it was submitted that, if it should be found that certain terms or clauses breach public policy or are uncertain, such terms or clauses should be treated as conditions subsequent or unessential, which could be expressed so as not to detract from a valid charitable purpose of creating a scholarship fund for students in need of financial assistance to pursue their studies in selected schools, colleges or universities.

67 All these submissions can be summarized into three main issues:

68 1. Did McKeown J. have jurisdiction to determine this matter or should he have deferred to the jurisdiction of the Ontario Human Rights Commission?

69 2. Is the trust void in whole or in part either for uncertainty or because it violates public policy?

70 3. If the trust is void on grounds of public policy or uncertainty, is there a general charitable intention so that the Court can apply the trust cy-près?

71 Questions 5 and 6 of the original application, which are subsidiary questions, could need to be addressed depending upon the answers to the three main issues.

II. The Facts

72 These are set out in sufficient detail in the judgment of McKeown J. at (1987), 61 O.R. (2d) 75 at 82-87. It is sufficient for our purposes to summarize therefrom.

73 By Indenture dated December 28, 1923, the trustee accepted the burden of certain trusts thereby created with respect to the trust property transferred and assigned to it. The trust was directed to be known as "The Leonard Foundation" (the "Foundation"), the scholarships from which were directed to be known as "The Leonard Scholarships". There was provision for the settlor to revoke the Indenture during his lifetime, but he did not do so before his death on December 17, 1930.

74 The most pertinent parts of the Indenture are:

> **The Recitals**
>
> *WHEREAS* the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:
>
> *AND WHEREAS* the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion:
>
> *AND WHEREAS* the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:
>
> *AND WHEREAS* the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian [sic] persons of British Nationality who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire. *For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.*
>
> . . . . .
>
> 2. *THE* Schools, Colleges and Universities in which such Scholarships may be granted and enjoyed, are such one or more of Schools and Colleges in Canada and such one or more of Universities in Canada and Great Britain as the General Committee hereinafter described may from time to time in its absolute discretion select, but subject always to the requirements, terms and conditions concerning same as hereinbefore and hereinafter referred to and set out, and to the further conditions that any School, College or University so selected shall be free from the domination or control of adherents of the class or classes of persons hereinbefore referred to, whom the settlor intends shall be excluded from the management of or benefits in the said Foundation:
>
> . . . . .

IF a vacancy in the General Committee is not filled for two years after it occurs, pursuant to the above provisions, the Trustee may apply to any Judge of the Supreme Court of Ontario, possessed of the qualifications herein required of a member of the said General Committee...

. . . . .

THE General Committee shall have the following powers:

. . . . .

(c) *Power* to select students or pupils of the classes or types hereinbefore and hereinafter described as recipients of the said Scholarships or for the enjoyment of the same, as the Committee in its discretion may decide.

. . . . .

SUBJECT to the provisions and qualifications hereinbefore and hereinafter contained, a student or pupil to be eligible for a Scholarship shall be a British Subject of the White Race and of the Christian Religion in its Protestant form, as hereinbefore in recital more particularly defined, who, without financial assistance, would be unable to pursue a course of study in any of the Schools, Colleges or Universities hereinbefore mentioned. Preference in the selection of students or pupils for Scholarships shall be given to the sons and daughters respectively of the following classes or descriptions of persons who are not of the classes or types of persons whom the Settlor intends to exclude from the management or benefit of the said Foundation as in the preamble or recital more particularly referred to, but regardless of the order of priority in which they are designated herein, namely:

(a) Clergymen,

(b) School Teachers,

(c) Officers, non-commissioned Officers and Men, whether active or retired, who have served in His Majesty's Military, Air or Naval Forces,

(d) Graduates of the Royal Military College of Canada,

(e) Members of the Engineering Institute of Canada,

(f) Members of the Mining & Metalurgical [sic] Institute of Canada.

PROVIDED further that in the selection, if any, of female students or pupils in any year under the provisions of this Indenture, the amount of income to be expended on such female students or pupils from and out of the moneys available for Scholarships under the terms hereof, shall not exceed one-fourth of the total moneys available for Scholarships for male and female students and pupils for such year.

. . . . .

8. *THE* Trustee shall disburse the whole or such part of the net annual income derived from the Trust Estate among the persons, Schools, Colleges and Universities in such amounts, at such times, upon such terms and in such manner as the General Committee shall, in its discretion, consistent with the intention of the Settlor as hereinbefore set out, decide, and the money payable in respect of such Scholarships shall, except as hereinafter provided, be paid to the respective Schools, Colleges or Universities in which the respective student or students, pupil or pupils, are in attendance ...

9. *THE* Trustee is hereby empowered at the expense of the trust estate to apply to a Judge of the Supreme Court of Ontario possessing the qualifications required of a member of the General Committee as hereinbefore in recital set out, for the opinion, advice and direction of the Court in connection with the construction of this trust deed and in connection with all questions arising in the administration of the trusts herein declared.

[Emphasis added.]

75 The Indenture indicates that the administration and management of the Foundation, as distinct from the powers and duties of the applicant with respect to the trust estate, are vested in a General Committee and a Sub-committee thereof known as the Committee on Scholarships.

76 Application forms for scholarships are made available during the months of January, February and March to members of the General Committee and, upon request, to schools, colleges, universities and individuals. An applicant submits an application through a member of the General Committee, who conducts a personal interview of the applicant, completes the nomination and recommendation and forwards the application to the General Committee before March 31.

77 The Committee on Scholarships meets in April or May in each year to consider the applications and to prepare recommendations to the General Committee for the award of scholarships. The General Committee then meets and, inter alia, receives the report and recommendations of the Committee on Scholarships and approves the awards to be made for the ensuing scholastic year. In making awards, the General Committee bases its decision in each individual case upon, inter alia, the requirements set out in the Indenture. To be eligible for the scholarship, a person must be one who, without financial assistance, would be unable to pursue a course of study and meets the other criteria in the Indenture.

78 Since 1971, the Ontario Human Rights Commission and its equivalents in the provinces of Alberta and British Columbia, together with other bodies, have expressed concerns over conditions of eligibility to officials of the trustee. There are universities which, in the last 10 years, have also complained or expressed concern to officers of the Foundation, regarding eligibility requirements. Notwithstanding instances of this kind, the Foundation receives approximately 230 new and renewal applications annually.

79 Evidence was submitted to McKeown J. to show that there exist in Ontario and elsewhere in Canada numerous educational scholarships which contain eligibility restrictions based on race, ancestry, place of origin, ethnic origin, citizenship, creed, sex, age, marital status, family status and handicap.

III. The Jurisprudence

(1) Jurisdiction — Human Rights Commission or Court?

80 The Ontario Human Rights Commission submitted that McKeown J. should have deferred to the Commission to exercise its jurisdiction under the *Human Rights Code* with respect to the complaint against the trustee that the Leonard Trust contravenes the *Code*. In considering this submission, one must start with the following fundamental proposition offered by Dubin J.A. [as he then was] in *Blainey v. Ontario Hockey Association* (1986), 54 O.R. (2d) 513, 7 C.H.R.R. D/3529, 10 C.P.R. (3d) 450, 21 C.R.R. 44, 26 D.L.R. (4th) 728, 14 O.A.C. 194 (C.A.), leave to appeal to S.C.C. refused (1986), 58 O.R. (2d) 274 (headnote), 7 C.H.R.R. D/3529n, 10 C.P.R. (3d) 450n, 21 C.R.R. 44n, 72 N.R. 76 (note), 17 O.A.C. 399 (note) (S.C.C.), at 532-533 [O.R.]:

> [T]he *Human Rights Code* provides a comprehensive scheme for the investigation and adjudication of complaints of discrimination. There is a very broad right of appeal to the Court from the ultimate determination of the board of inquiry constituted under the *Human Rights Code*. The procedure provided for in the *Human Rights Code* must first be pursued before resort can be made to the Court. This was so held in *Board of Governors of Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193 ... Chief Justice Laskin, speaking for the Court, stated at p. 183 S.C.R., pp. 194-5 D.L.R.:
>
> > In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of *The Ontario Human Rights Code* cannot succeed. The reason lies in

> the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law.

And at pp. 194-195 S.C.R., p. 203 D.L.R.:

> The view taken by the Ontario Court of Appeal is a bold one and may be commended as an attempt to advance the common law. In my opinion, however, this is foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the courts but rather makes them part of the enforcement machinery under the Code.
>
> For the foregoing reasons, I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

81 Nevertheless, although this may be taken as a starting proposition, I agree with McKeown J. that in this case several factors militate towards the High Court, as the superior court of inherent jurisdiction in this province, assuming jurisdiction despite a complaint being filed with the Human Rights Commission with respect to the same subject matter.

82 In the first place, the state of the law dealt with by this Court and the Supreme Court of Canada in *Seneca College of Applied Arts & Technology (Board of Governors) v. Bhadauria* (1979), 27 O.R. (2d) 142, 9 B.L.R. 117, 11 C.C.L.T. 121, 80 C.L.L.C. 14,003, 105 D.L.R. (3d) 707 (C.A.), rev'd [1981] 2 S.C.R. 181, 14 B.L.R. 157, 17 C.C.L.T. 106, 22 C.P.C. 130, 2 C.H.R.R. D/468, 81 C.L.L.C. 14,117, 124 D.L.R. (3d) 193, 37 N.R. 455, is in contrast with the situation in this case. In *Bhadauria*, supra, this Court had attempted "to advance the common law" in filling a void by creating a new tort of discrimination. The Supreme Court held that not to be necessary because of the comprehensive scheme of the *Human Rights Code*. Here, however, we are concerned with the administration of a trust, over which superior courts have had inherent jurisdiction for centuries and, in particular, with respect to charitable or public trusts. As noted at the beginning of this judgment, the trustee in this case applied to the High Court for advice and direction pursuant to the trust instrument itself as well as s. 60 of the *Trustee Act*.

83 Second, we are not concerned here with a typical proceeding under the *Human Rights Code, 1981*, in which an allegation of discrimination is brought against a respondent. The Commission's first mandate is to effect a settlement. However, the Trustee has no authority, absent authorization of the trust deed or legislation or a court order, to enter into a settlement which would be contrary to the terms of the trust. Even if no settlement could be effected and a board of inquiry were to be appointed, there is serious question as to whether the board could grant an adequate remedy. Its remedial authority is governed by s. 40(1) of the *Code*. If a *Code* infringement is found, the board may, by order,

> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

These remedial powers do not appear to give the board of inquiry the power to alter the terms of the trust or declare it void. In any case, resort to a court would have to be made to determine authoritatively whether such power exists.

84 Finally, I agree with McKeown J. that this is not a case where the fact-finding role of the Commission and a board of inquiry would be required. Even in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, 18 D.L.R. (3d) 1, where some further fact-finding and, particularly, fact-verification might have been useful, Martland J., on behalf of the majority on the Supreme Court of Canada, quoted Lord Goddard in *R. v. Tottenham and District Rent Tribunal; Ex parte Northfield (Highgate) Ltd.* (1956), [1957] 1 Q.B. 103 at 108 to the effect that: "[W]here there is a clear question of

law not depending upon particular facts — because there is no fact in dispute in this case — there is no reason why the applicants should not come direct [sic] to this court for prohibition." Similarly, here, I agree with McKeown J. that we are concerned with a question of law; there are no facts in dispute. The trustee is entitled to come to the superior court, pursuant to s. 60 of the *Trustee Act*, to seek advice and direction.

(2) Is the Trust Void in Whole or in Part Either for Uncertainty or Because it Violates Public Policy

85 We are concerned here with a charitable trust. In order to be considered charitable, a trust must have been established for one of the following four purposes: relief of poverty, advancement of education, advancement of religion or other purposes beneficial to the community as a whole as enunciated by the courts. (For the original summary and categorization of these see *Income Tax Commissioners v. Pemsel*, [1891] A.C. 531. For their Ontario application see *Charities Accounting Act*, R.S.O. 1980, c. 65 and *Re Levy* (1989), 68 O.R. (2d) 385, 33 E.T.R. 1, 58 D.L.R. (4th) 375, 33 O.A.C. 99 (C.A.). Also see, generally, D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984), c. 14.

86 The general rule is that in order to achieve charitable status, a trust must satisfy three conditions. It must have as its object one of the four purposes stated above; its purpose must be wholly and exclusively charitable, and it must promote a public benefit (*Ministry of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.); *McGovern v. Attorney General*, [1982] 1 Ch. 321, [1981] 3 All E.R. 493, at 331 [Ch.] and *Re Levy*, supra. To satisfy the public benefit requirement, the trust must be beneficial and not harmful to the public and its benefits must be available to a sufficient cross-section of the public (*Halsbury's Laws of England*, (4th ed., 1989) vol. 5, para. 505, p. 309; *Gilmour v. Coats*, [1949] A.C. 426, [1949] 1 All E.R. 848 (H.L.) at 855 [All E.R.] and Waters, supra, c. 14, pp. 460-504). If there is a personal nexus between each of the beneficiaries and the settlor, the trust will fail for lack of public benefit (*Oppenheim v. Tobacco Securities Trust Co.*, [1951] A.C. 297, [1951] 1 All E.R. 31 (H.L.) at 309 [A.C.]).

87 In the case at Bar, all of these tests are met. The trust is dedicated to the advancement of education and it is wholly charitable. Education is clearly a benefit to the public. Because the class was not ascertainable by the settlor, there was no personal nexus between him and the beneficiaries. The benefit, although not available to everyone, is available to a sufficiently wide cross-section of the public.

88 Next, it is necessary to consider whether the trust could be invalid because of uncertainty. It is important to note that in analyzing the validity of the trust on this basis, the Court may refer only to the operative words, unless they are ambiguous, in which case it can refer to the recitals. Regular rules of statutory construction apply (*Re Moon; Ex parte Dawes* (1886), 17 Q.B.D. 275, 34 W.R. 753 (C.A.)). Since recitals are descriptions of motive and are normally irrelevant to determining validity, McKeown J. held that they were irrelevant and inoperative. However, it could be argued that many sections of the Indenture refer to the recitals and thereby incorporate them. In fact, McKeown J. noted eight references, after the recitals, to the definition of the class of beneficiaries but then went on to state [at 214-215]:

> At no time throughout the operative clauses does Colonel Leonard refer back to the three opening recitals; thus his beliefs as stated therein are not incorporated into the operative words and play no part in the interpretation of this instrument.

89 Without deciding whether the recitals are incorporated in the trust instrument by subsequent references to them, I would agree that Colonel Leonard's beliefs as stated in the opening recitals are evidence of motive and are irrelevant. However, that part of the trust instrument which matters for the purpose of assessing certainty is the second sentence in the first full paragraph on p. 2 of the instrument, which reads as follows:

> For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope or Potentate, or who recognize any such authority, temporal or spiritual.

90 This definition of the class of beneficiaries is a condition precedent. A condition precedent is one in which no gift is intended until the condition is fulfilled. A condition subsequent differs in that non-compliance with the condition will put an end to an already existing gift. A condition precedent will not be void for uncertainty if it is possible to say with certainty that any proposed beneficiary is or is not a member of the class (*Jones v. T. Eaton Co.*, [1973] S.C.R. 635, 35 D.L.R. (3d) 97, at 650-651 [S.C.R.] and *McPhail v. Doulton*, [1971] A.C. 424, [1970] 2 All E.R. 228 (H.L.) at 456 [A.C.]). It is enough that some claimants can satisfy the condition (*Re Selby's Will Trusts; Donn v. Selby*, [1966] 1 W.L.R. 43, [1965] 3 All E.R. 386 (Ch.D.)). The condition will not fail for uncertainty unless it is clearly impossible for anyone to qualify (*Re Allen; Faith v. Allen*, [1953] Ch. 810, [1953] 2 All E.R. 898 (C.A.), subsequent proceedings [1954] Ch. 259, [1954] 1 All E.R. 526). It is well established that a charitable trust should not fail for uncertainty (see *Re Gott*, [1944] Ch. 193, [1944] 1 All E.R. 293). Historically, courts have been reluctant to strike down such gifts if it can be avoided. If a condition is uncertain, the court can consider it inoperative, but rarely will a trust fail because of uncertainty if the condition is a condition precedent.

91 In this case, there has been no difficulty over some 6 decades in ascertaining whether students qualify. The clause referred to above is sufficiently certain, except possibly for the "allegiance" exclusion. In my view, however, the clause as a whole meets the requirements established for a condition precedent, and the provisions containing the conditions are sufficiently certain. If I am wrong, however, I would find only the clause referring to "allegiance" to be uncertain and I would hold that it is severable from the other restrictions as to class.

92 Turning now to the public-policy issue, it must first be acknowledged that there has been no finding by a Canadian or a British court that at common law a charitable trust established to offer scholarships or other benefits to a restricted class is void as against public policy because it is discriminatory. In some cases, British courts have chosen to delete offensive clauses as "uncertain", as in *Re Lysaght; Hill v. Royal College of Surgeons of England*, [1966] Ch. 191, [1965] 2 All E.R. 888; *Clayton v. Ramsden*, [1943] A.C. 320, [1943] 1 All E.R. 16 (H.L.) and *Re Tarnopolsk; Barclay's Bank Ltd. v. Hyer*, [1958] 1 W.L.R. 1157, [1958] 3 All E.R. 479 or "impracticable" as in *Re Dominion Students' Hall Trust*, [1947] Ch. 183. In the latter case, the Court found a general charitable intention and then applied the trust property cy-près. The attitude of British courts, however, is probably best summed up in the words of Buckley L.J. in *Re Lysaght*, supra, at 206, quoted by McKeown J. at 220:

> I accept that racial and religious discrimination is nowadays widely regarded as deplorable in many respects and I am aware that there is a Bill dealing with racial relations at present under consideration by Parliament, but I think that it is going much too far to say that the endowment of a charity, the beneficiaries of which are to be drawn from a particular faith or are to exclude adherents to a particular faith, is contrary to public policy. The testatrix's desire to exclude persons of the Jewish faith or of the Roman Catholic faith from those eligible for the studentship in the present case appears to me to be unamiable, and I would accept Mr. Clauson's suggestion that it is undesirable, but it is not, I think, contrary to public policy.

However, in considering these observations of Buckley L.J., it is necessary to keep in mind two points. First, the observations themselves indicate that they were made *before* the enactment of the first comprehensive statute in the United Kingdom to prohibit discrimination on racial grounds — the *Race Relations Act*, (U.K.), 1968, c. 71. Second, religion, as a prohibited ground of discrimination, is conspicuously left out of the anti-discrimination laws of the United Kingdom. I do not, therefore, find the English cases on point to be of any help or guidance.

93 In Canada, the leading case on public policy and discrimination at the commencement of World War II was *Christie v. York Corp.*, [1940] S.C.R. 139, [1940] 1 D.L.R. 81, wherein the majority of the Supreme Court of Canada found that denial of service on grounds of race and colour was *not* contrary to good morals or public order.

94 After the war, this Court, in *Noble and Wolf v. Alley*, [1949] O.R. 503, [1949] 4 D.L.R. 375, rev'd [1951] S.C.R. 64, [1951] 1 D.L.R. 321, upheld a racially restrictive covenant in the course of deciding that there was insufficient evidence to conclude that racial discrimination was contrary to public policy in Ontario. In this, the Court specifically overruled

Mackay J., in *Re Drummond-Wren*, [1945] O.R. 778 (H.C.), who had found such covenants void as against public policy. The Supreme Court of Canada struck down the covenant in *Noble and Wolf*, supra, on technical grounds but did not refer to the public-policy argument.

95 Subsequently, in *Bhadauria*, supra, at 715 [D.L.R.], in concluding that the common law had evolved to the point of recognizing a new tort of discrimination, Wilson J.A. referred to the preamble to the *Ontario Human Rights Code*, R.S.O. 1970, c. 318, the first two paragraphs of which then provided:

> WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;
>
> AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin.

She then observed: "I regard the preamble to the Code as evidencing what is now, and probably has been for some considerable time, the public policy of this Province respecting fundamental human rights." That the *Human Rights Code* recognizes public policy in Ontario was acknowledged a few years later by the Supreme Court of Canada in *Ontario Human Rights Commission v. Borough of Etobicoke* (1982), 3 C.H.R.R. D/781, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 40 N.R. 159, at 23-24 [D.L.R.].

96 Therefore, even though McKeown J. referred to the caution of Duff C.J.C. in *Re Millar*, [1938] S.C.R. 1, [1938] 1 D.L.R. 65, at 7-8 [S.C.R.], to the effect that public policy is a doctrine to be invoked only in clear cases where the harm to the public is substantially incontestable and does not depend upon the "idiosyncratic inferences of a few judicial minds," the promotion of racial harmony, tolerance and equality is clearly and unquestionably part of the public policy of modern day Ontario. I can think of no better way to respond to the caution of Duff C.J.C. than to quote the assertion of Mackay J. of nearly 45 years ago in *Re Drummond-Wren*, supra, at 783:

> Ontario and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

97 Further evidence of the public policy against discrimination can be found in several statutes in addition to the preamble and content of the *Human Rights Code, 1981*: s. 13 of the *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 90; s. 4 of the *Ministry of Citizenship and Culture Act, 1982*, S.O. 1982, c. 6; s. 117 of the *Insurance Act*, R.S.O. 1980, c. 218; and s. 13 of the *Labour Relations Act*, R.S.O. 1980, c. 228. All of these indicate that this particular public policy is not circumscribed by the exact words of the *Human Rights Code, 1981*, alone. Such a circumscription would make it necessary to alter what the courts would regard as public policy every time an amendment were made to the *Human Rights Code*. This can be seen just by comparing the wording of the second paragraph of today's preamble with that considered by Wilson J.A. in 1979 and quoted above. Currently this paragraph reads:

> AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels

> a part of the community and able to contribute fully to the development and well-being of the community and the Province.

98 It is relevant in this case to refer as well to the "Ontario Policy on Race Relations" (Race Relations Directorate, Ministry of Citizenship) as well as the Premier's statement in the Legislature concerning the policy (*Hansard Official Report of Debates of Legislative Assembly of Ontario*, 2nd Session, 33rd Parliament, Wednesday, May 28, 1986, pp. 937-941). The Policy on Race Relations states:

> The government is committed to equality of treatment and opportunity for all Ontario residents and recognizes that a harmonious racial climate is essential to the future prosperity and social well-being of this province ... The government will take an active role in the elimination of all racial discrimination, including those policies and practices which, while not intentionally discriminatory, have a discriminatory effect ... The government will also continue to attack the overt manifestations of racism and to this end declares that: (a) Racism in any form is not tolerated in Ontario.

In introducing it in the Legislature, Premier David Peterson said (*Hansard* at 937):

> This policy recognizes that Ontario's commitment to equality has grown from benign approval to active support. It leaves no doubt that the path we will follow to full racial harmony and equal opportunity is paved, not just with good wishes and best intentions but with concrete plans and active measures.

99 Public policy is not determined by reference to only one statute or even one province, but is gleaned from a variety of sources, including provincial and federal statutes, official declarations of government policy and the Constitution. The public policy against discrimination is reflected in the anti-discrimination laws of every jurisdiction in Canada. These have been given a special status by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 52 O.R. (2d) 799 (headnote only), 17 Admin. L.R. 89, 9 C.C.E.L. 185, 7 C.H.R.R. D/3102, 86 C.L.L.C. 17,002, 23 D.L.R. (4th) 321, [1986] D.L.Q. 89 (headnote only), 64 N.R. 161, 12 O.A.C. 241, at 329 [D.L.R.]:

> The accepted rules of construction are flexible enough to enable the court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in *Insurance Corp. of B.C. v. Heerspink et al.* ... [1982] 2 S.C.R. 145 at pp. 157-158 ...), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional, but certainly more than ordinary — and it is for the courts to seek out its purpose and give it effect.

100 In addition, equality rights "without discrimination" are now enshrined in the *Constitution Act, 1982* [*Canadian Charter of Rights and Freedoms*] in s. 15; the equal rights of men and women are reinforced in s. 28, and the protection and enhancement of our multicultural heritage is provided for in s. 27.

101 Finally, the world community has made anti-discrimination a matter of public policy in specific conventions like the *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, and the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979, as well as arts. 2, 3, 25 and 26 of the *International Covenant on Civil and Political Rights*, all three of which international instruments have been ratified by Canada with the unanimous consent of all the provinces. It would be nonsensical to pursue every one of these domestic and international instruments to see whether the public-policy invalidity is restricted to any particular activity or service or facility.

102 Clearly this is a charitable trust which is void on the ground of public policy to the extent that it discriminates on grounds of race, (colour, nationality, ethnic origin) religion and sex.

103 Some concern was expressed to us that a finding of invalidity in this case would mean that any charitable trust which restricts the class of beneficiaries would also be void as against public policy. The respondents argued that this would have adverse effects on many educational scholarships currently available in Ontario and other parts of Canada. Many of these provide support for qualified students who could not attend university without financial assistance. Some are

restricted to visible minorities, women or other disadvantaged groups. In my view, these trusts will have to be evaluated on a case by case basis, should their validity be challenged. This case should not be taken as authority for the proposition that all restrictions amount to discrimination and are therefore contrary to public policy.

104 It will be necessary in each case to undertake an equality analysis like that adopted by the Human Rights Commission when approaching ss. 1 and 13 of the *Human Rights Code, 1981*, and that adopted by the courts when approaching s. 15(2) of the *Charter*. Those charitable trusts aimed at the amelioration of inequality and whose restrictions can be justified on that basis under s. 13 of the *Human Rights Code* or s. 15(2) of the *Charter* would not likely be found void because they promote rather than impede the public policy of equality. In such an analysis, attention will have to be paid to the social and historical context of the group concerned (see *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, [1989] 2 W.W.R. 289, 10 C.H.R.R. D/5719, 36 C.R.R. 193, 56 D.L.R. (4th) 1, 91 N.R. 255, at 152-153 [S.C.R.] per Wilson J. and 175 per McIntyre J.) as well as the effect of the restrictions on racial, religious or gender equality, to name but a few examples.

105 Not all restrictions will violate public policy, just as not all legislative distinctions constitute discrimination contrary to s. 15 of the *Charter* (*Andrews*, supra, at 168-169 per McIntyre J.). In the Indenture in this case, for example, there is nothing contrary to public policy as expressed in the preferences for children of "clergymen", "school teachers", etc. It would be hard to imagine in the foreseeable future that a charitable trust established to promote the education of women, aboriginal peoples, the physically or mentally handicapped, or other historically disadvantaged groups would be void as against public policy. Clearly, public trusts restricted to those in financial need would be permissible. Given the history and importance of bilingualism and multiculturalism in this country, restrictions on the basis of language would probably not be void as against public policy, subject, of course, to an analysis of the context, purpose and effect of the restriction.

106 In this case, the Court must, as it does in so many areas of law, engage in a balancing process. Important as it is to permit individuals to dispose of their property as they see fit, it cannot be an absolute right. The law imposes restrictions on freedom of both contract and testamentary disposition. Under the *Conveyancing and Law of Property Act*, s. 22, for instance, covenants that purport to restrict sale, ownership, occupation or use of land because of, inter alia, race, creed or colour are void. Under the *Human Rights Code*, discriminatory contracts relating to leasing of accommodation are prohibited. With respect to testamentary dispositions, as mentioned earlier, one cannot establish a charitable trust unless it is for an exclusively charitable purpose (see Waters, supra, at 601-603 and 626; and *Ministry of Health v. Simpson*, supra). Similarly, public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void.

107 A finding that a charitable trust is void as against public policy would not have the far-reaching effects on testamentary freedom which some have anticipated. This decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts. Historically, charitable trusts have received special protection: (1) they are treated favourably by taxation statutes; (2) they enjoy an extensive exemption from the rule against perpetuities; (3) they do not fail for lack of certainty of objects; (4) if the settlor does not set out sufficient directions, the court will supply them by designing a scheme; (5) courts may apply trust property cy-près, providing they can discern a general charitable intention. This preferential treatment is justified on the ground that charitable trusts are dedicated to the benefit of the community (Waters, supra, 502). It is this public nature of charitable trusts which attracts the requirement that they conform to the public policy against discrimination. Only where the trust is a public one devoted to charity will restrictions that are contrary to the public policy of equality render it void.

(3) Is There a General Charitable Intention So that The Court Can Apply the Trust Cy-près?

108 One of the great advantages of a charitable trust is that if it fails for some reason, it can be applied cy-près. However, in order to apply the trust property cy-près, the Court must find that the settlor had a general charitable intention. If the mode of application is such an essential part of the gift that the Court cannot distinguish any general purpose of charity but is obliged to say that the prescribed mode of doing the charitable act is the only one the testator intended,

it cannot apply the trust cy-près (see *Re Wilson; Twentyman v. Simpson*, [1913] 1 Ch. 314 [1911-13] All E.R. Rep. 1101; *Re Lysaght*, supra, at 203 and *Halsbury's Laws of England*, (4th ed., 1989), vol. 5, Charities, para. 696). Cy-près should never depart from the testator's true intention. This must be discerned from reading the trust instrument as a whole. The Court may have regard to the recitals in order to determine the "substantial, overriding, true or paramount intention."

109 If the Court must decide that the settlor would not have established the trust if it could not be carried out in the specific way set out, then there is no general charitable intention and the trust fails. If, on the other hand, the discriminatory provisions can be said to be the "machinery" of the trust, separable from the general intention to educate, then the Court may apply the money cy-près. The distinction between a general and a specific charitable intent was expressed by Buckley L.J. in *Re Lysaght*, supra, at 202 [Ch.]:

> A general charitable intention, then, may be said to be a paramount intention on the part of a donor to effect some charitable purpose which the court can find a method of putting into operation, notwithstanding that it is impracticable to give effect to some direction by the donor which is not an essential part of his true intention — not, that is to say, part of his paramount intention.
>
> In contrast, a particular charitable intention exists where the donor means his charitable disposition to take effect if, but only if, it can be carried into effect in a particular specified way.

110 The question in this case is, then, whether the testator's paramount intention was to provide scholarships for education or whether he intended to provide it for specific kinds of students and would not have created it otherwise. To preserve the trust, this Court must find that the settlor's general intention was to educate young people for the benefit of the Empire (now the Commonwealth and this country) and that the discriminatory provisions are merely the machinery designed to effect that intention. Was it his intention to educate particular kinds of people because only they could be entrusted with the future of the country? Was it his overriding purpose to select students of the right breeding and prepare them for leadership? If so, then his intention was specific and the trust must fail.

111 It seems to me, however, that his intention must be viewed as one to promote leadership through education. The scheme he chose was the one he thought best because of the time in which he lived. Although today discrimination is considered to have been an ugly feature of our society in the past (and is still too prevalent), we judge attitudes of the past with hindsight. It is easy, with the benefit of such hindsight, to feel contempt for the views expressed in the recitals of the trust instrument and to find the racial and religious restrictions contained in its text to be repugnant. In his day, however, Colonel Leonard was a philanthropist. He obviously believed that education was the key to a strong and prosperous country and a peaceful world. In that, he was no doubt right. The fact that he chose to implement his desire to promote education through a discriminatory scheme cannot displace his general charitable intention. In my view, the tests for finding a general charitable intention are met. This conclusion finds support in para. 13 of the trust instrument, which provides that the testator could alter the trust or change its objects and purposes and that any income that became available "shall thereupon become applicable for such other objects or purposes, being an object or purpose conducive to the promotion or encouragement of education, as the settlor may from time to time think proper."

112 I find support for this conclusion in the case of *Re Dominion Students' Hall Trust*, supra, where Eversheld J. granted a petition by the charity to remove a restriction which confined a student hostel to members of the Empire of European origin. He said, at 186:

> It is not necessary to go to the length of saying that the original scheme is absolutely impracticable. Were that so, it would not be possible to establish in the present case that the charity could not be carried on at all if it continued to be so limited as to exclude coloured members of the Empire.
>
> I have, however, to consider the primary intention of the charity. At the time when it came into being, the objects of promoting community of citizenship, culture and tradition among all members of the British Commonwealth of Nations might best have been attained by confining the hall to members of the Empire of European origin. But times

> have changed, particularly as a result of the war; and it is said that to retain the condition, so far from furthering the charity's main object, might defeat it and would be liable to antagonize those students, both white and coloured, whose support and goodwill it is the purpose of the charity to sustain.

This observation, made in 1946, is particularly apt today.

IV. The Disposition

113 In the result I would allow the appeal and substitute the following answers for those given by McKeown J.:

114 Q.1 (i) — Yes, but not just as confined by the *Human Rights Code.*

115 (ii) — Yes, the provisions of the trust which confine management, judicial advice and benefit on grounds of race, colour, ethnic origin, creed or religion and sex are void as contravening public policy.

116 (iii) — It is not necessary to answer this question.

117 (iv) — No.

118 Q.2 — No.

119 Q.3 — Yes.

120 Q.4 — As before, but with a deletion of the discriminatory restrictions mentioned in answer to Q.1, (ii).

121 Q.5 — This question should not be answered in this decision. After the application form is changed in accordance with this decision the question will become moot and, if not, it should be considered under the procedures in the *Human Rights Code.*

122 Q.6 — The answer to this question is provided in the answer to Q.5.

123 As far as costs are concerned, the order made by McKeown J. should stand, and the same disposition should apply with respect to costs on this appeal.

Appeal allowed.

Footnotes

1 L.A. Turnbull, lecturer, Osgoode Hall Law School.

TAB 13

1 ETR-CAN-ART 76
Estates and Trusts Reports (Articles)
2014

Welcome the Newest Unworthy Heir

Bruce Ziff *

A. Introduction

In *McCorkill v. McCorkill Estate*,[1] a New Brunswick court invalidated a large testamentary gift to a neo-Nazi organization. In doing so, the court extended the reach of the doctrine of public policy as a means to challenge the legality of property transfers. In this short note I will reflect on the reasons advanced in the case, and the implications of the ruling.

B. The Case

The case of *McCorkill v. McCorkill Estate* Estate involved the will of one Harry McCorkill, who passed away in 2004. The will gave his entire estate to the National Alliance (N.A.), an American-based neo-Nazi organization to which McCorkill belonged. In 2010, the executor applied for, and was granted, Letters Probate. At that point, the estate was valued at approximately $250,000.

However, in 2013, McCorkill's sister challenged the validity of the will, arguing that the gift to the National Alliance was contrary to public policy. An *ex parte* order was granted freezing the distribution of the estate pending the determination of the sister's challenge.[2] Shortly afterwards, intervener status was granted to the province of New Brunswick, the Centre for Israel and Jewish Affairs, the League for Human Rights of B'Nai Brith Canada, and the Canadian Association for Free Expression. One year later, Justice William Grant ruled on the substantive question, holding that the will was invalid as alleged. That decision is currently under appeal.

The crux of the claim for invalidity concerns the stated objectives of the National Alliance as reflected in the sundry materials it has disseminated over the years. A good deal of evidence was devoted to presenting or describing the publications and ideology of the group. The Court summarized the Alliance's mission as being hate-inspired, white-supremacist racism, and, more generally, "disgusting, repugnant and revolting."[3] There is enough material quoted in the judgment to justify those views. Justice Grant held that the publications constituted a clear[4] violation of the criminal law prohibitions against the wilful promotion of hatred, and that engaging in such activity contravened Canadian public policy.[5] That led the Court to conclude that a gift to the National Alliance, an organization whose *raison d'être* is to stand for these revolting ideologies, was invalid.[6]

The ruling in *McCorkill* is precedent-setting in two related ways. First, while the application of the doctrine of public policy is a longstanding basis on which to invalidate property dealings, in all previous cases in Canadian law the doctrine had been applied to some offensive stipulation or condition in the granting document. Here the gift was absolute; there were no strings attached. The donee was not obligated by virtue of the transfer to use the bequest in any particular way.

Second, invalidity was premised on the character of the recipient. Prior to this case, only two kinds of "unworthy heirs" have been recognized by the law. One concerns the donee who culpably kills the donor, with the result that the inheritance is triggered. Such a beneficiary will be disentitled by that action, as will a joint tenant who assumes title by virtue of

survivorship after killing another joint owner.[7] Another class of unworthy recipients has recently been added. It is now a criminal offence to provide financial support to a terrorist group. Those convicted are liable to be imprisoned for up to 10 years.[8] Presumably any gift that *per se* runs afoul of the criminal law will be regarded as invalid under the private law. However, apart from these instances, even the most despicable criminal is not thereby disentitled. One can be unspeakably cruel to a testator, or have committed a range of crimes against that person short of culpable homicide, and still be fully entitled to a testamentary gift.[9] Yet, in this case the National Alliance was held to be an unworthy heir, even though it is validly incorporated in Virginia, is not *per se* an illegal organization, and despite the fact that it has never been charged or convicted of hate crimes in Canada.

These are both significant moves. I believe they are justified.

C. The Juridical Backdrop

As mentioned above, there is nothing exceptional in turning to the doctrine of public policy as a mechanism for policing private conduct. However, cognizant of the potentially long reach of the doctrine, courts have repeatedly advocated a cautious and restrained approach. So, it has been warned that its application "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and . . . not . . . on the idiosyncratic inferences of a few judicial minds".[10]

In recent years, courts have occasionally been called upon to consider whether property dealings containing discriminatory provisions offend public policy. In some instances the challenged transfers were found to be invalid in whole or in part. But, as will be seen, that has not invariably been the case. The law has continually struggled to find the proper demarcation between acceptable and intolerable discriminatory private conduct.[11] *McCorkill v. McCorkill Estate* is the latest attempt to draw that line.

A useful starting point is *Re Drummond Wren*[12] (*circa* 1945). That case involved a restrictive covenant impressed upon a residential lot in Toronto which provided that the land was "not to be sold to Jews or persons of objectionable nationality". That restraint was invalidated on the ground, *inter alia*, that it was contrary to public policy. That ruling broke new ground. However, a few years later, the Ontario Court of Appeal unanimously reached the opposite result in relation to a covenant that prohibited ownership or occupation by "any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood".[13] That case involved a cottage resort area on Lake Huron. In upholding the terms, four separate concurring judgments were rendered. The low-water mark appears in the opinion of Chief Justice Robertson. He saw the covenant as attempting to foster a congenial summer-holiday community comprised of people who chose to be together. This he described as an "innocent and modest"[14] objective, in which "the public interest is in no way concerned".[15] While the promotion of goodwill among peoples was undoubtedly to be desired, seeking to enforce such a goal by such measures as invalidating the covenant was inappropriate.

A majority of the Supreme Court of Canada reversed, though not with reference to public policy. Among other things, it was held that, because the covenant did not restrict the *use* of the land but rather the kinds of owners or occupiers, it did not satisfy the doctrinal elements required to bind later owners. In short, the restrictions did not "touch and concern" the land.[16] That collateral attack effectively destroyed the efficacy of racial restrictive covenants in Canada. Some provinces put the matter beyond dispute, enacting legislation prohibiting the kind of restrictions found in these cases.[17]

In 1990, the legality of discriminatory conditions was revisited in the *Leonard Foundation Trust* case,[18] arguably the most important Canadian decision on the doctrine of public policy. *Leonard* involved a trust created by one Col. Reuben Wells Leonard, a Canadian patriot, mining magnate, and philanthropist. In 1916, Col. Leonard established a large trust designed to provide bursaries to needy students. Its terms were revised in 1920 and 1923. Leonard died in 1930, leaving the 1923 version unaltered.

The 1923 document contained a series of recitals that were designed to explain the rationale for the scheme as embodied in the operative part of the trust. Those recitals are a kind of political tract, hinting at a set of strongly held political views. In brief, Leonard believed in the innate superiority of the white race, and in the enduring importance of both the British Empire and the Christian religion in its Protestant form. In consequence, he established a fund for bursaries tenable only by white, Protestant, British subjects. Both male and female students were eligible, though no more than 25% of the monies allocated in any given year could be awarded to female applicants. [19]

The Leonard Trust was administered on this basis for decades. However, by the 1980s, the appropriateness of the bursary scheme had become a matter of public debate, particularly in Ontario, the site of the Leonard Foundation. When the Ontario Human Rights Commission commenced proceedings, the Leonard trustees applied to the Supreme Court of Ontario for directions as to the validity of the trust.

At first instance, the trust was upheld in its entirety; not a comma was touched. Proprietary freedom was regarded as the trumping value. [20] Three years later, the Ontario Court of Appeal reversed that decision, holding that the trust violated the common law doctrine of public policy. In the result, all of the provisions relating to race, religion, nationality, and gender were deleted, leaving a general charitable trust for the advancement of education. The Foundation continues to operate under these modified terms of reference.

Robins J.A. (with whom Osler J. concurred) took the view that the Leonard Foundation Trust, tenable at public universities, and available to members of the public at large, was to be regarded as a public or at least a *quasi*-public institution. Controversially, he looked to the recitals to see if the founding rationale of that institution could pass muster. (The judge at first instance had held that the recitals could not be relied upon for that purpose. [21]) Robins J.A. concluded that "[t]o say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious". [22] Tarnopolsky J.A. wrote a concurring opinion, holding that discriminatory trusts of this nature were presumptively invalid. In so doing, he accepted the prospect that a trust premised on affirmative action could be valid.

The reasoning of the majority, so heavily reliant on the offensive ideologies set out in the recitals, left open the proper analysis where there were no such statements, but merely discriminatory qualifications. [23] Later cases confronted that issue. In *Re Ramsden Estate*, [24] for example, a scholarship in favour of Protestant students was upheld even in the face of the *Leonard* decision. It was said that the Ramsden will did not contain the kind of "blatant religious supremacy and racism" [25] found in the Leonard Foundation Trust. Shortly afterwards, similar reasoning was applied in upholding a gift of bursaries tenable exclusively by Roman Catholics. [26]

Even if we are to ignore these subsequent cases, and discount the significance of the recitals in the majority holding, there remained a zone of private activity that was stated in *Leonard* to be outside the ambit of the ruling. Both judgments treat the so-called public dimension to the trust as significant. That aspect seems to have been important to Robins J.A. in assessing the rationale for the trust. Tarnopolsky J.A. quite explicitly stated that his approach was not directed at what he termed family (i.e., non-public) trusts.

Within that private sphere, another form of discriminatory action can be found. There are a number of reported decisions that address the validity of gifts conditioned in some way on a legatee's affiliation with a given religion, or marriage to a person of a given religion. Some of these provisions have been invalidated on the ground that they are too uncertain to be enforceable (what does it mean to be Jewish, or Lutheran, or whatever?). [27] However, are such gifts, when more precisely drafted, contrary to public policy?

That question was addressed by the House of Lords in *Blathwayt v. Baron Cawley*, [28] where the public policy argument was rejected. The case involved a term disinheriting a beneficiary should that person become a Roman Catholic. It was

acknowledged that public policy might well be moving against upholding such a term. However, the Lords resisted while taking what was regarded as a major step. It was said that as matters then stood, there was no express legislative edict or implicit policy forbidding this kind of private selection.

Not all Canadian cases line up behind *Blathwayt*. In *Murley Estate v. Murley*,[29] a gift was conditioned on the beneficiary's adherence to one of the mainstream Christian churches (Catholic, Anglican, or United). Expressly forbidden was an affiliation with Pentecostals, Seventh Day Adventists, Jehovah Witnesses, or Latter Day Saints. The testator, a retired United Church clergyman, explained in the will that he wanted his son (the beneficiary) to be a real Christian. With no analysis or reference to authority, the Court concluded that a gift that restricts religious affiliation was contrary to public policy.

The case of *Fox v. Fox Estate*[30] may likewise be seen as casting *some* doubt on the position taken in *Blathwayt*. That case involved the actions of an executor, the testator's widow. Under the will, she was given considerable scope to allocate funds to certain beneficiaries. When a son married a non-Jew, the executor used her discretion to reduce his entitlement to the residue of the estate. The son challenged her action.

Drawing on general principles, the Ontario Court of Appeal concluded that the widow had abused her office, because her decisions were motivated by considerations that were extraneous to the duties conferred in the will. One member of the Court, Galligan J.A., went further. Drawing on *Leonard*, it was suggested that it was now contrary to public policy to permit a testator to disinherit a beneficiary under the will for marrying outside of a religious faith. That being so, an executor could be in no better position to do so.

By contrast, the recent Illinois decision of *In re Estate of Fineberg*[31] permitted precisely that kind of disinheritance clause. The testator, a devout Jew, was deeply concerned about intermarriage and its potential effects on Judaism. In consequence, his will provided that any descendent who married outside the Jewish faith would be deemed to be deceased for all purposes under the will. Ultimately, the state's supreme court decided that testamentary freedom governed.

In taking stock of this jurisprudence, certain features stand out: the review demonstrates that in all three areas where discriminatory transfers have been challenged — covenants, scholarships, and disinheriting clauses — the path of the jurisprudential trail has been winding, and the current law is uneven. That should not be surprising, for there is inevitably a contest of values. On one side, one places concerns over equality, respect, and human dignity. On the other side one finds (proprietary) freedom, respect for difference (the promotion of multiculturalism), and freedom of religious choice.[32] In addition, as the *Leonard* case[33] graphically illustrates, property dispositions are, in effect, manifestations of free speech.[34] The predictable result of the need for a multi-variable balancing process is a line between valid and invalid private action that is imperfect and in constant flux.

D. Assessing *McCorkill v. McCorkill Estate*

The ruling in *McCorkill* generates two main concerns. One relates to the kinds of private discriminatory activity that the judgment does *not* purport to constrain. The second problem lies at the other end of the spectrum: the danger that the holding is so open-ended that the law is rendered overbroad and indeterminate. I will deal with each of these aspects in turn.

The outcome appears to create anomalies. Prohibiting this kind of bequest does not, arguably, preclude future McCorkills from providing support to racist organisations by means of an *inter vivos* transfer. Likewise, either a bequest or an *inter vivos* gift bequest can be given to the head of the organization in his or her personal capacity, as opposed to a direct donation to the group.

I do not regard the line between *inter vivos* and testamentary gifts to be anomalous. There is a good reason for treating testamentary transfers differently. Unlike an *inter vivos* gift, before a will can be effective as a disposition it *must* receive

judicial sanction. Probate must first be granted by a court of law. If a discriminatory condition is challenged, it must then be determined whether or not the law should affirm and enforce the exchange. This provides a funnel to bring all such gifts before the bar of justice. Moreover, in seeking probate one is inevitably asking the state to be complicit in the donor's actions, because it can now be called upon to enforce the gift. It is appropriate for a court to refuse to do so where public policy is offended. [35]

Furthermore, it is by no means clear that an *inter vivos* gift to the National Alliance is valid. Given the reasoning in *McCorkill*, there is no basis for enforcing it. While it may be true that such a gift need not be filtered through a process equivalent to probate, that is a practical difference only. Gambling contracts are invalid, but are made and complied with routinely. The fact that the contracting parties are able to carry out these illegal transactions does not make the doctrinal prohibition evaporate.

The testator could also have validly conferred a gift, by will or otherwise, on the Alliance's leader, or for that matter, any other ardent member. In *McCorkill*, Grant J. dealt with the hypothetical situation of a gift to a drug dealer. It was said that such a bequest was unimpeachable. A drug dealer does not "stand for" trafficking in drugs in the same way that the National Alliance stands for all of the revolting policies it espouses. [36] It would therefore seem to follow that even the head of the organization does not stand for the views of the Alliance, no matter how avidly (s)he adheres to its credo. That person might donate the gift to the National Alliance (which, as suggested, might be invalid), but the money can be lawfully used for myriad other purposes.

It must be acknowledged that the law can do only so much to make the world a better place. Nevertheless, it should do as much as is feasible. A limitation inherent in the *Leonard Trust* case [37] illustrates that point. A donor in the mould of Reuben Wells Leonard might well decide to stand on Philosopher's Walk at the University of Toronto and hand out envelopes full of money to every white male that passes his way. He might even ask them before handing over the package whether or not they were Canadian citizens. Likewise, even if the law were to prohibit disinheritance based on religious adherence, *etc.*, it would be impractical to overturn a will where a potential beneficiary was disinherited *ex ante* because of such a reason. These actions may be beyond the reach of the law, but that does not mean that the courts should in all events stand aside.

The more challenging problem with *McCorkill* is that it may be overbroad. That is so because this gift, uniquely, was invalidated even though it involved an unqualified and absolute transfer of legal and beneficial title. As noted above, all previous cases in which the doctrine of public policy was applied involved terms embedded in the granting document.

Fixing on such stipulations is important for several reasons. Such terms expressly recite the discriminatory preferences and thereby provide cogent proof of the predilection. The stipulations also give the stated preferences teeth, for failure to comply can have legal consequences. Moreover, as an incidental effect, a focus on such stated terms will necessarily limit the number of cases in which challenges can be brought; the litigation floodgates do not open.

However, those elements are not necessary here. The racist preferences are found memorialized in the published works of the donee. Compelling compliance is also not an issue. The extreme nature of the organizations' ethos provides another limiting feature, just as the recitals found in the Leonard Foundation Trust have served to do in the follow-on scholarship cases. [38] In the *Leonard* case, the majority in the Court of Appeal acknowledged that there were many scholarships tenable at Canadian schools that contained discriminatory provisions. The Court deliberately refrained from considering the impact of its holding on subsequent challenges, adding that the Leonard Trust was "hopefully[] unique." [39] Twenty-five years later, it would appear that the floodgates have not opened. On the contrary, judicial restraint has been exercised.

Nevertheless, questions remain. A group such as the National Alliance may also stand for more than acute racial bigotry. It may genuinely alter its ideology: is it to be forever ineligible to receive bequests? Other groups, such as Greenpeace have pursued their goals in illegal ways. Are they now unworthy heirs?

Despite these issues, there seems something absolutely correct about the holding in *this* case. As mentioned earlier, it is now a criminal offence to provide financial support to a terrorist group. Those convicted are liable to be imprisoned for up to 10 years.[40] Hence, not only is proprietary freedom compromised entirely by this law, but so may also personal freedom be denied. Courts look to legislation *in pari materia* for guidance as to the current state of public policy. It operates to complement extant statutory and other provisions: to fill gaps where necessary. Returning again to the *Leonard Foundation* case,[41] the *Ontario Human Rights Code* was considered relevant in determining the current state of public policy. The *Code* was not seen as creating a sealed list of prohibited forms of private discrimination. Rather, the doctrine of public policy was invoked to supplement the legislated prohibitions. Here, the *Criminal Code* provisions serve the role that the *Human Rights Code* played in *Leonard*. Some transfers — those to terrorist groups — are criminal. Other gifts, such as that in the instant case, are merely invalid. These are rationally calibrated responses.

Further, in my view, Grant J. does provide adequate parameters to constrain the law in a way that captures only the most egregious situations, that is, gifts in which the harm "is substantially incontestable".[42] Building on the reasoning of Justice Grant, the following two-prong test is suggested as a means of confining the application of public policy when unqualified gifts are involved. A gift should be invalidated if both of the following elements are found to exist:

1. At the time the gift takes effect, a core and substantial aim of an organization is to pursue a policy that manifestly violates extant Canadian public policy; and,

2. The donee has pursued those policies using illegal means.

A group such as the National Alliance may advocate a number of goals; some of these may satisfy that test, others may not. For instance, the Alliance is vehemently opposed to Mexican immigration into the United States. At some point, it might decide to devote money to establishing soup kitchens for the poor. Neither of these actions triggers the first test, but neither should these acceptable or laudatory actions necessarily insulate a gift from attack. The question to be determined is whether or not the manifestly objectionable policies reflect a core value of the group.

E. Conclusion

Reuben Wells Leonard wanted to leave his mark on Canada, in part through his privately endowed scholarship program. In the end he succeeded, but not in the manner to which he aspired. His discriminatory trust led to a change in the law that now invalidates trusts such as his. That was his unforeseen legacy.

As with Colonel Leonard, Harry McCorkill and the National Alliance may have served the ends of justice unwittingly. Its hateful rhetoric not only has deprived the Alliance of significant financial support, but it has contributed to the law aimed at eliminating pernicious acts of bigotry and hatred. This is a welcome, if not problem-free, development.

Footnotes

* Professor of Law, University of Alberta. I am grateful to Eric Adams for his helpful comments.

1 2014 NBQB 148, 2014 CarswellNB 425. The judgment also appears in this volume at 41 *ff.*

2 *McCorkill v. McCorkill Estate*, 2013 CarswellNB 433, 91 E.T.R. (3d) 324. For other interlocutory proceedings, see *McCorkill v. McCorkill Estate*, 2013 CarswellNB 761, 2013 NBQB 317; *McCorkill v. McCorkill Estate*, 2013 CarswellNB 754, 2013 NBQB 419; *McCorkill v. McCorkill Estate*, 2013 CarswellNB 753, 2014 NBQB 10, leave to appeal refused: 2014 CarswellNB 56, 1079 A.P.R. 386 (C.A.).

3 *Supra* note 1, at para. 48.

4 *Id.* at para 56.

5 *Id.* at para. 62.

6 *Id.* at paras. 89, 90.

7 See further N.M. Tarnow, "Unworthy Heirs: The Application of the Public Policy Rule in the Administration of Estates" (1980) 58 Can. Bar Rev. 582.

8 *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.02. See also s. 83.03.

9 For an argument in favour of extending the category of unworthy heirs to encompass other acts of wrongful behaviour toward the testator, see E.G. Hosemann, "Protecting Freedom of Testation: A Proposal for Law Reform", 47 U. Mich. J.L. Reform 419 (2014).

10 *Fender v. St. John Mildmay*, [1937] A.C. 1 (H.L.) at 5 (*per* Lord Atkin), quoted with approval in *Re Millar*, [1938] S.C.R. 1, 1937 CarswellOnt 108, at para. 15

11 See generally S. Grattan & H. Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) 50 McGill L.J. 511.

12 1945 CarswellOnt 62, [1945] 4 D.L.R. 674 (H.C.). See further B. Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014) at 407-10; B. Ziff, "Bumble Bees Cannot Fly: And Restrictive Covenants Cannot Run", in A. Smit & M. Valiante, eds., *Private Property, Planning, and the Public Interest* (Vancouver: U.B.C.Pr., forthcoming).

13 *Noble v. Alley*, 1949 CarswellOnt 47, [1949] O.R. 503 (C.A.).

14 *Id.* at para. 28.

15 *Id.* Aylesworth J.A. concurred with Roberston C.J.O.

16 *Re Noble and Wolf*, [1951] S.C.R. 64, 1950 CarswellOnt 127.

17 See, *e.g.*, *Land Title Act*, R.S.B.C. 1996, s. 222(1), which provides: "A covenant that, directly or indirectly, restricts the sale, ownership, occupation or use of land on account of the sex, race, creed, colour, nationality, ancestry or place of origin of a person, however created, whether before or after the coming into force of this section, is void and of no effect." Such covenants continue to come to light within British Columbia land titles: see "Vancouver real estate titles reveal city's racist history,", online: <www.cbc.ca/news/canada/british-columbia/vancouver-real-estate-titles-reveal-city-s-racist-history-1.2747924>. Human rights codes typically also restrict discrimination in the renting or selling property: see, *e.g.*, *Re Peach Estate*, 2009 NSSC 383, 2010 CarswellNS 29.

18 *Canada Trust Co. v. Ontario Human Rights Commission*, 1990 CarswellOnt 486, 74 O.R. (2d) 481 (C.A.).

19 For more on Colonel Leonard's beliefs and their influence on his trust, see B. Ziff, *Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust* (Toronto: U.T.P. & Osgoode Society for Legal History, 2000).

20 *Canada Trust Co. v. Ontario (Human Rights Commission)*, 1987 CarswellOnt 651, 27 E.T.R. 193 (H.C.).

21 *Id.* at paras. 22*ff.*

22 *Supra* note 18, at para. 39. *Cf. Kay v South Eastern Sydney Area Health Service*, [2003] NSWSC 292.

23 The recitals at issue in *Leonard* were not part of the 1916 and 1920 iterations of the Leonard Foundation Trust

24 1996 CarswellPEI 98, 139 D.L.R. (4th) 746 (T.D.).

25 *Id.* at para. 13 (*per* MacDonald C.J.T.D.).

26 *University of Victoria Foundation v. British Columbia (Attorney General)*, 2000 CarswellBC 529, 2000 BCSC 445.

27 See further Grattan & Conway, *supra* note 11, at 522*ff.*

28 [1976] A.C. 397 (H.L.).

29 *Murley Estate v. Murley*, 1995 CarswellNfld 143, 130 Nfld. & P.E.I.R. 271 (T.D.).

30 1996 CarswellOnt 317, [1996] O.J. No. 375 (C.A.).

31 919 N.E.2d 888 (Ill.S.C. 2009), reversing 891 N.E.2d 549 (App.Ct. 2008).

32 After all, one is allowed to make a gift to one religion based on the belief it is the only legitimate faith, even if every other religion receives nothing. Such a donation may even be eligible for a tax deduction.

33 *Supra* note 18.

34 See further D. Horton, "Testation and Speech", 101 Geo. L.J. 61 (2012).

35 There is another instance in which a distinction is drawn between the validity of testamentary and *inter vivos* directions. A will dictating that a property be destroyed may be found to be in violation of public policy where the direction serves no valid function, even though that same action could have been lawfully undertaken at the whim of that same owner while alive: see *e.g.*, *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo.App. 1975). See also *Will of Pace*, 400 N.Y.S.2d 488 (Surr. 1977). See generally L.H. Strahilevitz, "The Right to Destroy", 114 Yale L.J. 781 (2005).

36 *Supra* note 1, at para. 74.

37 *Supra* note 18.

38 See the text accompanying notes 24 to 26, *supra*.

39 *Supra* note 18, at para. 42 (*per* Robins J.A.).

40 *Criminal Code*, R.S.C. 1985, c. C-46, s. 83.02. See also s. 83.03.

41 *Supra* note 18.

42 *Fender v. St. John Mildmay*, *supra* note 10, at 5 (*per* Lord Atkin).

TAB 14

Date: 20010227
Docket: 9903-0412-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE McCLUNG
THE HONOURABLE MADAM JUSTICE HUNT
THE HONOURABLE MR. JUSTICE BERGER

---

01 065 096

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A. 1980, c. L-5

AND IN THE MATTER OF THE LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

HALF MOON LAKE RESORT LTD.,
APPLE AUCTION LTD., and BRIAN LOVIG

Appellants (Respondents)

- and -

STRATHCONA COUNTY

Respondent (Applicant)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE J. A. AGRIOS
Dated June 29, 1999
Filed September 3, 1999

Docket: 0003-0132-AC/0003-0133-AC

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A. 1980, c. L-5

AND IN THE MATTER OF THE LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

STRATHCONA COUNTY

Appellant (Applicant)

- and -

HALF MOON LAKE RESORT LTD., APPLE AUCTION CORPORATION OPERATING A BUSINESS UNDER THE FIRM NAME AND STYLE APPLE AUCTION LTD., and BRIAN LOVIG

Respondents (Respondents)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MADAM JUSTICE M. T. MOREAU
Dated March 10, 2000
Filed April 3, 2000

Docket: 0003-0296-AC

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT*, S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A. 1980, c. L-5

AND IN THE MATTER OF THE SALE OF LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

HALF MOON LAKE RESORT LTD., and BRIAN LOVIG

Appellants (Respondents)

- and -

STRATHCONA COUNTY

Respondent (Applicant)

- and -

APPLE AUCTION LTD., OPERATING A BUSINESS UNDER THE FIRM NAME AND STYLE APPLE AUCTION LTD.

Not Party to the Appeal

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE K. G. RITTER
Dated May 11, 2000
Filed June 14, 2000

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUNT
CONCURRED IN BY THE HONOURABLE MR. JUSTICE McCLUNG
AND CONCURRED IN BY THE HONOURABLE MR. JUSTICE BERGER

COUNSEL:

M. J. McCabe
K. L. Becker
For the Appellants

B. A. Sjølie
J. S. Grundberg
For the Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUNT

[1] A company owned a large tract of land which, for several decades, was operated as a campground. The company advertised an event at which it proposed to auction individual campsites pursuant to a form of contract. The local municipality obtained an interim injunction restraining the holding of the auction because the company had not obtained permission to subdivide its property. The company then developed two additional forms of contract pursuant to which it proposed to dispose of interests in its property. This appeal concerns the validity of the contracts in light of s. 95(1) of the *Land Titles Act*, R.S.A. 1980, c. L-5 ("*LTA*"). It also raises questions about the interaction between s. 95(1) and Part 17 of the *Municipal Government Act*, S.A. 1994, c. M-26.1 ("*MGA*").

[2] I conclude that all three contracts are invalid but that the first chambers judge should not have awarded solicitor-client costs against the company. Thus I would allow the appeal in part.

BRIEF BACKGROUND

[3] Although four appeals were filed, oral argument focussed on the two that concern the validity of the contracts and whether solicitor-client costs should have been awarded against the Appellants in the first decision considered here (Appeal 9903-0412). Since the parties agreed that the matters raised in the other two appeals (0003-0132/0003-0133) were moot or would be rendered moot by this Court's decision, these Reasons concentrate on the former issues. There is a thorough examination of the facts in the second chambers decision considered here (Appeal 0003-0296): [2000] A.J. No. 615.

[4] The Appellant Lovig is the president of the Appellant Half Moon Lake Resort Ltd. ("Half Moon"). Half Moon owns about 139 acres ("the Lands") located in Strathcona County ("County"), which Lands are subject to the jurisdiction of the Respondent County. Under the relevant land use by-law, permitted uses for the Lands include campsites, outdoor amusement establishments and outdoor participant recreation. The Lands contain over 200 campsites and have been operated as a campground and dude ranch for several decades. Amenities such as boating, equestrian and miniature golf facilities are found on the Lands.

[5] Half Moon advertised a public auction at which it proposed to dispose of interests in the Lands pursuant to a form of contract ("the First Contract"). In its advertising, Half Moon claimed to have obtained subdivision approval. This was not true, but Half Moon had registered a plan of survey at the Land Titles Office.

the Lessees have covenanted in the Third Contract to comply with municipal laws, if they do not, the recourse of the County would be to the Lessor. The evidence is that the County would deal with the registered owner, namely Half Moon (A.B. 36). But Half Moon has delegated its rights to the Tenants' Association, which does not own the Lands. Such a problem does not arise in the case of a condominium association (after which the Association is patterned) because such an association is itself an owner which is obligated to comply with planning laws. Most leases do not delegate the enforcement of their provisions to the lessees themselves. Thus, contrary to the Appellant's argument, there may be a degree of planning mischief in the Third Contract. This is an additional reason for characterizing it as a sale prohibited by s. 95(1).

[46] I recognize that owners may deal with their property as they see fit, subject to valid legislation. Indeed, this principle is enshrined in s. 617 of the *MGA*, which describes the purpose of its planning provisions. Not every long-term lease of property will be characterized as the sale of a lot. But wherever lies the line between a lease and the sale of a lot, for the above reasons it has been crossed by the Third Contract. The second chambers judge correctly concluded that the contract breaches s. 95(1).

SOLICITOR-CLIENT COSTS

[47] In my opinion, the first chambers judge erred in awarding solicitor-client costs against the Appellants. Costs orders are discretionary and will be interfered with on appeal only if there is a clear, palpable and overriding error: ***Westersund* v. *Westersund*** (1993), 157 A.R. 276 at 278 (C.A.). Notwithstanding this broad discretion and the necessity for appellate deference, it is appropriate to interfere if the trial or chambers judge has committed such a serious error: ***Sidorsky et al.* v. *CFCN Communications Ltd. et al.*** (1997), 206 A.R. 382 (C.A.).

[48] It is clear from the authorities that solicitor-client costs are to be awarded only in rare and exceptional circumstances. ***Jackson and Parkview Holdings* v. *Trimac Industries*** (1993), 138 A.R. 161 at para. 12 (Q.B.). The first chambers judge concluded that solicitor-client costs were justified because of his view that, by employing the Second Contract, the Appellants were flaunting the intent of the interim injunction.

[49] But the terms of the interim injunction order were appropriately precise, prohibiting only the use of the First Contract which was attached as an exhibit (A.B. 123-24). Indeed, this is exactly what the County had sought in its Notice of Motion. The order did not prohibit the use of a contract similar to the First Contract. The County complains, in part, that the Appellants neglected to inform it that they intended to employ a different form of contract. But the injunction order did not require this. Nor does any general legal principle.

[50] While I agree with the first chambers judge that the Second Contract is illegal, there are differences between the two contracts that make the legality of the Second at least marginally more arguable than the First. The Appellants did not act wrongly in testing the limits of s. 95(1) by drafting the Second Contract in terms somewhat different than the First. They were entitled to order their affairs as they saw fit, risking the possibility that a later legal assessment of the Second Contract would characterize it as being contrary to s. 95(1). They flaunted neither the letter nor the spirit of the interim injunction. Thus, they were not guilty of misconduct or blameworthiness to justify an award of solicitor-client costs.

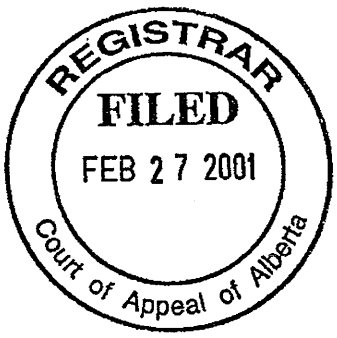
SUMMARY

[51] All three contracts breach s. 95(1) of the *LTA*. Solicitor-client costs, however, should not have been granted by the first chambers judge. Therefore, I would allow the appeal in part.

[52] Although the County sought solicitor-client costs on the appeal, I reject its assertion that the appeal was without merit. The issues raised are complex and important. Therefore, the County should receive only party-and-party costs under the appropriate column on the appeal.

APPEAL HEARD on NOVEMBER 28, 2000

REASONS FILED at EDMONTON, Alberta,
this 27th day of FEBRUARY, 2001



HUNT J.A.

I concur:

McCLUNG J.A.

I concur:

BERGER J.A.

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT*. S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A. 1980, c. L-5

AND IN THE MATTER OF THE SALE OF LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

HALF MOON LAKE RESORT LTD., and BRIAN LOVIG
Appellants (Respondent

- and -

STRATHCONA COUNTY
Respondent (Applicar

- and -

APPLE AUCTION LTD., OPERATING A BUSINESS UNDER THE FIRM NAME AND STYLE APPLE AUCTION LTD.
Not Party to the Appe

REASONS FOR JUDGMENT OF THE COURT

APPEAL NOS. 9903-0412-AC/0003-0132-AC/
0003-0133-AC/0003-0296-AC A.D. 20(

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT* S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A. 1980, c. L-5

AND IN THE MATTER OF THE LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

HALF MOON LAKE RESORT LTD., APPLE AUCTION LTD., and BRIAN LOVIG
Appellants (Responden

- and -

STRATHCONA COUNTY
Respondent (Applica

IN THE MATTER OF THE *MUNICIPAL GOVERNMENT ACT* S.A. 1994, c. M-26.1;

AND IN THE MATTER OF THE *LAND TITLES ACT*, R.S.A 1980, c. L-5

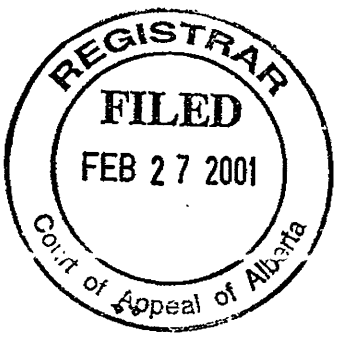
AND IN THE MATTER OF THE LANDS WITHIN THE SOUTH EAST QUARTER OF SECTION 6, TOWNSHIP 52, RANGE 21, WEST OF THE FOURTH MERIDIAN, AND WITHIN THE BOUNDARIES OF STRATHCONA COUNTY

BETWEEN:

STRATHCONA COUNTY
Appellant (Applic

- and -

HALF MOON LAKE RESORT LTD., APPLE AUCTION CORPORATION OPERATING A BUSINESS UNDER THE FIRM NAME AN STYLE APPLE AUCTION LTD., and BRIAN LOVIG
Respondents (Responde



180.

TAB 15

Court of Queen's Bench of Alberta

Citation: Babchuk v. Kutz, 2007 ABQB 88

Date: 20070209
Docket: 0110 01054
Registry: Red Deer

07 045 148

Between:

Clayton Dean Babchuk

Plaintiff

- and -

Cheryl Kutz, Karen Lopes and Carole Canino

Defendants

Reasons for Judgment
of the
Honourable Madam Justice A.B. Moen

Introduction

[1] There are two applications before the Court: first, an application by the successful Executor of the Babchuk Estate (the "Estate") for double costs from July 2001 up to and including the trial, to be paid by the challengers of the Will - the daughters of the testator, Fred Babchuk (the "Testator"); and second, an application by the daughters for their solicitor/client costs to be paid from the Estate.

[2] The daughters of the Testator unsuccessfully contested the Testator's Will on the basis that he lacked capacity at the time he made his Will which will gave all of his property to his son,

Clayton, the Executor. Judgment in the matter of Babchuk Estate was given June 8, 2006, after a three-week trial in September, 2005. The Judgment sets out my reasons in full.

[3] I shall not canvass the facts in any detail as they are set out in the Judgment. The Estate is worth at least $1.6 million and the Defendants say their costs are about $300,000.00.

[4] The issues in this matter are:

1. Should the Estate pay the unsuccessful daughters their costs?
2. If the Estate is ordered to pay costs to the unsuccessful party, on what basis should those costs be awarded?
3. If the unsuccessful party is required to pay costs, on what basis should those costs be awarded?

Discussion

[5] The Court has authority to award costs in its own discretion, but that discretion must be exercised judicially: ***Dansereau Estate v. Vallee***, 2000 ABQB 288 at para 16; ***Popke v. Bolt***, 2005 ABQB 861 at para 19; ***Seward v. Seward Estate*** (1997) 201 A.R. 77 (Q.B.) at para 9. The usual rule is that the unsuccessful party bears the costs. However, in an estate matter the unsuccessful party sometimes has its costs paid by the estate.

[6] The policy reason why the unsuccessful party bears the burden of the costs is to encourage litigants to settle their disputes, that is, to discourage litigation. Litigation is very expensive and often depletes assets. The competing policy reason why the estate sometimes pays the costs of both litigants is that society has an interest in ensuring only valid wills are probated. Sometimes litigation is necessary to ensure that the court supervises the probity of a particular will: ***Popke v. Bolt***, at para 22 and 23.

1. Should the Estate pay the unsuccessful daughters' costs?

[7] It is not automatic in probate litigation that the estate must pay costs: ***McCullogh Estate v. Ayer***, [1998] A.J. No. 111 (C.A.). Rather, the modern approach to fixing costs in estate litigation is to scrutinize the litigation carefully to restrict unwarranted litigation and protect estates from being depleted by such litigation: ***McDougald Estate v. Gooderham*** (2005), 255 D.L.R. (4th) 435 (Ont. C.A.).

[8] There are a number of factors that must be considered when determining whether the court should award costs to an unsuccessful party in estate litigation:

a. Did the testator cause the litigation?
b. Was the challenge reasonable?
c. Was the conduct of the parties reasonable?
d. Was there an allegation of undue influence?

e. Were there different issues or periods of time in which costs should differ?
f. Were there offers to settle?

a. Testator "causing" the litigation

[9] If the testator or a beneficiary defending the will has caused the litigation through his or her conduct or the manner in which he or she left the testamentary papers, the costs are properly paid out of the estate. However, there must be a substantial link between the testator or beneficiary's actions and the actual need for litigation before finding that the testator or beneficiary has caused the litigation for the purposes of awarding costs: ***Scramstad v. Stannard***, [1997] A.J. No. 302; ***Seward Estate***, *supra*; ***Re Sinigoj Estate*** (2000), 269 A.R. 30, 2000 ABQB 549; ***Syrota v. Clark Estate*** (1991), 77 Man. R. 250 (Q.B.), aff'd on other grounds (1992), 83 Man. R. (2d) 21 (C.A.).

[10] There may be a substantial link where the testator's intentions require interpretation such that "somebody had to bring the application": ***Dansereau Estate***, *supra*. The issue in the case here was whether the Testator had testamentary capacity when he executed his only will in hospital days before he died. I found at trial that he had testamentary capacity.

[11] Nevertheless, for the reasons that were set out in the Judgment, the Testator by his actions did contribute to the necessity of the litigation. He did not execute a will while he was well and not in the hospital. As I found, he knew well the consequences of not making a will. He knew what he wanted to do for years. By his procrastination, he ended up making a will in hospital when he was very ill. The circumstances surrounding the making of the will led to an understandable challenge by the daughters of the Testator.

[12] However, the Testator was consistent throughout his life about his wishes. The evidence established that the Testator had not led his daughters to believe that they would inherit. Quite the contrary. The bulk of the evidence demonstrated clearly that the Testator did not want his daughters to receive any of his estate because they had "abandoned" him and had turned to a religion of which he disapproved. Therefore, the Will of the Testator was consistent with his wishes as stated for many years prior to his death.

b. Reasonable Challenge

[13] If there is a sufficient and reasonable ground for a challenge, the losing party may properly be relieved from the costs of his or her successful opponent: ***Seward Estate***, *supra*. It is reasonable to make such a challenge where there are suspicious circumstances, such as a will made by a testator with deteriorating mental health: ***Stevens v. Crawford***, 2000 ABQB 305; ***Scramstad v. Stannard***, *supra*; ***Howse v. Shapter*** (1998), 525 A.P.R. 30 (Nfld. S.C.T.D.); ***Syrota v. Clark Estate***, *supra*.

[14] Here the challengers suggested two allegations: undue influence and lack of testamentary capacity.

[15] The main issue was lack of testamentary capacity which the Executor accepted before the trial as a real issue to be tried. Therefore, the Plaintiff/Executor set out to prove testamentary capacity with the Defendant daughters responding. This procedure agreed by the parties shortened the trial time and focussed the only real issue - testamentary capacity. The only persons likely to bring this issue to the court were the daughters of the Testator.

[16] As set out above and in the Judgment, the circumstances surrounding the instructions for and execution of the Will were potentially suspicious and therefore, *prima facie*, the challenge was reasonable.

[17] However, if at the trial the allegations prove to be completely unfounded and the associated litigation is therefore unreasonable, costs should not be awarded to the unsuccessful challenger: ***Re Sinigoj Estate***, *supra*; ***Popke v. Bolt***, *supra*. An estate should not be diminished in size because a party pursues a claim without merit, and so as in other litigation, a party who brings a claim against an estate with no substantial merit will have to pay the costs: ***Jumelle v. Soloway Estate*** (1999), 142 Man. R. (2d) 119 (C.A.).

[18] Although in this case I found that the Testator's intentions were clear and were reflected in his Will, nevertheless, the circumstances of the making of the Will required scrutiny as to the Testator's capacity. It is, therefore, understandable that the daughters initially challenged the Will.

[19] However, allegations made in light of overwhelming evidence to the contrary is indicative of ulterior motives and revenge, and can result in the party making the allegations having to personally pay substantial indemnity costs to the successful party: ***Fair v. Campbell Estate***, 2002 Carswell Ont 5482 (S.C.J.).

[20] Here, the daughters should have known that their father intended not to leave them anything in his Will. In fact, some of their evidence suggested that they knew this because their father had said so to one or more of them.

[21] Aside from the medical evidence, the facts in this case as set out in the Judgment suggested that it was unreasonable for the daughters to challenge the Will. The medical evidence suggested that the Testator did not have capacity when he executed his Will. However, as the other evidence unfolded, the challengers ought to have understood that the Testator had executed a will that met his intentions. At that point, and before trial, they ought to have considered compromise. I discuss compromise later in these reasons.

[22] One piece of evidence that would have been produced as the document production of the Executor, was the paper in the Testator's handwriting that suggested that at one time he considered leaving the daughters a small amount of money each, to be paid by the Estate over a long period of time - $5,000.00 each to be paid out in the amount of $100.00 per month. This

was a small amount of money indeed and the most that the Testator would have left them given his statements to his friends and to the daughters in his lifetime.

[23] Altogether, I find that the challenge by the daughters was not initially unreasonable given the circumstances at the hospital, but that as time went on in the litigation it should have become clear to them that their father did not intend to leave each of them an equal share of his Estate with his son, Clayton.

c. Conduct of the parties

[24] Thwarting the progression of the action through arbitrary conduct, bad faith, or by pursuing a position without any substantive basis can be a basis for being ordered to pay costs to the other party: ***Popke v. Bolt***, *supra*. The challengers' conduct could disentitle them from receiving any costs from the estate, notwithstanding that there may initially have been a good reason to investigate the will: ***Riva v. Robinson*** (2000), 263 A.R. 389, 2000 ABQB 391.

[25] In order to determine if costs should be awarded from the Estate, I must review the steps taken by the parties. These steps are set out in the materials provided by the Defendants.

[26] The first challenge to the Will by way of a challenge to the grant was made by the daughters on May 16, 2001. The matter finally came to trial in September, 2005, a full four years later. On June 25, 2001, Clayton Babchuk was ordered to submit the Will for formal proof. The Statement of Claim was filed by him on June 28, 2001. In July, 2001, Formal Offers to Settle were made by both parties and the Statement of Defence was filed. By end of October of that same year, Affidavits of Records had been filed. Examinations for Discovery were conducted in December, 2001, and January, 2002.

[27] Then the action appeared to stall. Nothing was done until October, 2002, when a Credit Union applied to limit Clayton Babchuk with respect to the payment or transfer of monies from any account of the Estate.

[28] The Defendants then attempted to obtain evidence from the hospitals and medical staff. Legal counsel for the hospitals took the view that it was necessary for the Defendants to get an order of the court before the hospitals revealed anything. This is not a delay attributable to the parties but to a third party. The motion was put in abeyance by the parties because there were ongoing settlement discussions between the parties until November, 2003, when those discussions broke down.

[29] The order for discovery of the hospitals and the medical personnel was given on January 12, 2004. However, the interviews of hospital staff and doctors did not happen until June of that year. In the meantime the Defendants applied successfully to remove Clayton Babchuk as Limited Administrator of the Estate. At that same application the Court ordered Clayton Babchuk to answer questions he refused at examinations for discovery in 2001 and 2002. At that time Clayton Babchuk was without counsel (through no fault of his own - his counsel was

unable to continue acting as counsel) his counsel having ceased to act February 10, 2004. He was without counsel until November, 2004. In the meantime, the Defendants continued to interview medical staff and the lawyers involved in the making of the Will. Clayton Babchuk was also examined without counsel.

[30] In October, 2004, the Defendants requested a pre-trial conference, which was held on November 30, 2004. The matter went sideways when the new counsel for Clayton Babchuk initiated process for a civil jury trial. Having abandoned this, the Plaintiff and Defendants filed a Certificate of Readiness February 5, 2005. The pre-trial conference was held in April, 2005, and the trial was held in September, 2005.

[31] From this description of the process, the matter proceeded at a pace that was not unreasonable. It appears that both parties could have moved it along more expeditiously, but I can find no fault on the part of either the Plaintiff or the Defendants. The matter was complicated, there were many witnesses - as evidenced in the Judgment - and both parties had a change in counsel which can inevitably slow matters down.

[32] Therefore, I cannot find that there was any arbitrary conduct, bad faith, or pursuit of a position without any substantive basis on the part of either party. No doubt there were times on the part of both parties that the parties could have been more reasonable - this is the nature of litigation - but, nothing that meets the test set out in the cases.

[33] However, there was a great deal of evidence led by the daughters about the Executor, Clayton Babchuk, during the trial which attempted to paint him in a bad light before the Court. This evidence was unnecessary and prolonged trial. I discuss their allegations of undue influence in the next section of this judgment.

d. Allegations of undue influence

[34] If an allegation of undue influence or fraud is made in situations where there is very little or no basis for such an allegation, it may be appropriate to order the unsuccessful party to pay costs: ***Scramstad v. Stannard***, *supra*; ***McCullogh Estate v. Ayer***, *supra*. In situations where a party would likely be awarded costs for a reasonable challenge on the issue of testamentary capacity, an unfounded allegation of undue influence can result in that party failing to recover any costs, and instead paying costs to the successful party: ***Stevens v. Crawford***, *supra*.

[35] The Statement of Defence (of the daughters) suggested that there was an allegation of undue influence. The Statement of Defence states:

> 16. Further, there are suspicious circumstances surrounding the preparation and execution of that Document (the last Will and Testament) including but not limited to the following:

a. The Plaintiff, and not the Deceased, contacted a lawyer to prepare the Document;
b. The Plaintiff, and not the Deceased, provided the lawyer who prepared the Document with the names of the family members of the Deceased;
c. The Plaintiff was present in the Deceased's hospital room at the time of the signing of the Document;
d. The Document names the Plaintiff as the sole executor and sole beneficiary of the estate of the Deceased;
... (the other suspicious circumstances related to testamentary capacity).

[36] Suspicious circumstances can lead to a conclusion of undue influence or of lack of testamentary capacity. Taken together the above four statements about suspicious circumstances could be taken by the Executor, Clayton Babchuk, to point to some impropriety on his part, especially undue influence.

[37] The allegation of undue influence by Clayton Babchuk was specifically abandoned by the daughters at the outset of the trial, although evidence was led on each of the points above by the daughters. Counsel for the Defendants on the first morning of trial advised the Court that the only issue before the Court was the Testator's mental capacity at the time he executed the Will and gave instructions for its execution, and that undue influence was not at issue.

[38] The Plaintiff said at this cost hearing that he believed up to the first day of trial that they would have to meet the allegation of undue influence. The Defendants said that it was clear from the pre-trial conferences that undue influence was not an issue. However, they could not point to a specific document sent to the Plaintiff withdrawing that allegation, nor did the Defendants amend the Statement of Defence to remove the statements set out above that amount to an allegation of undue influence.

[39] The events leading up to the trial could have caused confusion on the part of the Executor as to whether he had to meet the charge of undue influence.

[40] I find that the pleadings contained what amounts to allegations of undue influence. However, the Statement of Defence did not use the words "undue influence".

[41] At the pre-trial conferences of November 30, 2004, and April 25, 2005, the issues set out in the pre-trial conference memorandum did not identify undue influence as an issue for the trial. Only testamentary capacity was identified. Counsel for the Plaintiff was present at both of those pre-trial conferences.

[42] Therefore, although the pleadings suggested that undue influence was at issue, the Plaintiff did have ample time to clarify whether this was an issue at the trial and the Defendants also could have amended their pleadings to be clear.

[43] I did not have any specific evidence that the Plaintiff was put to unnecessary expense in preparing for this allegation.

*e. **Different costs for different issues or certain time periods***

[44] The court may make separate and distinct decisions regarding costs with respect to individual issues related to the litigation. If an unsuccessful challenger makes one allegation that is reasonable while another allegation is completely unfounded, a different award of costs could be made for the costs incurred with respect to each allegation: ***Re Olenchuk Estate*** (1991), 43 E.T.R. 146 (Ont. Gen. Div.).

[45] Further, it is possible to make different cost orders with respect to different periods of time. Therefore, if a challenge was reasonable up to a certain date, and unreasonable thereafter, a challenger could be awarded costs or merely bear his or her own costs before that date and be required to pay costs to the other side after that date: ***Popke v. Bolt***, *supra*; ***Bahry v. Zytaruk***, 2002 ABQB 858.

[46] The Defendants in their materials claim all costs relating to the Estate and this challenge. They changed counsel. They say that the account of their first counsel has been taxed at $64,081.13. The Defendants have been billed and paid present counsel about $89,000.00 in fees and disbursements. In addition, present counsel says that they have outstanding legal fees of approximately $143,000.00 without GST. This amount does not include travel costs. The total for the Defendants' legal fees approximates $296,000.00. It appears that these costs cover all matters reading to the challenges to the Estate.

[47] The Plaintiff has not presented the Court with his costs as he claims costs from the Defendants on a principled basis rather than specifics. Further, his costs, unless paid by the unsuccessful parties, will inevitably come from the Estate as he is the beneficiary.

[48] First, I must bear in mind that there are two files before the Court - this legal challenge and the estate file. This trial related to the challenge to the capacity of the Testator, not to issues relating to the administration of the Estate. Some of the amounts claimed by the Defendants must apply to the Estate file and are not legitimately part of the costs for this trial. I do not have many specifics of this, but any amounts to which they may be entitled in this trial must relate directly to this challenge and not to issues in the surrogate matter. If there are costs for applications or other matters in the surrogate matter, those costs must be dealt with by the court hearing the surrogate matter and making the orders.

[49] Second, I note that there have been many applications (which include applications made in the surrogate matter) for which costs orders have already been made. Those orders of the Court must stand as is and the legal work and disbursements on the part of the Defendants or Plaintiff relating to those applications cannot be included in this costs award even if the costs award did not indemnify the successful party, unless the orders specifically say that the costs are in the cause or the orders are silent as to costs.

[50] The Defendants say that there were unnecessary steps taken by the Plaintiff that cost the Defendants in legal fees and disbursements. The Defendants cite the Plaintiff's application for a civil jury trial that was subsequently abandoned by the Plaintiff. That issue directly relates to this trial.

[51] The Defendants also cite the application that removed Clayton Babchuk as administrator of the Estate. That matter is in the surrogate file and does not relate to this trial.

[52] Where there is a consent judgment and the issue of costs is not dealt with, such as the consent order dealing with the examination of the hospital staff and the doctors, those costs cannot be included for this trial. I do not have the specifics of that work.

[53] The conclusion that I have drawn from all of this is that the amounts set out above by the Defendants are probably inflated, that is, those amounts cover all matters in the two actions and matters for which costs have been specifically awarded.

[54] The only costs that are eligible for this case are: preparation of pleadings, preparation of the Affidavit of Records, examination for discovery, preparation of undertakings, the interlocutory motion regarding a civil jury, preparation for and attendance at trial and the concomitant disbursements - except travel for Defendants' counsel.

[55] On the issue of travel costs for counsel for the Defendants, I specifically disallow those costs as the Defendants could have retained counsel in Red Deer. There was no evidence before me to suggest that such counsel were not available.

[56] Costs that would be eligible for a costs award in this case are costs directly related to preparation for trial and the necessary steps leading up to trial. All costs relating to matters in the Estate file such as removing the Plaintiff from his functions as an Executor are costs in the surrogate matter and not eligible for a costs award here.

[57] Further, I note that the Formal Offers to Settle were made in July, 2001, and by October of that same year Affidavits of Records had been filed. Therefore, it must have become clear to the Defendants by early 2002 that their father had not intended to leave them any part of his estate. I refer again to the document described above which set out the only indication that the Testator would leave them each $5,000.00.

[58] I understand the argument of the Defendants of that I must make something of the fact that the Testator knew the consequences of not making a will and nevertheless did not do so. The Defendants suggest that I should take from this that their father intended that they share equally in the property with their brother. I find that this would be a stretch. The evidence before me was clear that he did not intend to leave money to his daughters.

f. Offers to Settle

[59] I must also consider the effect of Offers to Settle made by both of the parties.

[60] The *Rules of Court* pertaining to compromise apply to surrogate litigation in appropriate circumstances. A party, even in surrogate litigation, who is served with a Formal Offer, is "in greater peril as regards to disposition of costs": ***Bahry v. Zytaruk***, 2002 ABQB 858, at paras 16 and 19.

[61] On July 10, 2001, a not insubstantial offer was made by the Plaintiff, Clayton Babchuk, to the daughters for $210,000.00 inclusive of costs. The Plaintiff was entirely successful at the trial. Therefore, normally Rule 174(2) would apply:

> (2) Where a plaintiff, with respect to the matters specified by him in his offer to settle under Rule 170, recovers a judgment equal to or more favourable than the judgment offered, the judge or the Court of Appeal **shall**, unless for special reason, award the plaintiff double the amount of costs (excluding disbursements) he would otherwise have recovered for all steps in relation to the claim after the service of the offer.
>
> [my emphasis]

[62] In this case the Plaintiff made an early offer – in 2001. A counter offer by the Defendants was made within two weeks of the Plaintiff's offer, which offer was for an equal division of the Estate. Neither offer was accepted and no further offers were made.

[63] In the usual course of litigation, the Plaintiff would be entitled to double party/party costs from the Defendant for all steps taken after the preparation and filing of the Statement of Claim, unless for a special reason. Is there a special reason for the Court to award the Defendants their costs from the Estate? Or, should the Defendants pay the costs of the Plaintiff and should those costs be party/party or double party/party costs?

[64] We must start our analysis from the presumption that the Plaintiff is entitled to double party/party costs payable by the Defendants. This presumption reflects the Rule which is mandatory in its language. Then we must determine if there is a special reason not to follow Rule 174(2) in this case.

[65] The Defendants say that Rule 174(2) should not apply because it was reasonable that they did not accept the offer in the circumstances. The Plaintiff's formal offer was for $70,000.00 per daughter, which offer was considerably higher than anything the Testator has suggested during his lifetime. The Defendants countered with an even split, considerably higher than anything they could have expected to receive from their father. They did not make a reasonable offer in response, early in the litigation, nor did they make an offer later that was reasonable. They each clearly wanted one quarter of the Estate and were not prepared to compromise. In this case, the

Defendants took a risk when they proceeded with the litigation betting that they would defeat the Will and get the prize.

[66] The only possible special reason in this case was that the daughters were the only ones who were likely to challenge the Will on the basis of testamentary capacity. As I said earlier, given the medical evidence, it was reasonable for the daughters to question the Will. However, I must also address the issue of whether it was reasonable for them to carry this matter to trial and through trial. Given the clear evidence that the Testator did not want to leave his estate to his daughters and a generous offer made by the Plaintiff early in the litigation, it was not reasonable for them to carry the litigation all the way to and through trial.

[67] This factor weighs in favour of the Defendants paying double party/party costs.

[68] In summary, the factors in favour of the Defendants paying double party costs include success of the Plaintiff in the litigation and the application of Rule 174(2) which is mandatory in its language.

[69] A special reason in favour of the Defendants not paying double party costs is that the only parties likely to bring to court the doubt about the testamentary capacity of the Testator were the Defendants. That challenge I have found was not without merit because the doctors who treated the Testator doubted his capacity.

g. Other Considerations

[70] It is possible for a court to order an estate to pay the costs of an unsuccessful party despite the result that the successful party would ultimately bear a disproportionate share of the costs: ***Fuller Estate v. Fuller***, 2004 BCCA 218. In that case, the testator's children successfully challenged a will for lack of testamentary capacity. The previous will that thereby became valid awarded 80% of the estate to those three children. The party defending the validity of the will was awarded costs from the estate, and the children appealed this award by arguing that they would bear a disproportionate share of the costs as the primary beneficiaries. However, the Court of Appeal found that since the executor had properly brought the will for resolution of the testamentary capacity issue, the award of costs was tenable in the circumstances.

[71] ***Fuller Estate***, *supra*, can be distinguished from this case. In the ***Fuller Estate*** case the successful parties were the challengers and the executor defended. It is the responsibility of the executor to defend challenges to the estate. He is the only one who can legally stand in to establish the validity of the will. In many cases the executor is also the major beneficiary which muddies the waters. In our case, Clayton Babchuk defended the validity of the Will. He put it forward to the court for formal proof as he was obligated to do.

[72] The courts have found that the size of the estate is relevant, such that if an unsuccessful challenge is made in a situation where the executor is put to an expense that reduces the funds available to a beneficiary that is not immaterial in relation to the value of the estate, there should

be significant indemnification: ***Re Sinigoj Estate***, *supra*. This led the court in that case to award party/party costs to the estate from the unsuccessful challenger.

[73] In this case, the costs claimed by the Defendants is in an amount of about $300,000.00. That would substantially decrease the amount of the estate available to Clayton Babchuk. No evidence was put before me as to the approximate value of the Estate, but the application for probate, NC 7 in the Surrogate Court file valued the assets at the time of Fred Babchuk's death at about $1.6 million. The Estate is worth more than that, however, as there were three assets to be ascertained: shares in public and private companies, business interests and other promissory notes and claim. The amount of fees claimed by the Defendants would reduce that by over $300,000.00 if all the fees were to be allowed. Further, the Executor, Clayton Babchuk was obligated to defend the Estate. Those costs will be born by him as the only beneficiary of the Estate.

2. If the Estate is ordered to pay costs to the unsuccessful party, on what basis should those costs be awarded?

[74] Courts have taken different approaches to determining costs where the estate must pay those costs to an unsuccessful party. In some cases, courts simply order "costs" to be paid to the unsuccessful party from the estate, and presumably this implies costs on a party/party basis: ***Scramstad v. Stannard***, *supra*.

[75] Other courts have awarded unsuccessful parties solicitor/client costs from the estate: ***Syrota v. Clark Estate***, *supra*; ***Howse v. Shapter***, *supra*. In making such an award, these cases emphasized that the circumstances of the case led reasonably to an investigation in regard to the will, and therefore it could not be considered unreasonable for a person viewing those circumstances to make the challenge.

[76] In some cases, courts will award a lump sum award of costs that they consider to be appropriate compensation. This can involve reducing the amount to reflect the fact that some claims were unwarranted, or that some of the expenses incurred were as a result of their own actions: ***Seward v. Seward***, *supra*.

[77] The Plaintiff characterizes the manner in which the claim was advanced by the daughters as reprehensible and ought to entitle him to additional consideration. Clayton Babchuk points out certain findings I made in the Judgment about the conduct of the sisters [for example, para 212].

[78] There is no doubt from the Judgment that I found instances during the course of the illness and following the death of Fred Babchuk that the daughters acted in a manner which left the impression that they were only interested in the money. Further, the evidence given at the trial by the daughters was generally of a tone to discredit Clayton Babchuk's and Fred Babchuk's character. Insofar as evidence was given by the daughters, I also found that it was helpful to me in determining that Fred Babchuk would not leave anything to them.

[79] I did find that the daughters knew that they were not to be included in the Will. Further, they became aware of the intention of the Testator at one time to leave them $5000.00 each payable at $100.00 per month when they received the documentation from the Executor during the discovery process. Nevertheless, as set out above, there was a formal offer of $210,000.00 which was rejected.

3. If the Defendants are required to pay costs, on what basis should those costs be awarded?

[80] The Plaintiff seeks double party/party costs to be awarded against the Defendant.

[81] Courts often require the unsuccessful party to compensate the successful party by paying party/party costs: ***Dansereau Estate v. Vallee***, *supra*; ***Stevens v. Crawford***, *supra* (here, column 5 costs, based on the size of the estate); ***Re Sinigoj Estate***, *supra* (where party/party costs were paid by the unsuccessful party to the estate).

[82] In other cases where the challenge is found to be completely unreasonable, an award of solicitor/client costs may be made against the unsuccessful party. In ***Popke v. Bolt***, *supra*, the court found that the challenge was initially reasonable, but after a certain date upon further evidence, this was no longer the case. The court ordered the unsuccessful challenger to bear its own costs throughout, as well as paying the solicitor/client costs of the other party from the date on which the challenge became unreasonable onwards. In that case, the conduct of the challenger to the will was particularly reprehensible.

[83] In somewhat similar circumstances, however, a more generous costs award was made to the challenger in ***Bahry v. Zytaruk***, *supra*. Again, the court found that the challenge was reasonable up to a certain date, and no longer reasonable thereafter. The court awarded the challenger his solicitor/client costs out of the estate for the period prior to that date, and ordered him to pay party/party costs to the successful party after that date, with those costs being set off by the solicitor/client costs.

[84] Here, it was initially reasonable for the Defendants to challenge the testamentary capacity of the Testator given the circumstances surrounding the execution of the Will. I have commented unfavourably about the conduct of the daughters in the trial. Further, given the generous offer made by the Plaintiff to the daughters, they ought to have at least made a reasonable counter offer. They prolonged the litigation when it was not necessary.

Conclusion

[85] I find the following:

1. The Testator contributed to the litigation by the way in which he left his estate;
2. The challenge to the Will was reasonable initially given the circumstances around the execution of the Will but became unreasonable after the Defendants had

received the documents;

3. In the reasons above, I addressed specifically the fact that the costs for both parties cover both the issue at trial and a number of other issues relating to the surrogate file. Neither party can claim costs for anything that was not directly related to this trial;
4. The evidence at trial that was accepted by this Court was that the daughters could not reasonably expect to receive one quarter of the estate. In fact, their expectations should have been not to receive anything from their father;
5. There was no evidence of bad faith or arbitrary conduct on the part of either party that delayed or hindered the proceedings;
6. The Statement of Defence suggested undue influence on the part of the Plaintiff when the will was made although an allegation was not made directly in the pleadings. Further, I found that the Plaintiff had notice that it was not going to be an issue at trial. Nevertheless, the Defendants lead evidence about this issue;
7. There was considerable time taken in the trial by the Defendants in painting their father, the Testator, and their brother, the Executor, in a very bad light;
8. There was a generous early formal offer made by the Plaintiff which was considerably more than the Defendants received at trial, nor could the Defendants have hoped to have received from their father. In the normal course, such an offer would lead to the unsuccessful party, here the Defendants, paying a double party/party costs to the Plaintiff.

[86] The factors weighing against the Defendants receiving their costs are:

1. Proceeding with prolonged discovery and trial when the Defendants knew or ought to have known that their father would not have left them a part of his Estate in his Will, especially after they received the documents, including the one document which is suggested that he was considering leaving each of the daughters $5,000. Given that the daughters must have known all this and have seen the document when it was produced, they could have accepted the offer of the Executor of the Estate and would have received much more than they could have expected from the will of their father;
2. The Formal Offer after which the Defendants were risking paying double costs; and
3. The suggestion made by the Defendants that the Plaintiff had unduly influenced the Testator when he made his Will; and the amount of evidence led by the Defendants about the character of both the Testator and the Executor/Plaintiff.

[87] The factor weighing in favour of the Defendants receiving costs are: that the Testator made his Will in circumstances which suggested to challenge in the daughters were the only persons who would have made that challenge

[88] The factors weighing in favour of the Executor receiving costs are:

1. He was entirely successful at the trial;
2. He made the Formal Offer early in the litigation which proved to be more than generous;
3. Parties who are successful at trial are generally given their costs at trial and plaintiffs who have made Formal Offers when they are successful at trial are awarded double party/party costs;
4. Although the Statement of Defence did not specifically allege undue influence, nevertheless the pleadings and the evidence at trial put forward by the Defendants purported to impugn the behaviour and character of the Executor/Plaintiff.

[89] Weighing all of these factors, I find that the Defendants must pay the Plaintiff it's costs in the action. I will not award double party/party costs because there was evidence that the Testator was not capable of making a will, such evidence being given by the doctors in the case and it was somewhat reasonable for the Defendants to challenge his capacity.

[90] Finally, only the costs for those applications before the court where costs were not addressed and which related specifically to this trial are eligible costs. Only those costs relating to pre-trial discovery of documents and examinations for discovery are eligible costs. Costs relating to issues in the surrogate matter cannot be included as costs for this case.

Heard on the 8 th day of September, 2006.
Dated at the City of Edmonton, Alberta this 9th day of February, 2007.

A.B. Moen
J.C.Q.B.A.

Appearances:

Kevin M. Sproule
Sproule Macnaughton (Red Deer)
for the Plaintiff

David M. Bickman
Faber Gurevitch Bickman (Calgary)
for the Defendants

TAB 16

Court of Queen's Bench of Alberta

Citation: Serdahely (Estate of), 2005 ABQB 861

05 333 085

Date: 20051122
Docket: ES03 112886
Registry: Edmonton

Court File Number	ES03 112886
Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial District	Edmonton
Estate Name	Rose Ann Serdahely, also known as Rozalia Anna Szerdahelyi
Applicants	Mary Popke, Bernadette (Bonnie) Boykiw
Respondents	Olga Bolt, Paul Haljan

Reasons for Decision as to Costs
of the
Honourable Madam Justice C.I. Johnstone

Introduction

[1] After an eight day trial, and a further application to settle the terms of my Judgment, the only remaining issue is that of costs. It is not surprising, given the history of this matter, that this final issue is hotly contested. The Applicants seek solicitor-client costs and the Respondents request that all costs, including theirs, be paid out of the estate.

[2] Written arguments were filed by counsel for the parties. On the day of the hearing, counsel for the Respondents, Mr. Erler, filed a Notice of Ceasing to Act. As the ten day period prescribed by the *Alberta Rules of Court* had not yet expired, Mr. Erler asked for and was granted leave to withdraw from the record. Paul Haljan then proceeded to act for both himself and Olga Bolt. In their Response to the Applicants' Costs Brief, the Respondents alleged an apprehension of bias on the part of the Court.

Apprehension of Bias

(i) Allegations

[3] On August 28, 2003, Paul Haljan issued a Statement of Claim against the law firm of Nickerson Roberts Holinski and Mercer seeking general and punitive damages for the loss of executor's and solicitor's fees (Action No.: 0303 15661). Mr. Kenneth Nielsen, Q.C. of the Edmonton office of the law firm of Fraser Milner Casgrain LLP was retained by Nickerson Roberts Holinski and Mercer. Mr. John Day, Q.C. is a member of the Fraser Milner Casgrain LLP law firm and my spouse.

[4] I find it appropriate to repeat the allegations made by the Respondents in their Response to the Costs Brief, given the oblique manner in which these were presented:

1. Under Tab 18 the Applicants included a copy of a Statement of Claim issued on August 28, 2003, by Mr. Haljan against the members of the Nickerson Roberts Holinski & Mercer law firm seeking general and punitive damages, Q.B. Action No. 030 315661. In their submission (page 9, paragraph 4) the solicitors for the Applicants refer to this action as relevant and "should be considered by this Honourable Court as factors warranting an award of solicitor and client costs against the Respondents". [emphasis Paul Haljan's] [The Court notes that the quote was taken out of context, as illustrated later in this decision].

2. In the action commenced by Mr. Haljan, the law firm of Nickerson Roberts has been represented by their solicitor and counsel, Mr. Kenneth Nielsen of the firm of Fraser Milner Casgrain LLP, Edmonton Office, who is not appearing on this costs application in the case at bar. Mr. John Day is a partner of the same law firm and a colleague of Mr. Nielsen. He is the spouse of Your Ladyship.

3. Prima facie, the position taken by the Applicants would appear to infer an interest of Your Ladyship in the outcome of the litigation in the case at bar.

4. The Respondents have not had enough time to consider this unusual fact situation and are bringing it to the attention of the Court so that Your Ladyship may consider its legal ramifications on the whole trial, including the award of costs.

5. It may well be that the position of Your Ladyship as the trial judge has been tainted with a bias and prejudice.

[5] At the hearing, the Respondents' position on this issue was even more uncertain. Mr. Haljan did not make an application for my recusal, but rather indicated he was merely alerting me to the fact that there was a possibility of bias and he must review the matter further. He did not want to be placed in the position of being questioned in the future as to why he did not raise this issue. However, he did indicate that if he appeals my decision to the Court of Appeal he would consider it his duty to raise the issue.

[6] Given these comments, it is appropriate for me to determine whether a reasonable apprehension of bias exists calling for my recusal.

(ii) The Test for Bias

[7] The test to be applied in considering whether Mr. Nielsen's representation and my spouse's membership in the Fraser Milner Casgrain LLP firm (he is not a partner with the firm) gives rise to an apprehension of bias was discussed by my colleagues Veit J. in ***Broda v. Broda*** (2000), 285 A.R. 201, 2000 ABQB 948 at para. 20 and Burrows J. in ***Ritter v. Hoag*** (2003), 335 A.R. 185, 2003 ABQB 387 at para. 2 (citing ***Broda***):

> In ***S.(R.D.)*** [[1997] 3 S.C.R. 484], the Supreme Court of Canada also approved the test found in ***Middelkamp*** [***v. Fraser Valley Real Estate Board*** (1993), 83 B.C.L.R. (2d) 257 (C.A.)] for deciding if there is a reasonable apprehension of bias. Referring to that decision, and to the existing case law, Cory J. said:
>
> > This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case . . . Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'.
>
> This test has been described as having established a "high" threshold for a finding of perceived bias: ***Sorger*** [***v. Bank of Nova Scotia et al.*** (1998), 160 D.L.R. (4th) 66 (C.A.)]. Bastarache J., declining to recuse himself from a case stated: "The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood or probability of bias must be demonstrated." [Citations added in ***Ritter***.]

[8] Veit J. in ***Broda*** at para. 23 also referenced the words of McEachern C.J.B.C. in ***G.W.L. Properties v. W.R. Grace & Co. of Canada Ltd.*** (1992), 74 B.C.L. R. (2d) 283 at para. 53 (C.A.):

[49] The Applicants submit that the Respondents took few or no steps to acquire any evidence in support of their allegations. They failed to even acquire the medical records from the Glenrose Rehabilitation Hospital until commencement of the trial. They proceeded with their allegations without any evidence to support them. The Applicants suggest that it was solely as a result of the conduct of the Respondents that the formal proof of the Last Will required an eight day trial. They argue that this conduct should be sanctioned by the Court.

[50] The Applicants note that the Respondents advanced numerous arguments, such as the incompetence of Ms. Robins in the preparation and execution of the Last Will, the incorporation of the Holograph Will by reference, frustration, the applicability of the *Frustrated Contracts Act*, R.S.A. 2000, c. F-26, and presumption of revocation by destruction of a copy of the Last Will. All of these arguments were rejected by the Court.

[51] The Applicants submit that, if the Court is not inclined to award them solicitor-client costs, they should be given double party-party costs pursuant to Rule 174 for all steps taken in this litigation subsequent to the date of service of the Offer, as the Respondents failed to better the formal Offer of Settlement. They note that Clarke J. in ***Bahry v. Zytaruk*** (2002), 50 E.T.R. (2d) 187, 2002 ABQB 858 at paras. 16 and 17 found that Rule 174 applies to surrogate litigation.

(vi) The Respondents' Position

[52] The Respondents counter that the allegation of undue influence was withdrawn prior to trial. They point out that both Wilson J. and this Court held there were suspicious circumstances surrounding the making of the Last Will that required investigation and a trial.

[53] The Respondents argue that the Deceased was the primary cause of the litigation, given her manipulative conduct.

[54] Finally, they submit that the trial as to validity of the Last Will was not in vain. Nancy Steward testified that her cash bequest of $25,000.00 would go to a charitable fund maintained by the Capital Health Authority and the witness Betty Poetsema intends to donate any gift she may receive under the Last Will to people in need.

Determination

[55] The Respondents impeded the process of formally proving the Last Will with repeated motions and appeals that were determined to have no foundation. Throughout the litigation, they chose to pursue a highly oppositional course of conduct with little or no substantive basis for their position. There were numerous examples of arbitrary conduct and bad faith. It was the most egregious of obstructionist litigation I have observed. It was tantamount to what I would categorize as the shotgun approach to surrogate warfare.

[56] Both Mr. Justice Wilson and I found the circumstances of this case initially raised suspicious circumstances and Wilson J. did direct formal proof. Therefore, at the outset the Respondents had the right to challenge the Last Will. However, once they had disclosure of all the facts and had the opportunity to conduct their own due diligence to determine if the Last Will satisfied all the legal requirements, they had the responsibility to act reasonably and should have ceased their opposition. Rather, they embarked on a course of conduct that unreasonably lengthened the proceedings. They refused to admit the most straightforward of facts or to agree to the form of the Orders of the Court which constantly held against them. They attempted to thwart the progression of this action at every step.

[57] The Respondents should have become aware that there was no substantive basis for the Court's scrutiny of the matter when they had all the evidence before them. I find, at the very least, this should have occurred on October 23, 2003, when Dr. Weisz's report was served and after Ms. Robins' examination had occurred. They chose not to call any independent medical evidence. The trial did not bring any more clarity to the issues than was provided to the Respondents from March 2001 to October 21, 2003 in the numerous Affidavits and records served on them.

[58] The Respondents are not entitled to ignore the facts - the facts apparent to all who knew Rose Ann Serdahely nor are they entitled to proceed recklessly in the face of these facts when the basis for their challenge was proven repeatedly to be groundless. They do so at their peril.

[59] I find the Respondents' obstructionist conduct and motivation of greed to be egregious. As I have said, they should have determined that the issue of suspicious circumstances was groundless at the very least by no later than October 23, 2003. The residuary beneficiaries should not suffer for this improper, frivolous, vexatious and unnecessarily protracted litigation.

[60] Considering all the circumstances, the Respondents shall be responsible for their own costs. The Applicants shall be entitled to be indemnified by the Respondents for their solicitor-client costs from October 23, 2003 onwards.

Heard on the 30th day of September, 2005.
Dated at the City of Edmonton, Alberta this 21st day of November, 2005.

C.I. Johnstone
J.C.Q.B.A.

Appearances:

David Mercer and Anthony Holinski
Nickerson Roberts Holinski & Mercer
for the Applicants

Paul Haljan
for the Respondents

14p

TAB 17

Court of Queen's Bench of Alberta

Citation: Foote Estate (Re), 2010 ABQB 197

Date: 20090323
Docket: ES03 119897
Registry: Edmonton

In the Matter of the Estate of Eldon Foote

Court File Number	ES03 119897
Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial District	Edmonton
Estate Name	Eldon Douglas Foote
Applicant (Plaintiff)	Trudy David, Douglas Foote, Debbie Entwistle, Dean Foote & Laurie Evans and Anne Foote
Respondent (Defendant)	The Estate of Eldon Douglas Foote and the Lord Mayor's Charitable Fund and the Edmonton Community Foundation

Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] This decision on costs follows my earlier decision on the late Eldon Foote's domicile, ***Re Foote Estate***, 2009 ABQB 654.

[2] In that decision, I ruled that Eldon Foote was domiciled on Norfolk Island, an Australian territory, at the date of his death on May 17, 2004.

[3] Each of the successful Respondents, the Executor and the two residual beneficiaries, the Edmonton Community Foundation and the Lord Mayor of Melbourne Charitable Fund now applies for costs of the proceedings on a solicitor and client basis against the Applicants, Mr. Foote's widow Anne and 5 of his 6 children, Douglas, Trudy, Dean, Laurie and Debbie.

[4] Anne and the children seek payment of their solicitor and client costs from the Estate.

Background

[5] These proceedings were commenced by Anne and the children for advice and directions as to Mr. Foote's domicile as well as the validity or enforceability of a so-called poison pill clause in Mr. Foote's will, essentially disinheriting a beneficiary who challenged the will. Anne and the children intended to bring family relief claims against the Estate, but were concerned about the poison pill provision, and realized that an issue with respect to family relief claims, wherever they were brought, would be Mr. Foote's domicile at his death. It is common ground that domicile at death will determine the applicable law with respect to family relief claims.

[6] I was appointed case manager of the application for advice and directions. The first major application related to determining the proper forum for the domicile hearing. Anne and the children argued for Alberta; the Executor and residual beneficiaries argued for Norfolk Island or Australia. I ruled in ***Foote Estate***, 2007 ABQB 654 that the Alberta courts had jurisdiction to determine domicile, and directed that the issue be tried here. Costs of the forum application were reserved, to be dealt with in the domicile proceedings.

[7] The issue worked its way through document production and discoveries, and was tried over three weeks in the spring of 2009.

Position of the Parties

[8] The Executor and the Edmonton Community Foundation seek costs of all proceedings on a solicitor and client basis from Anne and the children; alternatively they seek party and party costs on a multiple of Column 5 of Schedule C of the *Rules of Court*. The Lord Mayor seeks costs of the domicile proceedings on a solicitor and client basis, or alternatively on a multiple of Column 5, but submits that Anne and the children should have their costs from the Respondents on the same scale with respect to the forum application.

[9] The basis for the position of the Respondents can be summarized as follows:

1. Modern law holds that the rule "costs follow the event" generally applies to estate litigation;

2. They were successful;

3. Once document discovery took place and discoveries were completed, it should have been obvious to the unsuccessful Applicants that they would not be successful; and

4. Costs are in the discretion of the Court, and the Court should exercise its discretion in favour of a solicitor and client costs award.

[10] With respect to their position on elevated Schedule C costs, they point to the size of the Estate - something in excess of $120,000,000.00.

[11] In support of their positions, they cite:

Re Anderson Estate, 2009 ABQB 663; ***Babchuk v. Kutz***, 2007 ABQB 88; ***College of Physicians and Surgeons of the Province of Alberta v. J.H.***, 2009 ABQB 48; ***McCulough Estate v. Ayer***, 1998 ABCA 38; ***McDougald Estate v. Gooderham***, [2005] O.J. No. 2432; ***Mitchell v. Gard*** (1863), 164 E.R. 1280; ***Petroski v. Petroski Estate***, 2009 ABQB 753; ***Riva v. Robinson***, 2000 ABQB 391; ***Salter v. Salter Estate***, [2009] O.J. No. 2328; ***Re Serdahely Estate***, 2005 ABQB 861; and ***St. Onge Estate v. Breau***, 2009 NBCA 36.

[12] Anne and the children argue for their solicitor and client costs out of the Estate, on the basis that the circumstances of this case fall within the established exceptions to the "costs follow the event" rule. They also point to the Court's general discretion, and argue that the circumstances and size of the Estate warrant a solicitor and client cost award in their favour.

[13] In support of their position, they cite:

Alberta Rules of Court, Alta Reg. 390/1968, Rule 607; ***Corlet, Re***, [1938] 3 W.W.R. 20; ***Hegedus Estate v. Paul (Public Trustee of)***, 71 Alta. L.R. (3d) 179; ***Ross v. Redl***, 2009 SKQB 266; ***Schuttler v. Anderson***, 246 A.R. 17; ***Scramstad v. Stannard***, [1997] A.J. No. 302; ***Seward v. Seward Estate***, 201 A.R. 77; and Stevenson & Côté, *Annotated Rules of Court 2009*, 601.

Law

[14] The basic principles for costs in estate litigation have been summarized by Moen J. in ***Babchuk v. Kutz***, 2007 ABQB 81 and ***Petrowski v. Petrowski Estate***, 2009 ABQB 753. In ***Babchuk***, the daughters of the testator unsuccessfully challenged his will on the basis of lack of testamentary capacity. The successful executor sought costs on the basis of double party/party costs (but not as a result of bettering an offer); the unsuccessful daughters sought their costs on a solicitor client basis payable out of the estate. Moen J. denied any costs to the unsuccessful daughters, and awarded the executor single party/party costs against them.

[15] In ***Petrowski***, the defendant executrix successfully defended a claim of undue influence against herself and the estate, as well as for family relief. The unsuccessful applicant sought costs on a solicitor and client basis from the estate, and the executrix sought costs from the unsuccessful defendant. Moen J. denied the unsuccessful applicant his costs, and ordered that he pay the executrix's costs on Column 5, doubled for steps after she had made a formal offer of accepting a discontinuance of action without costs.

[16] As a result of Moen J.'s thorough review of the law on costs payable by an estate, and recovery of costs by a successful executor, it is not necessary for me to deal with most of the cases cited to me. It is clear from her decisions that there are a number of well-established principles in Alberta:

1. The Court has a discretion with respect to costs, but that discretion must be exercised judicially (***Babchuk*** at para. 5);

2. The "modern" approach to costs in estate litigation requires careful scrutiny of the litigation to restrict unwarranted litigation and protect estates from being depleted by such litigation (***Babchuk*** at para. 6);

3. Payment of an unsuccessful party's costs out of the estate requires analysis of a number of factors:

    A. Did the testator cause the litigation?

    B Was the challenge reasonable?

    C. Was the conduct of the parties reasonable?

    D. Was there an allegation of undue influence?

    E. Were there different issues or periods of time in which costs should differ?

    F. Were there offers to settle? (***Babchuk*** at para. 8);

4. There is a residual discretion where factors such as who initiated the proceedings (***Babchuk***, para. 70), and the size of the estate (***Babchuk***, para. 72) may be relevant;

5. Costs for a successful claimant in family relief claims are generally awarded on a solicitor and client basis (***Petrowski***, para. 62);

6. Costs in favour of an unsuccessful family relief claimant are an exception to the basic rule that costs follow the event ***(Petrowski***, para. 68 and para. 74);

7. Estate litigation is no longer treated as an exception to the basic rule that costs follow the event, approving ***St. Onge Estate v. Breau***, 2009 NBCA 36 (***Petrowski***, paras. 76 - 78);

8. Costs will normally follow the event in estate litigation, unless the challenge to the estate was reasonable (***Petrowski*** at para. 78), or on the basis of a public policy exception recognizing society's interest in only probating valid wills (***Petrowski*** at para. 79).

[17] I agree with these statements as to the general law relating to estate action costs in Alberta.

[18] In ***Petrowski***, Moen J. considered the issue of solicitor client costs in favour of the estate or executor, and stated at para. 14:

> While costs are almost entirely in the discretion of the court, solicitor-client costs should only be resorted to where the facts so warrant. This is not such a case. While the Plaintiff was unsuccessful, there is no evidence of unreasonable or vexatious conduct which would warrant an elevation from party-party costs.

[19] I echo her words in that respect.

[20] In ***Anderson Estate***, 2009 ABQB 663, Veit J. was not referred to ***Babchuk***, but came to the same conclusion as did Moen J. with respect to ***St. Onge Estate***. She emphasized, at para. 9, that in pursuing estate litigation, the parties should carefully scrutinize "the merits of a claim; determine who bears the onus of proof, and whether the litigation falls withing one of the recognized exceptions (to the costs follow the event rule in modern litigation)".

[21] The "recognized exceptions" as noted by the New Brunswick Court of Appeal are:

1. Cases involving the validity of a will;

2. Cases involving the interpretation of a will or trust;

3. Cases involving dependant or family relief claims (wills variation cases);

TAB 18

Court of Queen's Bench of Alberta

Citation: McDonald Estate, 2012 ABQB 704

Date: 20121116
Docket: ES01 094868, ES01 101320
Registry: Calgary

In the Matter of the Estate of Albert Woodrow McDonald (a.k.a. Ab McDonald)

And

In the Matter of the Estate of Phyllis Florence McDonald

Reasons for Judgment
of the
Honourable Mr. Justice M. David Gates

I. Introduction

[1] The Applicant Michael McDonald ("the Applicant McDonald") and the Respondent Joan Gusa were the co-executors of the estates of both of their parents, Albert Woodrow McDonald ("Mr. McDonald"), and Phyllis Florence McDonald ("Mrs. McDonald"). They were also co-trustees of trusts established in both wills for the benefit of their sister, Arlene Mackintosh ("the Mackintosh Trusts").

[2] This is an application brought by the Applicant McDonald to determine whether the Respondent should be removed as one of the co-executors of the estates of Mr. and Mrs. McDonald; whether the Applicant Cheryl Elizabeth Mackintosh ("the Applicant Mackintosh") should be appointed as a trustee for the Mackintosh Trusts; and to determine an appropriate sanction for a previous finding of contempt made by Lutz J. relative to the Respondent. In addition, the Respondent applied to pass her accounts for the period during which she acted as

trustee for her sister, Arlene Mackintosh ("Mrs. Mackintosh"), a represented adult. Finally, costs of these applications are also at issue.

[3] This matter has a lengthy history, having been the subject of at least 14 previous Orders of this Court. To the date of the hearing of this matter, none of those Orders had been appealed. The matter has been under case management by Mahoney J. since May 2011.

[4] These applications were heard on October 17 and 18, 2010 as special applications and continued on November 18, 2010. At the conclusion of the hearing, I directed that the Respondent be discharged as co-executor of the estates of Mr. and Mrs. McDonald and as co-trustee of the Mackintosh Trusts and that the Applicant Mackintosh be appointed as co-trustee of the Mackintosh Trusts with the Applicant McDonald, with written reasons on this issue and the other issues raised in these applications to follow.

II. Background

[5] As noted above, the Applicant McDonald and the Respondent were the co-executors of their parents' estates. Mr. McDonald died on December 17, 2002. Mrs. McDonald died on November 26, 2006. A Grant of Probate was issued by the Court of Queen's Bench for the estate of Mr. McDonald on March 4, 2003 confirming the terms of his Last Will and Testament dated April 23, 2002. A Grant of Probate was issued by the Court of Queen's Bench for the estate of Mrs. McDonald on February 5, 2007, confirming the terms of her Last Will and Testament dated April 23, 2002. The residuary beneficiaries named in both Wills are their three children, the Respondent, the Applicant McDonald and Mrs. Mackintosh. The Respondent and the Applicant McDonald are each entitled to their equal one-third share outright and Mrs. Mackintosh's equal one-third share is to be held in trust for her lifetime according to the following provision set forth in s. 6(d)(i) of Mr. McDonald's Will and s. 6(h)(i) of Mrs. McDonald's Will:

> To hold and keep invested one (1) of such equal parts for the benefit of my daughter, ARLENE PHYLLIS MACKINTOSH, and to pay or apply the net income derived therefore to or for her during her lifetime. Upon the death of the survivor of my said spouse, my said daughter and me, to divide such part among her children then alive in equal shares, or failing such children, among her issue then living in equal shares per stirpes; or failing such issue, between my issue then living, in equal shares."

[6] Mrs. Mackintosh, who was aged 69 at the time of this hearing, suffers from paranoia and schizophrenia. Mrs. McDonald acted as trustee for Mrs. Mackintosh pursuant to the *Dependent Adults Act*, RSA 2000, c. D-11, as amended. By Order of Coutu J. dated December 12, 2005, Mrs. McDonald was discharged as Mrs. Mackintosh's trustee and the Respondent was appointed trustee in her place. This continued until September 23, 2010, when the Respondent was discharged as trustee by Order of Romaine J. and replaced by the Applicant McDonald and the Applicant Mackintosh (together, "the Applicants"). The Applicant Mackintosh is the daughter of Mrs. Mackintosh.

[7] Thus, there exists here a sort of "layering" of trusts. Mrs. Mackintosh is the beneficiary of the Mackintosh Trusts during her lifetime. She is also subject to trusteeship pursuant to the *Dependent Adults Act* and the Orders referred to above. I will refer to Mrs. Mackintosh's assets that are under administration pursuant to the *Dependent Adults Act* and to the above Orders as the "DAA Estate" to distinguish them from the assets of the Mackintosh Trusts.

[8] The Respondent served the Applicants on February 6, 2010 with an Application for a Review of Trusteeship Order and Application to Pass Accounts. A Notice of Objection was filed by the Applicants on February 11, 2010, citing three grounds:

a) The Respondent failed to provide Mrs. Mackintosh with sufficient funds to cover her ongoing expenses and her proper support;

b) The Respondent failed to cause the house owned by Mrs. Mackintosh and located at Silvercreek Close (the "Silvercreek Close Property") to be rented, thereby causing Mrs. Mackintosh to suffer an ongoing loss of income; and

c) The absence of information and ongoing concerns related to the accounting provided by the Respondent as Mrs. Mackintosh's trustee.

[9] On March 8, 2010, Sisson J. granted an Order that, *inter alia*, the Respondent's Application to Review the Trusteeship Order and Pass Accounts be adjourned to a Special Application. As a result of subsequent developments and adjournments, Mahoney J. was appointed Case Management Judge in May 2011. As a result of five Case Management Hearings and Orders, the matter came before me by way of this Special Application.

[10] The Case Management Orders of Mahoney J. of September 8 and 26, 2011 fixed the agenda for this Special Application as follows:

Monday, October 17

a. The Respondent's application to pass the accounts and whether an adverse inference should be drawn against her with respect to same for her failure to deliver documents and responses to undertakings;

b. The determination of a sanction for the previous finding of contempt by Lutz J.; and

c. Costs.

Tuesday, October 18

a. Determination of the *Dependants' Relief Act* claims of Mrs. Macintosh, including:

   i) whether Mrs. Mackintosh is a "dependant" as defined in the *Dependants' Relief Act*, RSA 2000, c. D-10.5;

   ii) whether the Mackintosh Trusts should be varied to permit encroachments on capital;

   iii) whether the Respondent should be replaced by the Applicant Mackintosh as trustee of the Mackintosh Trust;

b. Proposal to complete the administration of the Estates of Mrs. McDonald and Mr. McDonald, including:

   i) the application to remove the Respondent as one of the co-executors of the Estates.

[11] The *Dependants' Relief Act* matters (para. a(i) and (ii), above) were not opposed and, as such, were to be addressed by the Case Management Judge as a separate matter. I note that both the *Dependent Adults Act* and the *Dependants' Relief Act* have now been superseded by new legislation; however, those are the statutes that were in force at the times relevant to this application and will be referred to herein.

[12] It will be most expeditious to deal with the remaining matters in the order set out above.

III. The Passing of the Dependent Adult Accounts

[13] As noted above, the Respondent was appointed trustee for Mrs. Mackintosh under the *Dependent Adults Act* by Order of Coutu J. on December 12, 2005 and discharged as trustee by Order of Romaine J. dated September 23, 2010. Therefore, the period for which the Respondent sought to pass accounts pursuant to the *Dependent Adults Act* is January 1, 2005 to September 23, 2010.

[14] As the Respondent's written submissions in respect of this passing of accounts are brief, it will be convenient to set them out *in toto*. Her brief states as follows:

> 19. It is respectfully submitted that the DA Trust accounts for the period January 1, 2005 to September 23, 2010 should be passed based upon the application filed in February, 2010 and based upon the affidavit of Joan Gusa, affirmed October 4, 2011.

[107] However, the Mackintosh Trusts may continue for several years yet. While Mrs. Mackintosh is not young, there is nothing before me to indicate that she may not survive for some considerable period of time. Particularly given her status as a represented adult, it is imperative that the administration of the Mackintosh Trusts function smoothly. It is clear from the evidence that this has not been the case in the past and I have no confidence that it would be so in the future so long as the Respondent remains as co-trustee. It is necessary that she be removed.

[108] Notwithstanding this distinction, there would seem to be little point in discharging the Respondent as co-trustee of the Mackintosh Trusts while leaving her in place as co-executor of the estates. The sensible course in the circumstances is to remove her from both capacities and this is what was done, for the reasons set forth above.

[109] In the result, the Applicant McDonald is now the sole executor of the estates of Mr. and Mrs. McDonald. The Applicant McDonald and the Applicant Mackintosh are now the co-trustees of the Mackintosh Trusts.

VII. Costs of the Removal Application

[110] As a final matter, the Applicants ask that the Respondent pay their solicitor-client costs of the application to have her removed as co-executor and co-trustee. Alternatively, they ask that these costs be paid out of the estates of Mr. and Mrs. McDonald.

[111] The Applicants submit that the case law indicates that when an executor and/or trustee is removed by order rather than by consent, such that time and expense are required to achieve the removal, solicitor-client costs should be awarded.

[112] Respondent's counsel argued at the hearing that the issues leading to the Respondent's removal are not sufficiently severe to justify solicitor-client costs being awarded against her personally. The Respondent's position, then, is that costs of the removal application should be paid out of the estates.

[113] It will be clear from my decision above that the Applicants were justified by the Respondent's conduct in bringing this application for her removal as co-executor and co-trustee. Therefore, they should have their costs of the application. Further, it is clear to me that the conduct of the Respondent resulted in this application being longer, more complex and more costly than would otherwise have been the case. The Respondent should have to bear some of those costs. In the result, I direct that 75% of the Applicants' costs shall be paid from the estates of Mr. and/or Mrs. McDonald and the remaining 25% shall be paid by the Respondent.

[114] The Respondent was unsuccessful in resisting the application to have her removed as co-executor and co-trustee. However, in making my decision on this issue, I have relied more upon the discord between the Respondent and the Applicants and upon the resulting stalemate than

upon any specific transgression by the Respondent. I am satisfied that it was not wholly unreasonable for the Respondent to oppose this application. Therefore, the Respondent shall have 50% of her costs of this application from the estates of Mr. and/or Mrs. McDonald as a whole, rather than from her share thereof. For the avoidance of doubt, this applies only to that portion of the Respondent's costs attributable to the removal application, not to the passing of accounts application. Any dispute as to this may be brought before me.

[115] As with my previous determinations, any costs payable by the Respondent shall be paid from the estates of Mr. and/or Mrs. McDonald and deducted from her share thereof upon final distribution.

Heard on the 17th and 18th days of October, 2011 and the 18th day of November, 2011.
Dated at the City of Calgary, Alberta this 14th day of November, 2012.

M. David Gates
J.C.Q.B.A.

Appearances:

Ms. J.R. Lamb
Borden Ladner Gervais LLP
for the Applicants in respect of the *Dependent Adults Act* matters

Ms. M.A. McDonald
Borden Ladner Gervais LLP
for the Applicants in respect of the estate and Mackintosh Trusts matters

Mr. R.I. Holloway
D'Arcy & Deacon LLP
for the Respondent in respect of the *Dependent Adults Act* matters

Mr. C.G. Simmons
Colin G. Simmons Professional Corporation
for the Respondent in respect of the estate and Mackintosh Trusts matters

TAB 19

In the Court of Appeal of Alberta

Citation: Brill v Brill, 2017 ABCA 235

Date: 20170718
Docket: 1701-0103-AC
Registry: Calgary

Between:

Reizel-Vered Brill

Applicant
(Plaintiff)

- and -

Erez Brill

Respondent
(Defendant)

Reasons for Decision of
The Honourable Madam Justice Jo'Anne Strekaf

Application for Permission to Appeal Costs

Reasons for Decision of
The Honourable Madam Justice Jo'Anne Strekaf

[1] The applicant seeks permission to appeal costs of $2,600 awarded by a chambers judge for a full day hearing that resulted in an accelerated trial on custody.

[2] Rule 14.5(1)(e) of the *Alberta Rules of Court*, Alta Reg 124/2010 requires permission to appeal "a decision as to costs only". Permission should be granted sparingly: *Bun v Seng*, 2015 ABCA 165 at para 4. The purpose of the predecessor of this rule was "to bring finality to cost orders and to conserve this Court's time by screening out hopeless appeals on the issue of costs alone": *Colborne Capital Corp v 542775 Alberta Ltd,* 1996 ABCA 94 at para 10, 38 Alta LR (3d) 127. The same rationale underlies the current rule.

[3] The test for permission to appeal a costs award established under the former appellate *Rules* continues to apply: *Jackson v Canadian National Railway Company*, 2015 ABCA 89 at para 10. The following applies on such an application:

> (i) the applicant must identify a good, arguable case having enough merit to warrant scrutiny by the court;
>
> (ii) the issues must be important, both to the parties and in general;
>
> (iii) the appeal must have some practical utility; and
>
> (iv) the court should consider the effect of delay in proceedings caused by the appeal.

[4] The application that gave rise to the costs award arises out of a long standing high conflict family law dispute. As a result of a contested mobility application in 2010, it was determined that the parties' children would reside with the applicant in Israel and spend two months each summer with the respondent in Calgary. During the summer of 2016, questions arose regarding the treatment the children were receiving in Israel, which was hotly contested by the applicant. On July 29, 2016, a chambers judge heard a full day application and directed an accelerated trial which had been opposed by the applicant. The trial was conducted in August 2016. The trial judge directed that the children return to Israel with the applicant and granted ancillary orders, including an award of costs to the applicant for the trial.

[5] The applicant sought to have the costs of the July 29, 2016 application treated as costs in the cause whereas the respondent sought costs as he had been successful on that application. The chambers judge stated:

> In my view, costs of the July 29 applications should follow the event, not the cause. Success by Ms. Brill at trial does not mean that she ought to have resisted the July 29 applications or that her resistance should be overlooked because she was ultimately successful in the cause. On the record before me, there was more than enough evidence to satisfy the threshold for ordering either counsel for the children or a voice of the child report and, frankly, for remitting the matter for the viva voce hearing.
>
> Ms. Brill's resistance caused additional costs to Mr. Brill unnecessarily. Ms. Brill chose to oppose the application, as was her right, but she did so in the hopes of avoiding the longer process entirely and the risks it entailed and the costs it would cause. She called oral evidence on July 29 to correct a perceived misstatement and to undermine the reliability of some suspect affidavit evidence asserted against her position, but she also did so more generally to mount that resistance to the larger change of custody hearing ever getting underway. She did so against the known risk that her strategy may not succeed. She did so knowing the lower threshold Mr. Brill faced at pushing the matter to a hearing. In my view, it is appropriate that she bear the costs downside of having taken those risks for which both sides bore additional costs.

[6] A highly deferential standard is applied when reviewing a costs award: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 42, [2003] 3 SCR 371.

[7] The chambers judge proceeded reasonably in applying the usual rule of awarding the costs of an interlocutory application to the successful party. The applicant has not demonstrated that the proposed costs appeal has any arguable merit.

[8] The application is dismissed.

Application heard on June 29, 2017

Reasons filed at Calgary, Alberta
this 18th day of July, 2017

Strekaf J.A.

Appearances:

W. Aaron, Q.C.
for the Applicant

B. Minuk
for the Respondent

TAB 20

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests *Appellant*

v.

Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A57614 *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation *Interveners*

and between

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests *Appellant*

v.

Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his

Sa Majesté la Reine du chef de la province de la Colombie-Britannique, représentée par le ministre des Forêts *Appelante*

c.

Chef Dan Wilson, à titre personnel et en qualité de représentant de la Bande indienne Okanagan, et toutes les autres personnes qui coupent, endommagent ou détruisent du bois de la Couronne sur la terre publique visée par le permis de vente de bois A57614 *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Bande indienne des Songhees, Première nation des T'Sou-ke, Première nation de Nanoose et Bande indienne de Beecher Bay (collectivement appelées « Nations des Te'mexw »), et chef Roger William, en son nom, en celui de tous les autres membres du gouvernement des Premières nations Xeni Gwet'in et en celui de tous les autres membres de la Nation des Tsilhqot'in *Intervenants*

et entre

Sa Majesté la Reine du chef de la province de la Colombie-Britannique, représentée par le ministre des Forêts *Appelante*

c.

Chef Ronnie Jules, à titre personnel et en qualité de représentant de la Bande indienne d'Adams Lake, chef Stuart Lee, à titre

personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band, and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2 *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation *Interveners*

personnel et en qualité de représentant de la Bande indienne de Spallumcheen, chef Arthur Manuel, à titre personnel et en qualité de représentant de la Bande indienne de Neskonlith, et David Anthony Nordquist, à titre personnel et en qualité de représentant de la Bande indienne d'Adams Lake, de la Bande indienne de Spallumcheen et de la Bande indienne de Neskonlith, et toutes les autres personnes qui coupent, endommagent ou détruisent du bois de la Couronne sur la terre publique visée par le permis de vente de bois A38029 (bloc 2) *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général du Nouveau-Brunswick, procureur général de la Colombie-Britannique, procureur général de l'Alberta, Bande indienne des Songhees, Première nation des T'Sou-ke, Première nation de Nanoose et Bande indienne de Beecher Bay (collectivement appelées « Nations des Te'mexw »), et chef Roger William, en son nom, en celui de tous les autres membres du gouvernement des Premières nations Xeni Gwet'in et en celui de tous les autres membres de la Nation des Tsilhqot'in *Intervenants*

INDEXED AS: BRITISH COLUMBIA (MINISTER OF FORESTS) *v.* OKANAGAN INDIAN BAND

Neutral citation: 2003 SCC 71.

File Nos.: 28988, 28981.

2003: June 9; 2003: December 12.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

RÉPERTORIÉ : COLOMBIE-BRITANNIQUE (MINISTRE DES FORÊTS) *c.* BANDE INDIENNE OKANAGAN

Référence neutre : 2003 CSC 71.

N^os^ du greffe : 28988, 28981.

2003 : 9 juin; 2003 : 12 décembre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Costs — Interim costs — Principles governing exercise of court's discretionary power to grant interim costs — Minister of Forests serving Indian Bands with stop-work orders for logging on Crown land without authorization — Bands claiming aboriginal title to lands — Minister applying to have proceedings remitted to trial list — Bands arguing that matter of aboriginal title should not go to trial as they lack financial resources to fund action or in alternative, requesting order that Crown pay interim costs to fund action in advance and in any event of cause — Whether Court of Appeal's decision to grant interim costs should be upheld — Whether Court of Appeal had sufficient grounds to review exercise of chambers judge's discretion — Rules of Court, B.C. Reg. 221/90, ss. 52(11)(d), 57(9).

In 1999, members of the four respondent Bands began logging on Crown land in B.C. without authorization under the *Forest Practices Code of British Columbia Act*. The Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging the Code as conflicting with their constitutionally protected aboriginal rights. The Minister then applied to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The Bands argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order and to make orders as to costs, should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. The B.C. Supreme Court held that the case should be remitted to the trial list and declined to order the Minister to pay the Bands' costs in advance of the trial. The Court of Appeal allowed the Bands' appeal. The decision to remit the matter of the Bands' aboriginal rights or title to trial was upheld. The court concluded, however, that although the Bands did not have a constitutional right to legal fees funded by the provincial Crown the court did have a discretionary

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Dépens — Provisions pour frais — Principes régissant l'exercice du pouvoir discrétionnaire du tribunal de statuer sur les dépens — Signification par le ministre des Forêts aux bandes indiennes d'ordonnances de cessation des travaux pour avoir mené des activités d'exploitation forestière sur des terres publiques sans autorisation — Bandes soutenant qu'elles détiennent un titre aborigène sur les terres en question — Demande du ministre que l'instance soit inscrite pour instruction — Bandes plaidant que la question du titre aborigène ne doit pas faire l'objet d'une instruction parce qu'elles n'ont pas les ressources financières voulues pour financer un procès ou que la Couronne leur verse une provision pour frais pour le financement du procès quelle que soit l'issue de la cause — Faut-il confirmer la décision de la Cour d'appel d'attribuer une provision pour frais? — La Cour d'appel avait-elle des motifs suffisants pour réviser l'exercice du pouvoir discrétionnaire du juge en chambre? — Rules of Court, B.C. Reg. 221/90, art. 52(11)d), 57(9).

En 1999, des membres des quatre bandes indiennes intimées ont commencé l'exploitation forestière sur des terres publiques en C.-B. sans l'autorisation requise par la *Forest Practices Code of British Columbia Act*. Le ministre des Forêts a signifié aux Bandes des ordonnances de cessation des travaux en vertu du Code et a introduit une instance afin de les faire respecter. Les Bandes ont soutenu qu'elles détenaient un titre aborigène sur les terres en question et qu'elles avaient le droit d'y mener des activités d'exploitation forestière. Elles ont déposé un avis de question constitutionnelle contestant le Code au motif qu'il contrevient à leurs droits ancestraux garantis par la Constitution. Le ministre a alors demandé que l'instance soit inscrite pour instruction au lieu d'être tranchée par procédure sommaire. Les Bandes ont prétendu que l'affaire ne devait pas faire l'objet d'une instruction parce qu'elles n'avaient pas les ressources financières voulues pour financer un procès long et coûteux. Subsidiairement, elles ont prétendu que, dans l'exercice de ses pouvoirs d'assortir de conditions l'ordonnance discrétionnaire et de statuer sur les dépens, la cour ne devait ordonner la tenue d'une instruction que si elle donnait également à la Couronne l'ordre de payer à l'avance leurs honoraires et débours d'avocats, quelle que soit l'issue de la cause. La Cour suprême de la C.-B. confirme que l'affaire doit être inscrite pour instruction et refuse d'ordonner au ministre de payer à l'avance les dépenses des Bandes. La Cour d'appel accueille l'appel des Bandes. La

power to order interim costs. It ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that it imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation.

Held (Iacobucci, Major and Bastarache JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ.: The Court of Appeal's decision to grant interim costs to the Bands should be upheld. The discretionary power to award interim costs in appropriate cases has been recognized in Canada. Concerns about access to justice and the desirability of mitigating severe inequality between litigants feature prominently in the rare cases where such costs are awarded. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. Several conditions must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case; the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit; and there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

In public interest litigation special considerations also come into play. Public law cases, as a class, can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the special circumstances that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as special by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs

décision d'inscrire pour instruction la question du titre aborigène ou d'autres droits ancestraux des Bandes est confirmée. La cour conclut toutefois que, même si la Constitution ne garantit pas aux Bandes le paiement par la Couronne provinciale des honoraires d'avocats, la cour a le pouvoir discrétionnaire d'ordonner le paiement d'une provision pour frais. Elle ordonne à la Couronne de payer les honoraires et débours d'avocats des Bandes, selon ce que pourrait ordonner le juge en chambre, sous réserve de conditions détaillées qu'elle impose de manière à encourager les parties à un litige à éviter les démarches inutiles et à régler par la négociation le plus grand nombre possible de questions.

Arrêt (les juges Iacobucci, Major et Bastarache sont dissidents) : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Gonthier, Binnie, Arbour, LeBel et Deschamps : La décision de la Cour d'appel d'accorder une provision pour frais aux Bandes est confirmée. Le pouvoir discrétionnaire d'attribution de provisions pour frais dans certains cas a été reconnu au Canada. Les préoccupations concernant l'accès à la justice et l'opportunité d'atténuer les grandes inégalités entre les parties au litige occupent le premier plan dans les rares cas où de telles provisions pour frais sont accordées. Le pouvoir d'ordonner le paiement de frais provisoires est inhérent à la nature de la compétence en equity de statuer sur les dépens, et le tribunal peut, lorsqu'il l'exerce, décider à son gré à quel moment et par qui les dépens seront payés. Plusieurs conditions doivent être présentes pour qu'une provision pour frais soit accordée. La partie qui sollicite l'ordonnance doit être si dépourvue de ressources qu'elle serait incapable, sans cette ordonnance de faire entendre sa cause; elle doit prouver *prima facie* que sa cause possède un fondement suffisant pour justifier son instruction devant le tribunal et il doit exister des circonstances suffisamment spéciales pour que le tribunal soit convaincu que la cause appartient à cette catégorie restreinte de causes justifiant l'exercice exceptionnel de ses pouvoirs.

Dans les causes d'intérêt public, des considérations particulières entrent également en jeu. Les causes de droit public en tant que catégorie se distinguent des litiges civils ordinaires. Elles peuvent être considérées comme une sous-catégorie dans laquelle les « circonstances particulières » qui sont nécessaires pour que l'on puisse justifier l'octroi de provisions pour frais tiennent à l'importance des questions en jeu pour le public. Il incombe au tribunal de première instance de décider dans chaque cas si une affaire qui peut être qualifiée de « particulière » de par son caractère d'intérêt public est

would be appropriate. The criteria that must be present to justify an award of interim costs in this kind of case are as follows: the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; the claim to be adjudicated is *prima facie* meritorious; and the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Each of these criteria is met in this case. The Bands are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward; the issues sought to be raised at trial are of profound importance to the people of B.C., both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme. The conditions attached to the costs order by the Court of Appeal ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown, and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the Crown.

The Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court. Discretionary decisions are not completely insulated from review. An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues and erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Second, his finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and the prospect of the Bands' hiring counsel on a contingency basis seems

suffisamment particulière pour s'élever au niveau des causes où l'allocation inhabituelle de dépens constituerait une mesure appropriée. Les conditions qui doivent être réunies pour que l'octroi de provisions pour frais dans ce genre de cause soit justifié sont les suivantes : la partie qui demande une provision pour frais n'a véritablement pas les moyens de payer les frais occasionnés par le litige et ne dispose réalistement d'aucune autre source de financement lui permettant de soumettre les questions en cause au tribunal; la demande vaut *prima facie* d'être instruite et les questions soulevées dépassent le cadre des intérêts du plaideur, elles revêtent une importance pour le public et elles n'ont pas encore été tranchées.

Il doit être satisfait à chacune de ces conditions. Les Bandes ne disposent pas de ressources suffisantes et ne peuvent faire entendre leur cause sans ordonnance de paiement d'une provision pour frais. L'affaire vaut d'être instruite. Les questions que l'on cherche à soulever au procès sont d'une importance cruciale pour la population de la C.-B., tant autochtone que non autochtone, et une décision à leur égard constituerait un pas majeur vers le règlement des nombreux problèmes en suspens entre la Couronne et les Autochtones dans cette province. Bref, les circonstances de l'espèce sont effectivement particulières, voire exceptionnelles. Les conditions dont la Cour d'appel a assorti l'ordonnance de paiement des dépens garantissent que les parties seront encouragées à régler le litige par la négociation, qui demeure ultimement la meilleure manière de réconcilier les sociétés autochtones et la Couronne. Elles garantissent également que les Bandes ne seront pas tentées d'étirer le processus inutilement et de dilapider la provision pour frais versée par la Couronne.

La Cour d'appel avait des motifs suffisants pour réviser l'exercice du pouvoir discrétionnaire du tribunal de première instance. Les décisions discrétionnaires ne sont pas entièrement à l'abri de tout contrôle. Une cour d'appel peut et doit intervenir lorsqu'elle estime que le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits. Deux erreurs en particulier vicient la décision du juge en chambre et appellent l'intervention en appel. Premièrement, le juge en chambre a trop insisté sur l'importance d'éviter de rendre une ordonnance par laquelle on se trouverait à préjuger des questions en litige et il a commis une erreur lorsqu'il a conclu que son pouvoir discrétionnaire n'allait pas jusqu'à lui permettre de rendre l'ordonnance demandée. Deuxièmement, sa conclusion qu'une entente d'honoraires conditionnels serait peut-être une solution de rechange viable quant

unrealistic in the particular circumstances of this case.

Per Iacobucci, Major and Bastarache JJ. (dissenting): The chambers judge interpreted the applicable principles correctly and there is no basis for reversing his discretion. Traditionally, costs are awarded after the ultimate trial or appellate decision and almost always to the successful party. However, the common law on interim costs has been more confined and interim costs have been awarded in two circumstances: in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. Courts may also award interim costs in child custody cases. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits and the objectivity of the court making such an order will almost automatically be questioned. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. The new criteria endorsed by the majority broaden the scope of interim costs to an undesirable extent and are not supported in the case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion. A case must be exceptional in order to attract interim costs; however, the majority accept that most public interest cases would satisfy this criterion and leave to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. Even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. Further, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal. The *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs: the party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case; there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and it is presumed that the party seeking

au financement du litige ne paraît étayée par aucun élément de preuve, et la perspective que les Bandes puissent retenir les services d'un avocat sur une base d'honoraires conditionnels semble irréaliste dans les circonstances particulières de l'espèce.

Les juges Iacobucci, Major et Bastarache (dissidents) : Le juge en chambre a correctement interprété les principes applicables et il n'y a aucune raison d'infirmer sa décision discrétionnaire. Traditionnellement, les dépens sont attribués après que la décision finale a été rendue en première instance ou en appel et ils le sont presque toujours en faveur de la partie gagnante. Toutefois, les règles de common law en matière de provisions pour frais ont vu leur application restreinte et des provisions pour frais ont été accordées dans deux sortes d'affaires : dans des affaires de droit matrimonial où l'on présume une certaine responsabilité et où l'octroi des dépens répond à l'objectif d'indemnisation; dans des affaires en matière de sociétés ou de fiducie où le tribunal ordonne à la société ou à la fiducie pour laquelle l'action est intentée de payer la provision pour frais. Les tribunaux peuvent également accorder des provisions pour frais dans les affaires de garde d'enfants. La raison de cette application restreinte est apparente vu le risque que l'octroi de dépens avant l'instruction soit perçu comme laissant préjuger de l'issue de la cause et vu que l'objectivité du tribunal qui rend une telle ordonnance sera presque automatiquement remise en question. L'adjudication d'une provision pour frais dans les circonstances de l'espèce apparaît comme une forme d'aide juridique imposée par le tribunal. Il ne faut pas étendre les provisions pour frais pour amener, essentiellement, le tribunal à financer le litige pour les parties sans ressources suffisantes et à garantir leur accès aux tribunaux. Les nouveaux critères approuvés par la majorité élargissent le champ d'application des provisions pour frais dans une mesure qui n'est pas souhaitable et ils ne sont pas étayés par la jurisprudence. Une telle évolution devrait être amorcée par les tribunaux de première instance dans l'exercice judicieux de leur pouvoir discrétionnaire et non par l'annulation en appel de leurs décisions à cet égard. L'affaire doit être exceptionnelle pour ouvrir droit à une provision pour frais; toutefois, la majorité convient que la plupart des causes d'intérêt public répondraient à ce critère et laisse au juge de première instance le soin de décider si l'affaire est « suffisamment spéciale » pour justifier une ordonnance. La difficulté pour le juge de première instance est que cela ne constitue pas une norme ou une directive identifiable. Même s'il fallait prendre en compte de telles circonstances particulières, rien ne distingue les présentes revendications territoriales autochtones de toute autre revendication. De plus, on

interim costs will win some award from the other party. The chambers judge committed no error of law nor a palpable error in his assessment of the facts. Deference should be given to his decision not to exercise his discretion to grant interim costs.

Cases Cited

By LeBel J.

Referred to: *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23; *Ryan v. McGregor* (1925), 58 O.L.R. 213; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464; *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201; *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295; *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292; *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486, rev'd (1989), 67 O.R. (2d) 536, aff'd [1991] 2 S.C.R. 211; *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, aff'g (1992), 10 O.R. (3d) 321, aff'g [1989] O.J. No. 205 (QL); *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642; *Organ v. Barnett* (1992), 11 O.R. (3d) 210; *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527; *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306; *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL); *Amcan Industries Corp. v. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL); *Turner v. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76; *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273, rev'd [1999] 3 S.C.R. 46; *Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68; *Benson v. Benson* (1994), 120 Sask. R. 17; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

ne peut présumer que les Bandes prouveront l'existence d'un titre aborigène, même partiel, dans les affaires faisant l'objet du pourvoi. Il faut satisfaire aux trois conditions suivantes pour que l'exception en common law soit justifiée quant à l'octroi discrétionnaire et extraordinaire de provisions pour frais : la partie qui demande une provision pour frais n'a pas les moyens d'agir en justice et ne dispose en réalité d'aucune autre source de financement; il existe entre les parties une relation spéciale telle que l'octroi d'une provision pour frais ou d'un soutien est particulièrement approprié; on présume que la partie qui demande une provision pour frais obtiendra une certaine compensation de la part de l'autre partie. Le juge en chambre n'a pas commis d'erreur en droit ni d'erreur manifeste dans son appréciation des faits. Il faut faire preuve de déférence à l'égard de sa décision de ne pas exercer son pouvoir discrétionnaire pour accorder des provisions pour frais.

Jurisprudence

Citée par le juge LeBel

Arrêts mentionnés : *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23; *Ryan c. McGregor* (1925), 58 O.L.R. 213; *Fellowes, McNeil c. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464; *Skidmore c. Blackmore* (1995), 2 B.C.L.R. (3d) 201; *Kendall c. Hunt (No. 2)* (1979), 16 B.C.L.R. 295; *Canadian Newspapers Co. c. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292; *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486, inf. par (1989), 67 O.R. (2d) 536, conf. par [1991] 2 R.C.S. 211; *Rogers c. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, conf. (1992), 10 O.R. (3d) 321, conf. [1989] O.J. No. 205 (QL); *Jones c. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642; *Organ c. Barnett* (1992), 11 O.R. (3d) 210; *McDonald c. McDonald* (1998), 163 D.L.R. (4th) 527; *Woloschuk c. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306; *Roberts c. Aasen*, [1999] O.J. No. 1969 (QL); *Amcan Industries Corp. c. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL); *Turner c. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76; *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)* (1995), 131 D.L.R. (4th) 273, inf. par [1999] 3 R.C.S. 46; *Earl c. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68; *Benson c. Benson* (1994), 120 Sask. R. 17; *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12; *Pelech c. Pelech*, [1987] 1 R.C.S. 801; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010.

By Major J. (dissenting)

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527; *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954; *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL); *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

Statutes and Regulations Cited

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 248, 249.

Canadian Charter of Rights and Freedoms, s. 15.

Company Act, R.S.B.C. 1996, c. 62, s. 201.

Constitution Act, 1982, s. 35.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131(1).

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, ss. 96, 123.

Queen's Bench Rules, Man. Reg. 553/88, r. 49.10.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 49.10, 57.01(1)(d), (2).

Rules of Court, B.C. Reg. 221/90, rr. 1(12), 37(23) to 37(26), 52(11)(d), 57(9).

Authors Cited

Orkin, Mark M. *The Law of Costs*, 2nd ed. Aurora, Ont.: Canada Law Book, 1987 (loose-leaf updated November 2002).

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 95 B.C.L.R. (3d) 273, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, 92 C.R.R. (2d) 319 (*sub nom. British Columbia (Ministry of Forests) v. Jules*), [2002] 1 C.N.L.R. 57, [2001] B.C.J. No. 2279 (QL), 2001 BCCA 647, allowing in part an appeal from a decision of the British Columbia Supreme Court, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135. Appeal dismissed, Iacobucci, Major and Bastarache JJ. dissenting.

Patrick G. Foy, *Q.C.*, and *Robert J. C. Deane*, for the appellant.

Citée par le juge Major (dissident)

Delgamuukw c. Colombie-Britannique, [1997] 3 R.C.S. 1010; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *McDonald c. McDonald* (1998), 163 D.L.R. (4th) 527; *Randle c. Randle* (1999), 254 A.R. 323, 1999 ABQB 954; *Roberts c. Aasen*, [1999] O.J. No. 1969 (QL); *Watkins c. Olafson*, [1989] 2 R.C.S. 750; *R. c. Salituro*, [1991] 3 R.C.S. 654; *Office des services à l'enfant et à la famille de Winnipeg (région du Nord-Ouest) c. G. (D.F.)*, [1997] 3 R.C.S. 925.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 15.

Company Act, R.S.B.C. 1996, ch. 62, art. 201.

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, ch. 159, art. 96, 123.

Loi constitutionnelle de 1982, art. 35.

Loi sur les sociétés par actions, L.R.O. 1990, ch. B.16, art. 248, 249.

Loi sur les tribunaux judiciaires, L.R.O. 1990, ch. C.43, art. 131(1).

Règles de la Cour du Banc de la Reine, Règl. du Man. 553/88, règle 49.10.

Règles de procédure civile, R.R.O. 1990, Règl. 194, règles 49.10, 57.01(1)d), (2).

Rules of Court, B.C. Reg. 221/90, règles 1(12), 37(23) à 37(26), 52(11)d), 57(9).

Doctrine citée

Orkin, Mark M. *The Law of Costs*, 2nd ed. Aurora, Ont. : Canada Law Book, 1987 (loose-leaf updated November 2002).

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2001), 95 B.C.L.R. (3d) 273, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, 92 C.R.R. (2d) 319 (*sub nom. British Columbia (Ministry of Forests) c. Jules*), [2002] 1 C.N.L.R. 57, [2001] B.C.J. No. 2279 (QL), 2001 BCCA 647, qui a accueilli en partie un appel interjeté contre une décision de la Cour suprême de la Colombie-Britannique, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135. Pourvoi rejeté, les juges Iacobucci, Major et Bastarache sont dissidents.

Patrick G. Foy, *c.r.*, et *Robert J. C. Deane*, pour l'appelante.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

B. *Appellate Review of Discretionary Decisions*

42 The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68, at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice

3. Les questions soulevées dépassent le cadre des intérêts du plaideur, revêtent une importance pour le public et n'ont pas encore été tranchées.

Ce sont là les conditions à remplir pour avoir recours aux provisions pour frais dans ce type de causes. Le fait qu'elles soient remplies dans une espèce donnée n'établit pas automatiquement la nécessité d'une telle ordonnance; cette décision relève du pouvoir discrétionnaire du tribunal. Si les trois conditions sont remplies, les tribunaux disposent d'une compétence limitée pour ordonner que les dépenses de la partie sans ressources suffisantes soient payées préalablement. De telles ordonnances doivent être formulées avec soin et révisées en cours d'instance de façon à assurer l'équilibre entre les préoccupations concernant l'accès à la justice et la nécessité de favoriser le déroulement raisonnable et efficace de la poursuite, qui est également l'un des objectifs de l'attribution de dépens. Lorsqu'ils rendent ces décisions, les tribunaux doivent également tenir compte de la position des défendeurs. Il ne faut pas que l'octroi de provisions pour frais leur impose un fardeau inéquitable. Dans le contexte des poursuites d'intérêt public, les juges doivent prêter une attention toute particulière à la position des justiciables privés qui, d'une certaine manière, peuvent faire les frais de litiges qui mettent essentiellement en cause la relation entre les demandeurs et certaines autorités publiques ou l'effet de lois d'application générale. À l'intérieur de ces paramètres, il appartient au tribunal de première instance de décider si l'affaire est telle qu'il est dans l'intérêt de la justice que l'ordonnance soit rendue.

B. *Examen en appel des décisions discrétionnaires*

On a qualifié d'absolu et d'illimité le pouvoir discrétionnaire du tribunal de première instance de décider s'il y a lieu d'adjuger des dépens, sous la seule réserve des règles de pratique applicables et de la nécessité d'agir de façon judiciaire selon les faits de l'espèce (*Earl c. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68, par. 7, citant *Benson c. Benson* (1994), 120 Sask. R. 17 (C.A.)). En l'espèce, le juge Sigurdson a rendu sa décision en se fondant

required, and his assessment of the evidence; it is not to be interfered with lightly.

As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues. In a case of this kind, as I have indicated, this consideration is of less weight than in the ordinary case; in fact, the allocation of the costs burden may, in certain cases, be determined independently of the outcome on the merits. Sigurdson J. erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Secondly, Sigurdson J.'s finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and I agree with Newbury J.A. that the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

C. *Application to the Facts of this Case*

It is unnecessary to send this case back to the chambers judge to apply the criteria set out here,

sur son expérience judiciaire, sa perception des exigences de la justice et son appréciation de la preuve; cette décision ne doit pas être modifiée à la légère.

43 Comme je l'ai fait remarquer dans *R. c. Regan*, [2002] 1 R.C.S. 297, 2002 CSC 12, toutefois, les décisions discrétionnaires ne sont pas entièrement à l'abri de tout contrôle (par. 118). Une cour d'appel peut et doit intervenir lorsqu'elle estime que le juge de première instance s'est fondé sur des considérations erronées en ce qui concerne le droit applicable ou a commis une erreur manifeste dans son appréciation des faits. Comme la Cour l'a dit dans *Pelech c. Pelech*, [1987] 1 R.C.S. 801, p. 814-815, les conditions d'exercice du pouvoir discrétionnaire du juge constituent des critères juridiques et leur définition, tout comme leur non-application ou leur mauvaise application, pose des questions de droit susceptibles de révision en appel.

44 Deux erreurs en particulier vicient la décision du juge en chambre et appellent l'intervention en appel. Premièrement, le juge en chambre a trop insisté sur l'importance d'éviter de rendre une ordonnance par laquelle on se trouverait à préjuger des questions en litige. Dans une affaire de ce type, comme je l'ai mentionné, cette considération revêt moins d'importance que dans une affaire ordinaire; en fait, la répartition du fardeau des frais peut, dans certains cas, être établie indépendamment de l'issue quant au fond. Le juge Sigurdson a commis une erreur lorsqu'il a conclu que son pouvoir discrétionnaire n'allait pas jusqu'à lui permettre de rendre l'ordonnance demandée. Deuxièmement, sa conclusion qu'une entente d'honoraires conditionnels serait peut-être une solution de rechange viable quant au financement du litige ne paraît étayée par aucun élément de preuve, et je conviens avec la juge Newbury que la perspective que les Bandes puissent retenir les services d'un avocat sur une base d'honoraires conditionnels semble irréaliste dans les circonstances particulières de l'espèce.

C. *Application aux faits de l'espèce*

45 Il n'est pas nécessaire de renvoyer la présente affaire au juge en chambre pour qu'il applique les

TAB 21

In the Court of Appeal of Alberta

Citation: Bun v Seng, 2015 ABCA 165

Date: 20150515
Docket: 1503-0107-AC
Registry: Edmonton

Between:

Heang Bun

Applicant
(Appellant)

- and -

Pheap Seng and The Cambodian Canadian Friendship Society of Edmonton and Areas

Respondent
(Respondent)

Reasons for Decision of
The Honourable Madam Justice Ellen Picard

Application for Permission to Appeal

Reasons for Decision of
The Honourable Madam Justice Ellen Picard

[1] The self-represented Mr. Bun seeks permission to appeal the March 26, 2015 costs order of Mr. Justice Verville.

[2] Mr. Bun brought a claim against The Cambodian Canadian Friendship Society of Edmonton and Areas and Pheap Seng (an officer of the Society), alleging irregularities in the Society's financial records and requesting further information from the Society. Mr. Bun was not satisfied by the materials he received and sought assistance of the Court. Justice Verville was appointed case manager.

[3] A case management meeting was scheduled for March 26, 2015 at Mr. Bun's request. At the case management meeting, the Society brought forward a cross-application to strike Mr. Bun's claim and prevent him from filing any further claims against the Society; that application was adjourned to a later date. Mr. Bun did not file an application or supporting affidavit in advance of the case management meeting, and the case management justice ordered him to pay the costs of the March 26 appearance to the Society. It is those costs that Mr. Bun seeks to appeal to this Court.

[4] Rule 14.5(1)(e) requires a party to obtain permission to appeal a decision as to costs only. The case law is clear that permission to appeal costs orders should be granted sparingly, and a party seeking permission to appeal such an award must meet a high threshold: ***Lameman v Alberta***, 2011 ABQB 724 at para 9, 521 AR 121; ***Gutierrez v Jeske***, 2005 ABQB 971 at para 4, 396 AR 1. This Court has held that it is appropriate to rely on the test for permission to appeal a costs award that was established under the former appellate Rules: ***Jackson v Canadian National Railway Company***, 2015 ABCA 89 at para 10. That test requires an applicant to demonstrate: (i) a good arguable case having sufficient merit to warrant scrutiny by this Court; (ii) issues of importance to the parties and in general; (iii) that the costs appeal has practical utility; and (iv) no delay in proceedings caused by the costs appeal.

[5] The standard of appellate review of a costs award is important in assessing the first step of the test, the merits of the appeal. Costs decisions are highly discretionary and will not be interfered with lightly: ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71 at para 42, [2003] 3 SCR 371. Costs awards should not be set aside on appeal unless the judge below made an error in principle or the award is plainly wrong: ***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 at para 27, [2004] 1 SCR 303. Discretionary orders of case management justices are similarly afforded deference, and absent an error of law, this Court will not interfere unless the decision was unreasonable: ***Decock v Alberta***, 2000 ABCA 122 at para 13, 255 AR 234; ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Ltd***, 2014 ABCA 74 at para 17, 569 AR 308.

[6] On the facts of this case and given the high degree of deference owed to costs awards on appeal, Mr. Bun has not demonstrated a good arguable case of sufficient merit and the first step of the test has not been satisfied. While the issue may be important to Mr. Bun, he has not demonstrated any general importance. Nor would this costs appeal have any practical utility because Mr. Bun has not raised any issues that would allow this Court to provide direction on the law with respect to costs. Although there are no concerns about delay in the proceedings below if this costs appeal were allowed to proceed, Mr. Bun has failed to satisfy the other steps of the test and permission to appeal is denied.

[7] Both parties spoke to costs at the hearing before me. I award costs of $600 inclusive of disbursements to the respondent.

Application heard on May 12, 2015

Reasons filed at Edmonton, Alberta
this 15th day of May, 2015

Picard J.A.

Appearances:

K.C. Ng
for the Respondent (Respondent)

Applicant (Appellant) Heang Bun in Person

TAB 22

In the Court of Appeal of Alberta

Citation: Chisholm v Lindsay, 2017 ABCA 21

Date: 20170118
Docket: 1601-0096-AC
Registry: Calgary

Between:

Catherine Chisholm

Appellant
(Plaintiff)

- and -

Noreen Lindsay

Respondent
(Defendant)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice R.J. Hall
Dated the 24th day of March, 2016
Filed on the 2nd day of May, 2016
(Docket: 0701 04015)

Memorandum of Judgment

The Court:

[1] This appeal is from a decision by a chambers judge who addressed an alleged inconsistency in a previous decision by a panel of this court ("Panel") (reported as *Chisholm v Lindsay*, 2015 ABCA 179 ("Reasons")).

I. Background

[2] By way of brief background, parties involved in a motor vehicle accident each appealed a trial judge's costs decision (reported as *Chisholm v Lindsay*, 2013 ABQB 589). The injured party cross-appealed claiming that the trial judge had erroneously failed to award costs for six items. The Panel dismissed the first ground of the injured party's cross-appeal, being the trial judge's failure to award enhanced costs for additional expense caused by the defendant's refusal to admit some of the plaintiff's expert opinion. The Panel did so on the basis that rule 10.33(2)(b) of the *Alberta Rules of* Court, Alta Reg 124/2010 did not impose an obligation to award costs where a party failed to make an admission: Reasons at paras 48 – 51. The Panel stated that it saw "no basis to intervene on the cross-appeal" (para 48) and "declined to intervene" on the remaining five grounds of appeal which the trial judge had specifically declined to award because those grounds "in whole or in part are prematurely referred to this Court" (para 53). The Panel directed the parties to go before an assessment officer to have those matters resolved. Before the order finalizing the judgment was entered, the respondent sought clarification of paragraph 53 or, alternatively, a reconsideration of that aspect of the judgment.

[3] The Panel directed the parties to make written submissions on the paragraph in dispute and, after reviewing the submissions, a judgment ("Judgment") was entered that stated in part:

> 3. The Plaintiff's cross-appeal in Appeal No. 1301-0286-AC for enhanced costs under Rule 10.33(2)(b) is dismissed; however, the following cost matters shall be resolved by way of Taxation by a Taxation Officer but if in the Taxations Officer's view a discrete question of law arises the Taxation Officer may refer that question of law onto a judge of the Court of Queen's Bench of Alberta:
>
> i. A fee(s) for the multiple submissions of Written Arguments after the initial Reasons;
>
> ii. Inflation on the Schedule C fees so awarded;
>
> iii. Full expert witness fee disbursement accounts of Mr. Stephen Mader Certified Medical Illustrator (MSc Bio-Mechanical Matters) and Dr. Hashman, Forensic Psychiatrist;

iv. Rule 5.41 nominates fees of Dr. Hashman, Dr. Hoyer, Dr. Selland and Marni Tory; and

v. The photocopy disbursement expense.

[4] The parties appeared before the assessment officer who made the assessment directed by the Panel. He awarded additional costs of $68,441.94 (including $1,050 for the costs of the assessment) but noted that his assessment was provisional and referred a question to the Court of Queen's Bench with respect to his jurisdiction. The Chief Justice directed a chambers judge to determine the following issue:

> Does the Assessment Officer have the jurisdiction to assess the 5 costs items referred to in paragraph 3 of the judgment of the Court of Appeal filed August 13th, 2015, notwithstanding the same 5 items were previously decided by the trial judge?

[5] The chambers judge concluded that the assessment officer lacked jurisdiction to assess the five costs items previously decided by the trial judge. He concluded that the trial judge's costs order must be final and binding because the Panel declined to intervene on those items. He concluded, "that the taxation assessment completed by the Assessment Officer is of no force or effect".

[6] The appellant appeals on the basis that the Panel's Judgment meant that the issue of jurisdiction was *res judicata*.

II. Analysis

[7] The issue on appeal is whether the chamber judge correctly interpreted paragraph 3 of the Judgment. Questions of jurisdiction are questions of law for which the standard of review is correctness. The same standard applies to whether a matter is *res judicata*: *David M. Gottlieb Professional Corporation v Nahal*, 2012 ABCA 88, 522 AR 25 at para 9

[8] A judgment or order of the court, not the reasons given, is the governing document. However, when the judgment contains an ambiguity it can be resolved by reviewing the reasons: *3264920 Canada Inc v Strother*, 2010 BCCA 328 at para 27, citing *Canadian Pacific Railway Co. v Blain* (1905), 36 SCR 159 at 166-67:

> I cannot conceive that this formal judgment, transmitted to the court below, is at variance with the written memorandum read in open court as the judgment of the court. I cannot even say that it contradicts the very terms of the reasons. But suppose it is inconsistent with their tenor and meaning, which document is to govern and constitute the judgment of this court? Is it the judgment pronounced in court, which alone should be transmitted and certified to the court appealed from, or the reasons for judgment which were not read in court nor transmitted to the

> court below… The reasons of judgment are mere opinions which may be considered as part of the judgment in so far as they disclose the grounds upon which it is rendered, but they cannot vary the text or *dispositif* of the formal judgment.
>
> As noted by Chief Justice Taschereau in the same decision, the reasons cannot be entirely disregarded in the construction of the formal order. Where, for instance, the formal order contains an ambiguity, the ambiguity can be resolved by reviewing the reasons of the court: see *The Quebec, Jacques-Cartier Electric Company v. The King* (1915), 51 S.C.R. 594 at 601, 24 D.L.R. 424.

See also *Badawy v Hassanein*, 2016 ABCA 42 at para 16; *1007374 Alberta Ltd. v Ruggieri*, 2015 ABCA 205, 602 AR 117 at para 11.

[9] The interpretation adopted by the chambers judge focused on the Reasons not the Judgment. This was an error of law.

[10] Admittedly, there may have been some difficulty reconciling the statements in the Reasons that the Panel found "no basis upon which to intervene" in the cross-appeal (para 48), was declining to intervene on the remaining grounds in the cross-appeal (para 53), and failed to identify any overriding error or improper exercise of discretion by the trial judge (which was acknowledged in paragraph 49 to be the test) with their direction in paragraph 53 that five of the matters which the trial judge had declined to award be resolved by taxation. However, that ambiguity was resolved by the Judgment.

[11] As outlined above, it is the formal judgment not the reasons that govern. The respondent's interpretation of the Judgment treats the entire cross-appeal as having been dismissed, when paragraph 3 merely states that "the cross-appeal in Appeal No. 1301-0286-AC for enhanced costs under Rule 10.33(2)(b) is dismissed" (with emphasis). It effectively renders the direction to proceed with taxation a pointless exercise. By contrast the interpretation proposed by the appellant recognizes that, of the six items raised on the cross-appeal, only the first ground (based on Rule 10.33(2)(b)) was dismissed, and the remaining five grounds were directed to taxation. This latter interpretation is preferable as it gives reasonable meaning to the entirety of paragraph 3 of the Judgment.

III. Conclusion

[12] As a result, the appeal is allowed. We adopt the provisional assessment of the assessment officer who awarded the appellant additional costs (in relation to the trial and the assessment) of $69,491.94.

[13] The appellant sought solicitor-client costs for all steps taken after the Judgment issued, contending that those steps were unnecessary. Such costs are only awarded in exceptional circumstances and are not appropriate in this case. The costs of the assessment are already

included in the above award. Costs are awarded to the appellant for the costs of this appeal only. The parties shall each bear their own costs for the remaining proceedings.

Appeal heard on January 11, 2017

Memorandum filed at Calgary, Alberta
this 18th day of January, 2017

Rowbotham J.A.

Authorized to sign for: Veldhuis J.A.

Strekaf J.A.

Appearances:

N.C. Mayer and M.B. Warren
for the Appellant

D.S. Pagenkopf
for the Respondent