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IN THE MATTER of the *Consumer Protection Act*, RSA 2000, c. C 26.3, Part 3.1 and *Life Leases Interest Rate Regulation*, Alberta Regulation 177/2024;

IN THE MATTER OF the *Societies Act*, RSA 2000, c.S-14, s. 26;

IN THE MATTER OF the *Trustee Act*, RSA 2022, c.T-8.1, ss. 16, 17, 22, 26(3), 29, 30, 31, 32 and Part 8;

IN THE MATTER OF the *Business Corporations Act*, RSA 2000, c.B-9, ss. 81, and 85 Part 8, ss. 214, 215, 231 and 232;

IN THE MATTER OF the *Judicature Act*, RSA 2000, c.J-2, ss. 8, 13, 16 and 19

APPLICANTS	CARLA TREMBLAY in her capacity as executrix of the estate of EDITH GREENE, deceased, and GISELE LEBLANC, and SUSAN VAN ESSEN and TEUNIS (aka TONY) VAN ESSEN and LIFE LEASE HOLDERS and LENDERS UNDER RELATED LOAN AGREEMENTS
RESPONDENT	LIONS VILLAGE OF GREATER EDMONTON SOCIETY
DOCUMENT	**BRIEF OF LAW**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, 10155 - 102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.586 Attention: Terrence M. Warner and Michael Gibson E-Mail: twarner@millerthomson.com / mgibson@millerthomson.com File No.: 0298982.0001

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PART I - INTRODUCTION

1. This Application arises from the insolvency of Lions Village of Greater Edmonton Society ("**Lions Village**"), its failure to adhere to a trust and security structure it established ostensibly to protect the financial commitment made by seniors, and its failure to properly maintain the buildings the seniors were buying into.

2. The Applicants include current and former Life Lease Holders, as well as the representatives of deceased residents' estates.

3. Lions Village is an Alberta society and registered charity that markets itself as a charitable seniors housing provider associated with Lions Clubs International.

4. Lions Village owns and operates three seniors housing communities in the Edmonton area, Lions Village Railtown ("**Railtown**"), Lions Village Riverside ("**Riverside**"), and Lions Village Castledowns ("**Castledowns**"; Railtown, Riverside, and Castledowns are collectively referred to herein as the "**Projects**").

5. Based upon the most recent audited financial statements filed with corporate registry for the year ending June 30, 2023, Life Lease Holders collectively have advanced $34,665,010 through the Life Lease program to Lions Village.

6. To induce seniors to advance funds to Lions Village, Lions Village promised to implement a trust and mortgage structure in which funds paid by Life Lease Holders to Lions Village in exchange for the right to occupy a unit in a Lions Village residential building, would be delivered to the appointed trustee and held in trust to be administered in accordance with the Trustee Agreement.

7. The promise made by Lions Village was that the investment of the Life Lease Holders would be repaid when their occupancy ended within a defined period of time.

8. The protections promised to the Life Lease Holders are illusory. Lions Village ignored its obligations under its own agreements. By Lions Village own admission, no funds were delivered to the Trustee, and there are no funds in trust; the funds were spent by Lions Village.

9. Lions Village has no current ability to satisfy repayment obligations to Life Lease Holders who have left the Projects, some of which have been outstanding for in excess of a year.

10. Repayment arrangements made with various Life Lease Holders who vacated their residences have not been honoured by Lions Village.

11. In breach of the requirements of the *Consumer Protection Act*, Part 3.1[1] and *Life Leases Interest Rate Regulation*,[2] no interest has been paid in regard to Life Leases that were terminated and remained unpaid after 180 days.

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[1] *Consumer Protection Act,* RSA 2000, c. C 26.3 ("***Consumer Protection Act***") at Part 3.1.

[2] *Life Leases Interest Rate Regulation* Alberta Regulation 177/2024 ("***Life Leases Interest Rate Regulation***").

12. The appointed trustee, UMC Financial Management Inc. ("**UMC**"), no longer acts as trustee as Lions Village terminated the Trustee Agreement effective January 31, 2026, and no replacement trustee has been appointed.

13. Lions Village has fostered a culture of secrecy:

    (a) concerns raised by Life Lease Holders go unanswered;

    (b) departing Life Lease Holders were required to enter into non-disclosure agreements in order to secure repayment arrangements;

    (c) no audited financial statements have been filed since the year ending June 30, 2023, in breach of Lions Village's obligations under the *Societies Act*;[3]

    (d) Lions Village has refused to provide statements of operating expenses to Life Lease Holders or a financial budget of estimated expenses in breach of the Life Lease Agreements, and continues to raise their monthly obligations without accounting for the amounts required to be paid;

    (e) Lions Village amended its Bylaws in 2025 to prohibit Life Lease Holders from becoming members of the society.

14. Serious concerns exist regarding the condition of the Projects. The evidence discloses deferred maintenance, water ingress, structural deterioration, and security concerns affecting both residents and the assets against which the mortgage security was granted.

15. This is therefore not merely a dispute concerning unpaid repayment obligations. It concerns the failure of a trust structure established to protect vulnerable seniors, substantial sums whose disposition remains unclear, deteriorating assets, and the complete absence of independent oversight at a time when repayment obligations remain unsatisfied.

16. In the absence of a functioning trustee, the Applicants are the only parties presently positioned to seek the Court's assistance. They seek independent Court supervision to preserve the Projects, protect the mortgage security, restore fiduciary oversight, investigate the financial affairs of Lions Village, determine the disposition of Life Lease funds and operating revenues, and safeguard the interests of Life Lease Holders pending determination of the parties' rights.

17. The Applicants therefore seek the appointment of BDO Canada LLP ("**BDO**") as Receiver and Judicial Trustee, or such other relief as this Honourable Court considers just and appropriate in the circumstances.

PART II – FACTS

<u>Lions Village and the Life Lease Program</u>

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[3] *Societies Act*, RSA 2000, c.S-14 (the "***Societies Act***") at s 26.

18. As indicated above, Lions Village markets itself as a non-profit charitable organization dedicated to providing life lease housing for seniors.[4]

19. Lions Village markets itself as a charitable seniors housing provider associated with Lions Clubs International ("**Lions Club**"). For many residents, including the Applicants, that representation was an important factor in deciding to invest substantial portions of their retirement savings into the Life Lease program.[5] Gisele Leblanc states that her investment represented approximately 30 years of savings, together with insurance proceeds and inheritances received from family and friends, and the claimed affiliation with the Lions Club was an important consideration and gave her some comfort that her investment was safe.[6]

20. This claimed connection with the Lions Club was also an important consideration for Susan and Teunis Van Essen.[7]

21. Lions Village promoted a life lease model pursuant to which seniors would sell their homes and invest a significant portion of their retirement savings into a life lease residence. Lions Village represented that, upon termination of the life lease or the death of the resident, the resident or the resident's estate would generally receive back approximately 94% or more of the amount originally paid.[8]

22. The Applicants, together with numerous other current and former residents of the Projects, entered into Life Lease Agreements and associated Loan Agreements with Lions Village. Pursuant to those agreements, each resident advanced a substantial sum of money to Lions Village in exchange for the right to occupy a unit within one of the Projects until the Life Lease was terminated either by vacating the unit or the passing of the Life Lease Tenant.

23. Lions Village agreed that the principal amount advanced by each resident would be repayable within 90 days following termination of the resident's tenancy. The Loan Agreements further contemplated that residents' loans would be delivered to a trustee to be dealt with in accordance with the Trust Agreement and the Lands and Project would be charged by way of mortgage as security for repayment of the Principal Sum.[9]

24. There are mortgages registered against the Projects in the name of UMC as mortgagee which state that they are "general and continuing collateral security for the payment of all present and future indebtedness and liability of the Mortgagor to the Mortgagee and is given as security for all amounts owing by the Mortgagor to any person or persons being a tenant of the mortgaged lands or a part thereof to which the Mortgagor is indebted."[10]

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[4] Affidavit of Carla Tremblay, sworn July 2, 2026 (the "**Tremblay Affidavit**") at paras 3-7 and Exhibits "A", "B", and "C".

[5] Tremblay Affidavit at para 6 and Exhibit "C".

[6] Affidavit of Gisele Leblanc, sworn July 2, 2026 (the "**Leblanc Affidavit**") at paras 8-10.

[7] Affidavit of Teunis Van Essen sworn July 3, 2026 (the "**Van Essen Affidavit**") at para 13.

[8] Tremblay Affidavit at paras 19-20.

[9] Tremblay Affidavit at paras 17-24.

[10] Tremblay Affidavit at paras 40-46.

Failure of the Trust Structure

25. The trust and security structure contemplated by the governing documents was intended to provide meaningful protection for Life Lease Holders. Under the Trustee Agreement, Lions Village was required to deliver residents' loan funds to the trustee for administration in accordance with the trust arrangement.[11]

26. As indicated previously, no funds were delivered to the trustee by admission of the Chairman, Linda Stainton, in meetings held in March with residents of the various Lions Village buildings. Instead, the funds were paid directly to Lions Village and spent.[12]

27. UMC, the trustee identified in the Trustee Agreement, subsequently advised residents that it had never received or held funds in trust for Lions Village or the Life Lease Holders. UMC also advised that it no longer acted as trustee.[13]

28. Lions Village has suggested that some funds were used to support other projects, including Castledowns. However, residents and former residents have not been provided with sufficient information to determine how Life Lease funds were utilized, whether funds were transferred between Projects, or whether funds intended for one Project were used for another purpose.

29. Notwithstanding the failure to administer the trust as contemplated, mortgages remain registered against the Projects in favour of UMC as trustee for the benefit of Life Lease Holders.[14]

30. Despite the provisions of the Trustee Agreement and the trust structure generally, no successor trustee has been appointed.

Repayment Defaults

31. Lions Village is unable to meet its obligations as they become due. By Lions Village own admission, there are more than 10 former Life Lease Holders whose Life Lease investments remain unpaid totaling at least $1.6 million, and by Lions Village own admission, they do not have the funds to pay them.[15]

32. Following the death of Carla Tremblay's mother, Edith Greene, notice was provided terminating her Life Lease. Under the applicable Loan Agreement, the associated entrance loan became repayable no later than January 31, 2026. Lions Village failed to make payment.[16]

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[11] Tremblay Affidavit at paras 17-24.

[12] Tremblay Affidavit at para 43 and Exhibit "O", p 4.

[13] Tremblay Affidavit at para 36 and Exhibit "L".

[14] Tremblay Affidavit at paras 45-48 and Exhibit "P".

[15] Tremblay Affidavit at para 43 and Exhibit "O", pp 5-7.

[16] Tremblay Affidavit at paras 29-39.

33. In January 2026, Lions Village advised the Estate that repayment could not be made because insufficient funds were available and because Lions Village was experiencing significant vacancies and a lack of new Life Lease sales.[17]

34. Susan and Teunis Van Essen (aka "Tony") similarly terminated their Life Lease effective March 31, 2026 and became entitled to repayment on June 29, 2026. No repayment has been made. Mr. Van Essen states that he is aware of numerous other former residents who have been waiting significantly longer for repayment.[18]

35. Lions Village continues to acknowledge outstanding repayment obligations but has provided no meaningful timeline for repayment.[19]

36. Following the coming into force of Alberta's life lease legislation, Lions Village became subject to statutory repayment obligations under the *Consumer Protection Act*[20] and the *Life Leases Interest Rate Regulation.*[21] Despite prolonged repayment delays affecting multiple residents and estates, Lions Village has failed to pay the statutory interest required to be paid under the *Life Leases Interest Rate Regulation*.[22]

Financial Distress, Lack of Transparency and Governance Concerns

37. Publicly available financial information indicates that Lions Village is experiencing significant financial distress, including recurring operating losses, declining asset values, negative equity, and liabilities that substantially exceed assets.[23]

38. Residents and former residents have repeatedly sought information concerning Lions Village's operations, finances, and management of Life Lease funds. Those requests have largely been refused. Following Lions Village's failure to repay the Estate of Edith Greene, Carla Tremblay repeatedly requested financial statements, operating cost information, and budget materials. Lions Village declined to provide financial statements and advised that annual operating cost expenditure statements and forecast budgets would no longer be distributed to residents despite continuing to collect substantial monthly operating fees.[24] These concerns are particularly significant given the statutory reporting and disclosure obligations recognized in ss. 29 and 30 of the *Trustee Act*.[25]

39. The Applicants are unable to determine how ongoing operating revenues are being applied.[26]

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[17] Tremblay Affidavit at para 31 and Exhibit "I".

[18] Van Essen Affidavit at paras 26-28.

[19] Tremblay Affidavit at para 37 and Exhibit "O", p 10.

[20] *Consumer Protection Act*, *supra* note 1 at Part 3.1.

[21] *Life Leases Interest Rate Regulation, supra* note 2.

[22] Tremblay Affidavit at para 38.

[23] Tremblay Affidavit at paras 52-59.

[24] Tremblay Affidavit at paras 32-33 and 60-61; Leblanc Affidavit at paras 13 and 18-21.

[25] *Trustee Act*, RSA 2022, c T-8.1 ("***Trustee Act***") at ss 29 and 30.

[26] Leblanc Affidavit at paras 20-21.

40. Public records further indicate that Lions Village is in breach of its statutory obligation to file annual returns with audited financial statements. The most recent annual return filed with the Alberta Corporate Registry relates to the fiscal year ending June 30, 2023.[27]

41. As a result, seniors, and their estates, who collectively advanced more than $34 million through the Life Lease program have little visibility into Lions Village's financial condition, the use of those funds, or Lions Village's ability to satisfy existing and future repayment obligations.[28]

42. Governance concerns have also emerged. Lions Village has fostered a culture of secrecy by various actions designed to shield it from scrutiny. Quite apart from the failure to comply with its statutory obligation to file annual reports with audited financial statements[29] and its failure to provide statements of operating expenses and estimates of the Tenant's Proportionate Share of Operating Expenses for the current fiscal year of the Landlord, which is a contractual obligation of the Life Leases,[30] in December 2025, Lions Village amended its bylaws to prohibit residents and persons related to residents from becoming members of the Society, thereby shielding the society from scrutiny and excluding Life Lease Holders from meaningful participation in the governance of the organization.[31]

43. Individuals who entered into agreements for repayment over time were required to execute non-disclosure agreements as a condition of payment, which Lions Village has acknowledged. Lions Village excuse when asked why they were doing this is “Because to protect the society. We didn't want a panic and a race to further legal action, which wouldn't do you any good. You might get a court date in 18 months to 2 years”.[32]

44. Collectively, these circumstances have made it increasingly difficult for Life Lease Holders to obtain information regarding Lions Village's financial affairs and administration of the Projects.[33]

<u>Deterioration and Mismanagement of the Projects</u>

45. Despite continued collection of monthly operating fees, the lack of proper maintenance and the general condition of the Projects is a significant concern.

46. Serious maintenance deficiencies have been identified that remain unaddressed despite years of complaints and requests for corrective action.[34]

47. The affidavit evidence describes roofs in serious need of replacement and roof leaks, water ingress, and resulting damage to residential units and common areas. Residents

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[27] Tremblay Affidavit at paras 9 and 15.

[28] Leblanc Affidavit at paras 20-21; Tremblay Affidavit at paras 43 and 60-63.

[29] *Societies Act*, *supra* note 3 at s 26.

[30] Tremblay Affidavit at Exhibit “F”.

[31] Tremblay Affidavit at paras 10-12.

[32] Tremblay Affidavit at Exhibit “O”, p 6.

[33] Tremblay Affidavit at paras 32-34 and 60-63.

[34] Leblanc Affidavit at paras 22-25; Van Essen Affidavit at paras 18-20 ; Affidavit of Jaimie Martin, sworn July 6, 2026 (the “**Martin Affidavit**”), paras. 8-29.

report water penetration, standing water, and water entering lighting fixtures and other building components.[35]

48. Residents have also documented deteriorating balconies, rotting structures, temporary plywood repairs, deteriorating retaining walls, crumbling parging, and other structural concerns affecting the Projects.[36]

49. Other concerns include non-functioning toilets, unresolved electrical and plumbing issues, non-functioning closet doors, and service requests which are not addressed.[37]

50. The main (common area) air system for the buildings have not been cleaned, and black oily residue blows out of the vents and stains the ceilings and the walls.[38]

51. Security measures have deteriorated as well. At one Project, security monitoring services were suspended due to non-payment, resulting in the loss of monitoring and video retention services. Residents report recurring concerns regarding unauthorized access, theft, and safety.[39]

52. Numerous maintenance concerns identified by residents have remained unresolved for extended periods despite ongoing complaints and requests for action. The evidence suggests a pattern of lack of proper maintenance and asset deterioration that threatens both the quality of life of current residents and the value of the assets securing the Life Lease Holders' interests.[40]

<u>Need for Court Intervention</u>

53. The Applicants are beneficiaries of a trust and mortgage structure intended to secure repayment of their loans. Repayment obligations have matured and remain unpaid. UMC no longer acts as trustee, and no replacement trustee has been appointed.

54. Significant questions also remain regarding the disposition of Life Lease funds, the use of ongoing operating revenues, the financial condition of Lions Village, and the continuing deterioration of the Projects. Despite repeated requests, residents and former residents have been unable to obtain sufficient information to address those concerns.

55. This Application therefore concerns more than unpaid repayment obligations. It concerns a trust structure that no longer functions, substantial sums entrusted by vulnerable seniors whose disposition remains unclear, a lack of financial transparency, and assets that continue to deteriorate while repayment obligations remain unsatisfied.

56. The Applicants therefore seek the appointment of an independent court officer, whether by way of receiver, judicial trustee, or both, to preserve the Projects, protect the mortgage security, investigate the financial affairs of Lions Village, restore independent oversight of

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[35] Leblanc Affidavit at paras 24(a) and 25(a); Van Essen Affidavit at paras 18-20.

[36] Leblanc Affidavit at paras 24(b) and 25.

[37] Van Essen Affidavit at paras 18-20.

[38] Leblanc Affidavit at para 24(e) ; Martin Affidavt para. 16.

[39] Leblanc Affidavit at para 24(d).

[40] Leblanc Affidavit at paras 22-25; Van Essen Affidavit at paras 18-20.

the trust structure, and safeguard the interests of Life Lease Holders pending determination of the parties' rights and remedies.

PART III - ISSUES

57. The issues to be determined by this Honourable Court are as follows:

(a) Whether the Life Lease Holders have standing to seek relief in respect of the trust and mortgage security held for their benefit;

(b) Whether the circumstances justify Court intervention in the affairs of Lions Village; and

(c) What form of Court-supervised administration is necessary and appropriate, including the appointment of a Receiver, a replacement trustee or judicial trustee, or both.

PART IV - ARGUMENT

A. The Life Lease Holders Have Standing to Seek Relief

The Life Lease Holders are the Parties Beneficially Entitled to the Mortgage Security

58. Although legal title to the mortgages registered on title to all three buildings was vested in UMC as trustee, as previously noted, the mortgages are held, in part, in trust for the tenants as general and continuing collateral security for all amounts owing by Lions Village to its tenants.[41]

59. Also as previously noted, the Loan Agreements, Trustee Agreement, and mortgages establish a structure under which Life Lease Holders advanced funds to Lions Village in exchange for repayment rights secured through a trust and mortgage arrangement. The repayment obligations arise under the Loan Agreements. The trust and mortgage structure was created to secure and protect those obligations.[42]

60. UMC possesses no beneficial interest in either the indebtedness owed to the Life Lease tenants or the mortgage security. The beneficial interests belong to the Life Lease Holders. They are the persons whose funds were advanced to Lions Village, whose repayment rights are secured by the mortgages, and whose interests the trust structure was created to protect.

61. Courts have consistently recognized that beneficiaries retain substantive proprietary interests notwithstanding that legal title is vested in a trustee.[43] The question, therefore,

[41] Tremblay Affidavit at paras 23 and 46, Exhibit “F”.

[42] See for example paragraphs 17-27 of the Tremblay Affidavit describing the structure of the Life Lease of Edith Greene.

[43] See for example *Re Urman*, 1983 CanLII 1854 (ON CA) ("***Urman***") at pp 13-14 (trust beneficiaries held "undivided proportionate interests" in the mortgage and had the same rights as if proportionate assignments had been made to them).

is not whether the Life Lease Holders possess a beneficial interest in the mortgage security, but whether they are entitled to seek relief directly in the present circumstances.

The Ordinary Rule Restricting Beneficiary Actions Does Not Apply

62. Trust property is ordinarily administered and enforced by the trustee rather than directly by beneficiaries. However, that principle presupposes the existence of a functioning trustee capable of fulfilling those responsibilities.[44]

63. In this case, UMC advised residents that its relationship with Lions Village was terminated effective January 31, 2026, and that it no longer acts as trustee. Lions Village has not appointed a successor trustee despite the requirements of the Trustee Agreement. There is presently no fiduciary responsible for administering the trust, protecting the mortgage security, enforcing repayment rights, or advancing the interests of the beneficiaries.[45]

64. This is therefore not a case in which beneficiaries seek to interfere with or usurp the role of a functioning trustee. There is no functioning trustee.

65. Courts have long recognized that exceptions exist to the general rule requiring trustee enforcement. Beneficiaries may invoke the assistance of the Court where trustee action is unavailable, impracticable, or impossible. The ordinary rule requiring trustee enforcement exists to facilitate orderly trust administration, not to deprive beneficiaries of a remedy where the trustee is unable or unavailable to protect trust property or beneficiary interests.[46]

66. Those principles are directly engaged here. The trust remains in existence. The mortgage security remains registered. The indebtedness remains outstanding. Yet there is no trustee capable of protecting, administering, or enforcing the rights arising under the trust structure.[47] Where no trustee is capable of acting, beneficiaries may invoke the Court's supervisory jurisdiction to ensure that the trust and the interests it was created to protect remain capable of administration and enforcement.[48]

67. The absence of a functioning trustee does not extinguish the indebtedness, invalidate the mortgage security, or defeat the beneficial interests the structure was created to protect. Courts have likewise recognized that deficiencies in the administration of mortgage trust arrangements do not necessarily defeat the underlying beneficial interests the arrangements were intended to protect, particularly where the parties' intention to create security is clear.[49]

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[44] Donovan W.M. Waters, K.C., *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Limited, 2021) at c. 24.II ("***Waters***").

[45] Tremblay Affidavit at paras 34-49.

[46] *Stoney First Nation v Imperial Oil Resources Ltd.,* 2014 ABQB 408 at paras 53-61, citing *Kwinter v Metrowest Development Ltd.,* 2007 ABQB 713 at para 36; *Waters, supra* note 44, citing *Hayim v Citibank NA* [1987] AC 730 (Eng Prob Ct) ("***Hayim***").

[47] Tremblay Affidavit at paras 34-49.

[48] *Waters, supra* note 44; *Trustee Act, supra* note 25 at ss 16, 17, 32, and Part 8.

[49] *Eron Mortgage Corp v Eron Mortgage Corp (Trustee of)*, 1999 CanLII 6283 (BCSC) ("***Eron***") at paras 19-29.

68. Absent Court intervention, the interests of the beneficiaries would simply go unprotected.

The Breakdown of the Trust Structure Does Not Extinguish the Applicants' Rights

69. The breakdown of trust and mortgage structure does not extinguish the rights they were created to protect. The indebtedness remains outstanding, the mortgage security remains registered, and the beneficial interests remain vested in the Life Lease Holders.

70. In *Eron*, the Court upheld the validity of mortgage trust arrangements notwithstanding significant deficiencies in administration and trust documentation, recognizing that beneficial interests remain capable of protection despite failures in the administration of the trust structure.[50]

71. Importantly, *Eron* confirms that deficiencies in trust administration do not invalidate otherwise valid beneficial interests. The Court expressly held that tracing is not a prerequisite to establishing or maintaining a trust interest and rejected the argument that administrative deficiencies could defeat beneficiaries' rights once trust property had been appropriated to them. The Court confirmed that administrative deficiencies do not defeat beneficial interests that have otherwise been validly created.[51]

72. To conclude otherwise would permit the collapse of the trust structure to defeat the very interests it was intended to protect. It would also allow Lions Village to benefit from the collapse of protective arrangements established for the benefit of the Life Lease Holders. In *Eron*, the Court rejected a similar result, holding that there was no equitable basis to deprive investors of the interests allocated to them under the trust structure merely because of administrative failures in its operation.[52]

The Court Possesses Broad Jurisdiction to Protect the Beneficiaries and the Trust Structure

73. The Court's supervisory jurisdiction over trusts is grounded in the longstanding principle that a trust does not fail for want of a trustee.[53] The Court's role is to ensure that trust property remains capable of administration and that the interests of beneficiaries remain protected notwithstanding failures in the ordinary mechanisms of trust administration.[54]

74. Consistent with that principle, the Trustee Agreement expressly contemplates that a trustee may resign, be removed, or become incapable of acting, and provides for the appointment of a successor where Lions Village fails to do so.[55] The parties therefore anticipated that Court intervention might be required to preserve the trust structure and protect the beneficiaries.

75. Independent of the Trustee Agreement, the Court possesses broad authority under the *Trustee Act* to remove trustees, appoint replacement trustees, confer additional powers

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[50] *Eron* at paras 19-29.

[51] *Eron* at paras 23, 29, and 33-40.

[52] *Eron* at paras 51-52.

[53] *Trustee Act, supra* note 25 at ss 26(3) (…the trust does not fail because of the absence of a trustee).

[54] *Figley v Figley,* 2012 SKCA 36 ("***Figley***") at paras 29-32*; Trustee Act, supra* note 25 at ss 16, 22, 26, 32 and Part 8.

[55] Tremblay Affidavit at Exhibit "N" (Trustee Agreement) at s 17.

on trustees, order disclosure regarding trust administration, and make orders necessary to ensure proper administration of trust property and protection of beneficiaries.[56]

76. The Court's jurisdiction is protective rather than punitive. It exists to ensure proper administration of trust property and preservation of beneficiaries' interests when the ordinary mechanisms of trust administration have failed. As recognized in *Figley*, the Court's supervisory jurisdiction exists to ensure that trusts are properly administered and that beneficiary interests remain protected. Beneficiaries may seek the appointment of a receiver or replacement trustee where mismanagement or other circumstances create a serious danger to trust property.[57]

77. The governing principle is that the Court's paramount concern is the welfare of the beneficiaries and the proper administration of the trust. In *Letterstedt v Broers*, the Privy Council held that the Court's jurisdiction to intervene in trust administration is exercised for the welfare of the beneficiaries and the trust estate. The Saskatchewan Court of Appeal reaffirmed that principle in *Figley*, emphasizing that the Court's "main guide must be the welfare of the beneficiaries". [58]

78. Those principles apply directly in the present case. The trust structure was created to protect seniors and their estates who collectively advanced more than $34 million to Lions Village in reliance upon repayment rights, mortgage security, and independent trust administration.[59]

79. UMC no longer acts as trustee. No replacement trustee has been appointed. Meanwhile, repayment obligations have matured and remain unpaid, significant concerns exist regarding the condition of the Projects, and serious questions remain regarding the use of Life Lease funds and ongoing operating revenues.[60]

80. In those circumstances, the continued absence of an active fiduciary creates a direct risk both to the beneficiaries and to the assets intended to secure their claims.

The Applicants Have Standing to Seek the Relief Requested

81. These are precisely the circumstances in which the Court's supervisory jurisdiction is engaged to ensure that the interests of beneficiaries remain protected and that the trust is properly administered.

82. The Applicants are not seeking merely a declaration of rights. They seek relief necessary to preserve trust property, protect the mortgage security, restore fiduciary oversight, and safeguard the interests secured by the trust structure established for their benefit.

83. Where no functioning trustee exists and no other party is positioned to invoke the Court's supervisory jurisdiction, the beneficiaries are the only persons capable of bringing these

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[56] *Trustee Act, supra* note 25 at ss. 16, 22, 26, 32 and Part 8.

[57] *Waters, supra* note 44; *Figley, supra* note 54 at para 32.

[58] *Figley, supra* note 54 at para 32.

[59] Leblanc Affidavit at paras 8-10; Tremblay Affidavit at paras 14, 23-24, and 46.

[60] Tremblay Affidavit at paras 34-51; Leblanc Affidavit at paras 22-25.

matters before the Court. In practical terms, they are the only parties presently capable of protecting the trust estate and the interests for which it was created.[61]

84. Their interest is direct and immediate. They advanced the funds. Lions Village owes the indebtedness to them. The mortgage security was granted to secure their claims and is held in trust for their benefit.

85. The Applicants therefore possess a sufficient legal and equitable interest to invoke the supervisory jurisdiction of this Court and seek the relief requested. In addition, section 16(2) of the *Trustee Act* expressly authorizes beneficiaries and secured parties to apply for appointment of a replacement trustee, confirming the Applicants' statutory standing to seek relief where no functioning trustee remains in office.[62]

B. Independent Court Supervision Is Necessary

86. The protections that formed a central part of the Life Lease program are no longer operating as contemplated.

87. We submit that based upon the factors previously enumerate regarding the dire financial condition of Lions Village as amply demonstrated by its inability to discharge its obligations as they come due and the deteriorating condition of the Lions Village buildings, Court intervention is required to preserve the Projects, protect the mortgage security, restore fiduciary oversight, investigate the financial affairs of Lions Village, determine the disposition of Life Lease funds and operating revenues, and safeguard the interests of Life Lease Holders pending determination of the parties' ultimate rights and remedies.

C. A Receiver Should Be Appointed

Under s. 243 of the *Bankruptcy and Insolvency Act*

88. Section 243 of the *Bankruptcy and Insolvency Act* (“**BIA**”)[63] and s. 13(2) of the *Judicature Act*[64] confer broad authority upon the Court to appoint a receiver where it is just and convenient to do so. The governing question is whether appointment of a receiver is appropriate in light of all of the circumstances before the Court.[65]

89. The Applicants have satisfied the procedural prerequisites for relief under the BIA.[66] Demands have been made and the defaults remain unresolved. Lions Village has acknowledged in public meetings and in correspondence that it does not have the financial resources required to meet its current obligations, including repayment obligations and funds required for very substantial and costly repairs to the buildings, including roof replacement.

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[61] *Waters, supra* note 44, citing *Hayim.*

[62] *Trustee Act, supra* note 25 at s 16.

[63] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 ("**BIA**") at s 243.

[64] *Judicature Act,* RSA 2000, c J-2 ("**Judicature Act**") at s 13(2).

[65] *Bank of Nova Scotia v Smiling Simba Learning Academy Inc,* 2025 ABKB 11 at paras 27-31.

[66] BIA, *supra* note 63 at s 244.

90. Section 2 of the BIA defines an insolvent person as follows:

> "***insolvent person" means a person who is not bankrupt and who resides, and carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and***
>
> (a) ***who is for any reason unable to meet his obligations as they generally become due;***
>
> (b) ***who has ceased paying his current obligations in the ordinary course of business as they generally become due; or***
>
> (c) ***the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due***."[67]

91. Based on the First Report of the Proposed Receiver:

(a) Lions Village has debt which exceeds $1,000;

(b) They may not be able to pay their obligations as they become due as the mortgage may not be able to be renewed and the condominium fees may become due based on the pending appeal; and

(c) The value of their assets appears to be insufficient to enable the payment of all their liabilities.

92. Therefore, based on the above, Lions Village may be considered insolvent.[68]

93. In *Paragon Capital Corporation Ltd. v Merchants & Traders Assurance Co.*, the Court identified a non-exhaustive list of factors relevant to whether the appointment of a receiver is just and convenient, including preservation of assets, protection of stakeholders, actual or apprehended waste of property, management concerns, enforcement difficulties, balance of convenience, efficient administration of assets, and the need for independent oversight.[69]

94. Those factors strongly favour relief in this case.

95. First, there is a clear need to protect stakeholders. The Applicants are creditors of Lions Village pursuant to the Loan Agreements. The repayment obligations arising under those agreements have matured and remain unpaid. More than ten former Life Lease Holders are awaiting repayment and Lions Village has acknowledged that outstanding repayment obligations exceed approximately $1.2 million. Those obligations are among the liabilities secured through the mortgage structure established for the benefit of Life Lease Holders.[70]

96. Second, there is a need to preserve and protect the assets against which the mortgage security was granted. The Projects constitute the primary assets securing Lions Village's

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[67] BIA, *supra* note 63 at s 2.

[68] First Report of BDO Canada Limited in its Capacity as Proposed Receiver at paras 24 and 25.

[69] *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co,* 2002 ABQB 430 ("***Paragon***") at para 27.

[70] Tremblay Affidavit at para 37(d); Leblanc Affidavit at paras 14-15.

repayment obligations under the Loan Agreements. The evidence discloses significant unmitigated maintenance issues and security issues affecting the Projects.[71]

97. Third, serious concerns exist regarding the administration of Lions Village's affairs. Residents have repeatedly been denied meaningful financial disclosure, annual corporate filings have not been maintained, and residents have been excluded from participation in governance through amendments to Lions Village's bylaws.[72]

98. Fourth, there is presently no effective internal mechanism capable of addressing those concerns.

99. Fifth, significant questions remain regarding the disposition of funds advanced through the Life Lease program. Lions Village advised residents that more than $34 million advanced through the Life Lease program was not held in trust and had instead been spent. However, the Applicants have no reliable means of determining how those funds were used, whether funds were transferred between Projects, or how operating revenues continue to be applied despite ongoing maintenance deficiencies.[73]

100. Independent investigation is therefore required. The Applicants do not presently know:

(a) how funds advanced by Life Lease Holders were utilized;

(b) whether funds generated from one Project were used to support another;

(c) whether funds received from incoming residents were used to satisfy obligations to former residents;

(d) the extent of any inter-project transfers;

(e) the current availability of funds attributable to the Life Lease program; or

(f) why substantial operating revenues have not translated into corresponding maintenance and capital repairs.

101. These questions cannot be answered absent independent access to Lions Village's books, records, financial affairs, and operations.

102. Appointment of a Receiver would place the Projects and Lions Village's affairs under independent Court-supervised oversight and permit a neutral officer of the Court to preserve assets, investigate financial affairs, determine the disposition of Life Lease funds and operating revenues, address urgent operational concerns, preserve the assets securing the Applicants' repayment claims, and report to the Court and stakeholders.

103. Courts have also recognized that a demonstrated loss of confidence in management may support the appointment of a receiver. Here, the combination of repayment defaults, absent trust administration, deteriorating assets, lack of transparency, and unanswered

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[71] Leblanc Affidavit at paras 22-25; Van Essen Affidavit at paras 9-11.

[72] Tremblay Affidavit at paras 9-15, 32-34, and 60-61.

[73] Tremblay Affidavit at para 43 and Exhibit “O”.

questions regarding the disposition of substantial sums advanced by seniors and their estates provides ample basis for such concerns.[74]

104. BDO has consented to act as Receiver.

105. Having regard to the *Paragon* factors, the unpaid obligations arising under the Loan Agreements, the mortgage security granted to secure those obligations, the deterioration of the Projects, the absence of trust administration, the lack of financial transparency, and the uncertainty surrounding the disposition of more than $30 million advanced through the Life Lease program, the appointment of a Receiver is just and convenient.[75]

Alternatively, under Section 13 of the *Judicature Act*

106. Even if the Court concludes that the Applicants' rights do not fit neatly within a conventional secured creditor framework, that does not preclude the appointment of a receiver.

107. Section 13(2) of the *Judicature Act* grants the Court broad equitable jurisdiction to appoint a receiver whenever it appears just or convenient to do so.[76] The jurisdiction is discretionary and is directed toward the protection and preservation of property pending determination of the parties' rights. It is not confined to cases involving uncontested security interests or conventional creditor-debtor relationships.[77]

108. Alberta courts have repeatedly recognized that the appointment of a receiver is a flexible equitable remedy intended to preserve property, protect stakeholders, facilitate investigation and oversight, and prevent further prejudice pending resolution of competing claims. The Court may intervene where independent supervision is required, even where the parties' ultimate rights remain disputed.[78]

109. Courts exercising their supervisory jurisdiction over trusts have similarly recognized that beneficiary protection and preservation of trust property may require intervention where ordinary trust administration has broken down. As noted in *Waters' Law of Trusts in Canada*, beneficiaries may seek the appointment of a receiver where trust property is endangered and intervention is necessary to protect beneficiary interests.[79]

110. The circumstances before the Court are unusual and compelling. The Applicants are beneficiaries of a trust and mortgage structure intended to protect repayment of loans advanced through the Life Lease program. Repayment obligations have matured and remain unpaid. UMC no longer acts as trustee. No replacement trustee has been appointed. Significant questions remain regarding the disposition of more than $30 million advanced through the Life Lease program, while residents continue to be denied

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[74] *KingSett Mortgage Corporation v 30 Roe Investments Corp*, 2022 ONSC 2777 (leave to appeal ref'd 2022 ONCA 479) at para 29.

[75] *Paragon*, *supra* note 69, at para 27.

[76] *Judicature Act, supra* note 64 at s 13(2).

[77] *Paragon supra* note 69 at paras 27-28.

[78] *Paragon supra* note 69 at para 27.

[79] *Waters*, *supra* note 44.

meaningful access to financial information concerning Lions Village's operations and finances.[80]

111. The evidence also discloses ongoing deterioration of the Projects that form the subject matter of the mortgage security. Residents report roof leaks, water ingress, deteriorating balconies, structural concerns, deferred maintenance, and security issues affecting the Projects and the residents who continue to live in them.[81]

112. In practical terms, there is presently no effective mechanism through which these concerns can be independently assessed or addressed. There is no trustee administering the trust structure. Residents have been excluded from meaningful participation in governance. The Applicants do not have access to the information necessary to determine how Life Lease funds have been utilized, how operating revenues are being applied, or whether assets are being managed in a manner consistent with Lions Village's obligations.

113. Section 13 of the *Judicature Act* exists precisely to permit the Court to intervene where independent supervision is required to preserve property and protect those with a legitimate interest in it. The Applicants do not seek premature determination of their ultimate rights. They seek the appointment of an independent officer of the Court to preserve assets, investigate financial affairs, maintain transparency, and safeguard the interests of all stakeholders pending determination of those rights.

114. Regardless of the ultimate characterization of the Applicants' security interests, the combination of unpaid repayment obligations, absent trust administration, deteriorating assets, governance concerns, limited disclosure, and unanswered questions regarding the disposition of substantial sums advanced by vulnerable seniors makes independent Court supervision both necessary and appropriate.

115. In these circumstances, the appointment of a Receiver under section 13(2) of the *Judicature Act* is just and convenient.

D. Alternatively, or in Addition, a Judicial Trustee Should Be Appointed

116. The difficulties before the Court extend beyond the operation of Lions Village itself. They also concern the failure of the trust structure established to protect Life Lease Holders.

117. UMC no longer acts as trustee. No successor trustee has been appointed. Consequently, no fiduciary is presently responsible for administering the trust, protecting the mortgage security, enforcing rights arising under the Loan Agreements and Trustee Agreement, or otherwise safeguarding the beneficiaries' interests.[82]

118. Section 16 of the *Trustee Act* authorizes the Court to appoint a replacement trustee where such an appointment is in the best interests of the objects of the trust and would otherwise

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[80] Tremblay Affidavit at paras 31-37, 43, and 60-63.

[81] Leblanc Affidavit at paras 22-25; Van Essen Affidavit at paras 9-11.

[82] Tremblay Affidavit at paras 23-49.

be expedient, difficult or impracticable. Significantly, beneficiaries and secured parties are expressly entitled to seek that relief.[83]

119. Section 32 further permits a trustee, beneficiary, or secured party to apply for an order conferring additional powers on a trustee where necessary for the proper administration of the trust and in the best interests of the beneficiaries.[84] The Act also imposes reporting and disclosure obligations and authorizes the Court to order disclosure regarding the trust, its administration, and its assets and liabilities.[85]

120. Those powers are particularly important in the present case. Questions exist regarding the administration of the trust structure, preservation of the mortgage security, repayment defaults, and the disposition of funds advanced through the Life Lease program. There is presently no fiduciary capable of independently addressing those issues on behalf of the beneficiaries.

121. Appointment of a judicial trustee would restore the fiduciary oversight expressly contemplated by the Trustee Agreement while ensuring ongoing Court supervision and accountability under the *Trustee Act*.

122. A judicial trustee would be capable of:

(a) administering the trust and trust property;

(b) protecting and preserving the mortgage security;

(c) reviewing the administration of the trust arrangement;

(d) enforcing rights arising under the Loan Agreements, Trustee Agreement, and mortgage;

(e) communicating with beneficiaries and reporting to the Court; and

(f) taking such other steps as may be necessary to ensure proper administration of the trust.

123. The appointment of a judicial trustee addresses a distinct problem from that addressed by a receivership. While a Receiver would oversee the operations and assets of Lions Village, a judicial trustee would restore proper administration of the trust and security structure established for the benefit of Life Lease Holders.

124. Appointment of BDO as judicial trustee would restore the independent fiduciary protection promised to Life Lease Holders and ensure that their interests are represented by a fiduciary subject to continuing Court supervision.

[83] *Trustee Act, supra* note 25 at s 16.

[84] *Trustee Act supra* note 25 at s 32.

[85] *Trustee Act, supra* note 25 at ss 29-30.

E. The Most Effective Remedy Is a Combined Approach

125. The present difficulties arise from two interconnected failures: the breakdown of Lions Village's governance and financial management and the breakdown of the trust structure established to protect Life Lease Holders.

126. A Receiver directly addresses the first problem. A Receiver can preserve and manage the Projects, investigate Lions Village's financial affairs, determine the disposition of Life Lease funds and operating revenues, address urgent operational and maintenance concerns, and report to the Court on the financial condition of Lions Village.

127. A judicial trustee directly addresses the second. A judicial trustee can restore independent fiduciary oversight, administer and preserve the trust property, protect and enforce the mortgage security, and advance the interests of the beneficiaries under the Court's ongoing supervision.

128. Neither remedy, standing alone, fully addresses the circumstances before the Court. A receivership may secure operational control of the Projects but does not restore administration of the trust structure. Conversely, a judicial trustee may restore trust administration but does not necessarily provide the broader investigatory and operational powers required to address Lions Village's affairs as a whole.

129. Appointing BDO in both capacities would permit a coordinated and efficient response to the concerns giving rise to this Application. In its capacity as Receiver, BDO could investigate and preserve Lions Village's assets and operations. In its capacity as judicial trustee, BDO could protect and administer the trust and mortgage security structure established for the benefit of Life Lease Holders.

130. Such an arrangement is particularly appropriate where repayment obligations remain unpaid, no trustee is acting, significant questions remain regarding the disposition of Life Lease funds, residents have been denied meaningful financial disclosure, and the Projects continue to experience deferred maintenance and deterioration.

131. The combined appointment would ensure that the Projects, the trust structure, and the interests of Life Lease Holders are overseen by independent fiduciaries subject to continuing Court supervision.

132. The Applicants therefore submit that the most practical and effective remedy is the appointment of BDO as both Receiver and judicial trustee, with such powers as may be necessary to preserve the Projects, protect the mortgage security, investigate the affairs of Lions Village, restore trust administration, and safeguard the interests of Life Lease Holders pending determination of the parties' ultimate rights and remedies.

PART V - REQUESTED RELIEF

133. For the reasons set out above, the Applicants respectfully request orders substantially in the following form:

    (a) appointing BDO as Receiver and Manager, without security, over all of the current and future assets, undertakings, and properties of Lions Village, pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, s. 13(2) of the *Judicature Act*, and the Court's inherent jurisdiction;

(b) granting the Receiver all powers necessary to preserve, manage, investigate, and protect the assets and affairs of Lions Village, including authority to:

(i) take possession and control of the Projects and related assets;

(ii) collect and preserve books, records, financial information, and trust-related documentation;

(iii) investigate the financial affairs of Lions Village;

(iv) assess and address maintenance, repair, and safety issues affecting the Projects;

(v) report to the Court regarding Lions Village's assets, liabilities, operations, and obligations to Life Lease Holders;

(vi) commence, continue, defend, or settle proceedings where necessary for the protection of the estate or stakeholders; and

(vii) take such further steps as may be necessary to preserve value and protect stakeholder interests;

(c) appointing BDO, or such other independent person as this Honourable Court considers appropriate, as replacement trustee or judicial trustee in respect of the trust and mortgage security structure established pursuant to the Loan Agreements, Trustee Agreement, and registered mortgages;

(d) granting the trustee or judicial trustee authority to:

(i) administer the trust and trust property;

(ii) take possession and control of trust records and documentation;

(iii) review the administration of the trust arrangement;

(iv) preserve, protect, and enforce the mortgage security;

(v) investigate potential breaches of trust obligations;

(vi) communicate with beneficiaries and provide reports to the Court; and

(vii) take such steps as may be necessary to protect the interests of the Life Lease Holders;

(e) declaring that the Applicants, as beneficiaries of the trust and mortgage security structure, have standing to seek the relief requested in this application;

(f) directing that the Receiver and judicial trustee cooperate and share information as necessary to ensure efficient administration of the Projects, trust assets, and security interests;

(g) alternatively, should the Court determine that a receivership is unnecessary, appointing a replacement trustee or judicial trustee with enhanced investigative, reporting, and enforcement powers sufficient to protect the interests of the Life Lease Holders and preserve the mortgage security;

(h) alternatively, should the Court determine that appointment of a judicial trustee is unnecessary, appointing a Receiver with authority sufficient to investigate and preserve both the Projects and the trust-related assets and interests;

(i) granting such further and other relief as this Honourable Court considers just and appropriate in the circumstances; and

(j) costs of this application on a solicitor-client basis, or such other basis as this Honourable Court considers appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of July, 2026.

Terrence M. Warner
Counsel for the Applicants

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	*Consumer Protection Act,* RSA 2000, c. C 26.3, Part 3.1
2.	*Life Leases Interest Rate Regulation* Alberta Regulation 177/2024
3.	*Societies Act*, RSA 2000, c.S-14, s 26
4.	*Trustee Act*, RSA 2000, c.T-8.1, ss. 16, 22, 26, 29, 30, 31, 32, and Part 8.
5.	*Re Urman*, 1983 CanLII 1854 (ON CA)
6.	Donovan W.M. Waters, K.C., *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Limited, 2021), c. 24.II ("***Waters***")
7.	*Stoney First Nation v Imperial Oil Resources Ltd,* 2014 ABQB 408
8.	*Kwinter v Metrowest Development Ltd,* 2007 ABQB 713
9.	*Hayim v Citibank NA*, [1987] AC 730 (Eng Prob Ct)
10.	*Eron Mortgage Corp v Eron Mortgage Corp (Trustee of)*, 1999 CanLII 6283 (BCSC)
11.	*Figley v Figley,* 2012 SKCA 36
12.	*Bankruptcy and Insolvency Act,* RSC 1985, c B-3, ss 2, 243, and 244
13.	*Judicature Act,* RSA 2000, c J-2, s. 13(2)
14.	*Bank of Nova Scotia v Smiling Simba Learning Academy Inc*, 2025 ABKB 11
15.	*Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co,* 2002 ABQB 430
16.	*KingSett Mortgage Corporation v 30 Roe Investments Corp*, 2022 ONSC 2777

TAB 1

Province of Alberta

CONSUMER PROTECTION ACT

Revised Statutes of Alberta 2000
Chapter C-26.3

Current as of January 1, 2025

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Part 3.1
Life Leases

Part 4
Marketing Through Electronic Media

Part 5
Credit and Personal Reports

Part 6
Wage Assignments

Part 7
Fees Charged by Loan Brokers

Part 8
Consignment Sales, Mobile Homes and Motor Fuel

supplier is entitled to reasonable compensation for the use of the property, but the supplier's rights under this section do not arise until the supplier complies with subsection (1).

1998 cF-1.05 s39

Recovery of refund

40 If the supplier fails to refund to the consumer all money paid under the time share contract under section 39, the consumer may recover the money from the supplier as a simple contract debt.

1998 cF-1.05 s40

Regulations

41 The Minister may make regulations

(a) respecting the form and contents of time share contracts;

(b) respecting the giving of a notice of cancellation of a time share contract, including specifying when notice is deemed to be received.

1998 cF-1.05 s41

Part 3.1
Life Leases

Definitions

41.1 In this Part,

(a) "entrance fee" means an amount, other than occupancy fees, payable under a life lease to a lease operator or a trustee;

(b) "lease operator" means a person who, under a life lease, grants to a leaseholder the exclusive right to occupy a residential dwelling and, if applicable, the right to use areas intended for the common use of occupants of a building;

(c) "leaseholder" means an individual who, under a life lease, is granted the exclusive right to occupy a residential dwelling and, if applicable, the right to use areas intended for the common use of occupants of a building, or the estate of a deceased leaseholder;

(d) "life lease" means a written agreement pursuant to or with respect to which

(i) an entrance fee has been paid or is payable with respect to a residential dwelling, and

(ii) the leaseholder is granted the exclusive right to occupy the residential dwelling and, if applicable, the right to use areas intended for the common use of occupants of a building for life or until the life lease is terminated by the lease operator or the leaseholder;

(e) “occupancy fees” means any amount the lease operator requires the leaseholder to pay on a monthly or other basis for operations, maintenance and services or to secure the upkeep and cleanliness of the residential dwelling;

(f) “pre-lease payment” means a payment that may be used as a deposit to hold a residential dwelling for an individual who has not formally entered into a life lease;

(g) “trustee” means a person or entity appointed by the lease operator to receive, manage and disburse funds on behalf of the lease operator.

2024 c3 s3

Application

41.2 Subject to section 41.4(3) and (4), this Part applies to life leases entered into on or after this Part comes into force.

2024 c3 s3

Life lease requirements

41.3(1) Subject to section 41.5 and the regulations, a life lease must include provisions respecting

(a) the collection and use of entrance fees,

(b) the return of entrance fees, including the timing of and conditions for a return,

(c) cancellation rights respecting the life lease, including

(i) a minimum 10-day cancellation period for a leaseholder after the leaseholder has signed a life lease,

(ii) notice requirements for cancellation, and

(iii) conditions respecting cancellation,

(d) termination rights respecting the life lease, including

(i) notice requirements for termination, and

(ii) conditions respecting termination,

(e) occupancy fees, including

(i) conditions for the increase of those fees,

(ii) notice requirements for the increase of those fees, and

(iii) the allowable frequency of increases,

(f) lease operator obligations,

(g) leaseholder obligations, and

(h) any other provisions required under section 41.5 or by the regulations.

(2) A lease operator shall use a form of life lease that complies with subsection (1), section 41.5 and the regulations.

2024 c3 s3

Return of entrance fee

41.4(1) A lease operator shall return the leaseholder's entrance fee within 180 days of termination of a life lease.

(2) If a lease operator does not return the leaseholder's entrance fee or any portion of it within the time specified in subsection (1), interest at the prescribed rate will accrue on any unreturned amount.

(3) Notwithstanding any provision respecting the matters in subsections (1) and (2) in leases substantially similar to a life lease, those subsections apply with respect to substantially similar leases that are

(a) subsisting on the coming into force of this Part, and

(b) terminated after the coming into force of this Part.

(4) Nothing in this section affects any provisions in a

(a) life lease,

(b) lease terminated before the coming into force of this Part that is substantially similar to a life lease, or

(c) lease subsisting on the coming into force of this Part that is substantially similar to a life lease,

respecting the order in which entrance fees are to be returned.

2024 c3 s3

Standard content of agreements, forms, other documents

41.5(1) The Minister may establish standard content for agreements, forms and other documents used by lease operators, including, but not limited to, life leases, cancellation forms and receipts.

(2) If the Minister establishes standard content for a document, a lease operator shall use that standard content.

2024 c3 s3

Regulations

41.6(1) The Lieutenant Governor in Council may make regulations

(a) respecting life lease requirements, including specifying requirements in addition to any set out in section 41.3 or under section 41.5;

(b) respecting pre-lease payment disclosure and refund requirements;

(c) respecting entrance fees, including

(i) the maximum allowable fees,

(ii) the percentage that is returnable,

(iii) receipt requirements, and

(iv) interest or other payments to be paid by a lease operator to a leaseholder with respect to unreturned entrance fees, including the rate of interest under section 41.4(2);

(d) requiring lease operators or trustees who receive entrance fees or pre-lease payments to deposit those fees or payments into a trust account;

(e) respecting the trust account referred to in clause (d), including

(i) where the trust account may be established and maintained and when the fees or payments must be deposited,

(ii) the qualifications and appointment of trustees,

(iii) the powers, duties and functions of trustees and the disbursement of funds from the trust account, and

(iv) the records to be kept respecting the trust account, the period of time that those records are to be maintained and any audit of the trust account;

(f) respecting any restrictions on the use by a lease operator of entrance fees or pre-lease payments not held in trust;

(g) requiring lease operators to provide or submit a security;

(h) respecting the provision or submission of a security referred to in clause (g), including

(i) the circumstances in which a lease operator is required to provide or submit a security,

(ii) the person to whom a lease operator must provide or submit a security, and the powers, duties and functions of that person,

(iii) the person from whom a security may be obtained if issued by a third party at the request of a lease operator,

(iv) the type, form, amount and terms and conditions of a security,

(v) the terms and conditions under which a security is forfeited, the persons who are entitled to the proceeds under the security and the procedures to be followed for claiming on a security,

(vi) a system of resolving disputes involving claims against a security that claimants and lease operators are required to participate in and providing that decisions under the system are binding,

(vii) any notification, reporting or disclosure requirements related to the security, and

(viii) the records to be kept respecting a security and the period of time for which those records are to be maintained;

(i) respecting establishment of a fund for ongoing building maintenance and requirements for a study to assess the condition of a building;

(j) respecting financial audit and disclosure requirements with respect to leaseholders;

(k) respecting governance requirements, including annual meeting requirements for leaseholders and lease operators;

(l) respecting notice periods and restrictions respecting increases in fees applicable to leaseholders;

(m) respecting insurance requirements and disclosure of insurance coverage to leaseholders;

(n) defining any term used but not defined in this Part;

(o) prescribing anything required to be prescribed under this Part or that this Part refers to as prescribed;

(p) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent of this Part.

(2) Without limiting the generality of subsection (1)(n), the Lieutenant Governor in Council may make regulations that restrict or broaden the definition of any term defined in or under this Part, and the restricting or broadening of the definition may apply to one or more provisions of this Part and to one or more provisions of the regulations under this Part.

2024 c3 s3

Part 4
Marketing Through Electronic Media

Regulations

42(1) The Minister may make regulations respecting the marketing of goods and services through forms of electronic media, such as telephone, television, fax, e-mail or the Internet, that are specified in the regulations.

(2) Without limiting subsection (1), the Minister may make regulations

(a) specifying the forms of electronic media and the types of marketing to which the regulation applies;

(b) regulating and prohibiting specified activities involved in marketing of goods and services through electronic media;

(c) setting out the rights and remedies of consumers who enter into consumer transactions wholly or partly through a form of electronic media.

RSA 2000 cF-2 s42;2005 c9 s17

Part 5
Credit and Personal Reports

Definitions

43 In this Part,

TAB 2

Province of Alberta

CONSUMER PROTECTION ACT

LIFE LEASES INTEREST RATE REGULATION

Alberta Regulation 177/2024

Current as of November 7, 2024

Extract

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Note

All persons making use of this document are reminded that it has no legislative sanction. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

(no amdt)

ALBERTA REGULATION 177/2024

Consumer Protection Act

LIFE LEASES INTEREST RATE REGULATION

Interest rate

1 Interest that is payable under section 41.4(2) of the Act is simple interest at a rate of 9% per year.

Payment of interest

2(1) Subject to subsection (2), a lease operator must pay the interest accrued each month on any unreturned portion of the entrance fee to the former leaseholder or the former leaseholder’s agent or estate within 5 business days of the last day of the month in which the interest accrued.

(2) Where a lease operator fully returns the entrance fee or the balance of the unreturned entrance fee during a month in which interest must be paid under section 41.4(2) of the Act, the lease operator must pay the interest accrued in that month, if it is not paid together with the full return of the entrance fee or the balance of the unreturned entrance fee, to the former leaseholder or the former leaseholder’s agent or estate within 5 business days of the date the entrance fee is fully returned.

Expiry

3 For the purpose of ensuring that this Regulation is renewed for ongoing relevancy and necessity, with the option that it may be repassed in its present form or an amended form following a review, this Regulation expires on October 31, 2028.

9780077984989 5

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TAB 3

Province of Alberta

SOCIETIES ACT

Revised Statutes of Alberta 2000
Chapter S-14

Current as of November 16, 2022

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

Definitions

1 In this Act,

(a) “body corporate” means a body corporate however or wherever incorporated;

(a.1) “director” means any person occupying the position of director by whatever name called;

(2) Notice of the location of the registered office of a society, giving the postal address, shall be filed with the Registrar

(a) with the application for incorporation or the application for continuance, as the case may be, and

(b) within 15 days after a change in the location of the registered office.

RSA 2000 cS-14 s24;2014 c8 s8

Annual general meeting

25 A society shall hold an annual general meeting and shall present at that meeting a financial statement setting out its income, disbursements, assets and liabilities, audited and signed by the society's auditor.

RSA 2000 cS-14 s25;2022 c14 s17

Electronic meetings

25.1 Unless the bylaws, articles or other governing documents expressly provide otherwise,

(a) a person entitled to attend a meeting of the society or of its board of directors may attend the meeting by electronic means,

(b) a meeting of the society or of its board of directors may be held entirely by electronic means,

(c) a person attending a meeting by electronic means under clause (a) or (b) who is entitled to vote at the meeting may vote by any electronic, telephonic or other method that the society has made available for that purpose, and

(d) a person attending a meeting by electronic means under clause (a) or (b) is deemed for the purposes of this Act to be present in person at the meeting.

2021 c3 s6

Electronic notice

25.2 Unless the society's bylaws, articles or other governing documents expressly provide otherwise, a notice of a meeting under this Act may be sent by electronic means in accordance with the provisions of the *Electronic Transactions Act*.

2021 c3 s6

Annual report

26(1) In this section, "anniversary month" means the month in each year that is the same as the month in which the certificate of incorporation of the society was issued.

(2) A society shall each year, on or before the last day of the month immediately following its anniversary month, make a return to the Registrar containing

(a) the address of the registered office of the society,

(b) the full name and street address or postal address of each officer and director of the society, and

(c) repealed 2021 c13 s13,

(d) the audited financial statement presented at the last annual general meeting of the society.

(3) Notwithstanding anything in this section, where there is a change

(a) in the membership of the officers or directors of a society, or

(b) in the name and street address or postal address of an officer or director of a society,

the society shall, within 30 days from the day that the change occurs, give notice to the Registrar in a form acceptable to the Registrar setting out the change.

RSA 2000 cS-14 s26;2018 c20 s16;2021 c13 s13

Officers and directors

27 A society shall, on request of the Registrar, furnish the Registrar with particulars of its officers and directors.

RSA 1980 cS-18 s23

Filing special resolution

28 A society shall file with the Registrar every special resolution passed for any purpose mentioned in this Act.

RSA 1980 cS-18 s24

Verification of notice, etc.

29 Every notice, return or resolution required to be filed with the Registrar shall be dated and verified by a person having knowledge of the affairs of, and who is authorized by, the society on whose behalf the notice, return or resolution is made.

RSA 1980 cS-18 s25

Furnishing copy of bylaws

30 A society shall furnish to a member, at the member's request and on payment of a sum not exceeding $0.50, a copy of its application for incorporation and bylaws.

RSA 1980 cS-18 s26

TAB 4

Province of Alberta

TRUSTEE ACT

Statutes of Alberta, 2022
Chapter T-8.1

Current as of December 7, 2023

Office Consolidation

Alberta King's Printer
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10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.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-8.1

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

Part 1
Interpretation and Application

Definitions

1 In this Act,

(a) "additional trustee" means a person appointed as an additional trustee under section 16;

(b) "alter ego trust" has the same meaning as in the *Income Tax Act* (Canada);

(c) "continuing trustee" means a person who continues to be a trustee after another trustee ceases to be a trustee;

(d) "court", except in clause (s), means

(i) in respect of Alberta, the Court of King's Bench;

(ii) in respect of a jurisdiction other than Alberta, a court of competent jurisdiction;

(e) "fiscal period", in respect of a trust, means

(i) the period identified in the trust instrument as the period adopted for accounting purposes,

(ii) if subclause (i) does not apply, the period specified by the trustee as the period adopted for accounting purposes, or

(iii) if subclauses (i) and (ii) do not apply, the calendar year;

(f) "incapacitated person" means

(i) a represented adult under the *Adult Guardianship and Trusteeship Act*,

(ii) an incapacitated person under the *Public Trustee Act*, or

(iii) a person who is unable to make decisions about financial matters by reason of mental disability and has an attorney acting under the *Powers of Attorney Act*;

(g) "joint spousal or common-law partner trust" has the same meaning as in the *Income Tax Act* (Canada);

(h) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(i) "objects", in respect of the objects of a trust, means beneficiaries or purposes;

(j) "post-1971 spousal or common-law partner trust" has the same meaning as in the *Income Tax Act* (Canada);

(k) "pre-1972 spousal trust" has the same meaning as in the *Income Tax Act* (Canada);

(l) "qualified beneficiary", in respect of a trust, means a beneficiary who

(i) has a vested beneficial interest in the trust property, or

(ii) has delivered written notice to a trustee that the beneficiary wants to be a qualified beneficiary and has not delivered a written withdrawal of notice;

(m) "replacement trustee" means a person appointed as a replacement trustee under section 15 or 16;

(n) "secured party", in respect of a trust, means a person who has a security interest in property of the trust;

(o) "security interest" means an interest in property that secures payment or performance of an obligation;

(p) "settlor", in respect of a trust created by a will, includes a testator;

(q) "temporary trustee" means a person appointed as a temporary trustee under section 11;

(r) "transfer", in respect of property, means to transfer by any method, including

(i) to assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest or release, or

(ii) to agree to do any of the things referred to in subclause (i);

(s) “trust instrument” means any of the following that create or vary a trust:

(i) deed, will or other legal instrument;

(ii) an enactment, other than this Act;

(iii) an oral declaration,

but does not include a judgment or an order of any court;

(t) “trustee”, except where this Act provides otherwise, includes an additional trustee, a replacement trustee and a temporary trustee;

(u) “vest” includes to vest by means of

(i) an order of a court,

(ii) the terms of a trust instrument or other legal instrument, or

(iii) the operation of section 26.

2022 cT-8.1 s1;AR 217/2022;2023 c8 s6

Application to existing trusts

2 This Act applies in respect of a trust created before, on or after the date this section comes into force, except to the extent this Act provides otherwise.

Trust instrument prevails

3 A trust instrument prevails over any contrary provision of this Act except to the extent this Act provides otherwise.

Application to trusts arising outside of this Act

4 This Act does not apply in respect of

(a) an implied trust,

(b) a resulting trust,

(c) a constructive trust,

(d) any other trust that arises by operation of law, or

(e) a trust that arises by operation of an enactment other than this Act, except as provided in that enactment.

Application to personal representatives

5 If a person is both a personal representative and a trustee with respect to all or part of the same estate, this Act does not apply in respect of a matter relating to the person in the person's capacity as personal representative, but this Act does apply in respect of a matter relating to the person in the person's capacity as trustee.

Secured party in possession

6 The fact that a secured party is in possession of trust property that is the subject of a security interest does not make the secured party a trustee for the purposes of this Act.

Continuation of existing rules

7 The rules of common law and equity continue to apply except to the extent they are inconsistent with this Act.

Trust is not a person

8 For greater certainty, nothing in this Act makes a trust a person.

Part 2
Appointment and Removal of Trustee

Division 1
Appointment of Trustee

Designated person

9(1) In this Division, "designated person", in respect of a trust, means the person determined under subsection (2) or (3).

(2) For a trust with a sole trustee, the designated person is the first of the following persons or classes of person, proceeding in descending order, who is able and willing to act as a designated person:

(a) the person nominated by the trust instrument for the purpose of appointing a replacement trustee;

(b) the person appointed in writing by the sole trustee to be a replacement trustee after the sole trustee's death or retirement;

(c) the personal representative of the sole trustee.

(3) For a trust with more than one trustee, the designated person is the first of the following persons or classes of person, proceeding in descending order, who is able and willing to act as a designated person:

(a) the person nominated by the trust instrument for the purpose of appointing a replacement trustee;

(b) the continuing trustees, excluding any continuing trustee who has been appointed as a temporary trustee;

(c) the person appointed in writing by the last remaining trustee to be a replacement trustee after the last remaining trustee's death or retirement;

(d) the personal representative of the last remaining trustee.

(4) If the designated person determined under subsection (2) or (3) is a class of persons, they must act by majority to appoint a replacement trustee.

Person not qualified to be appointed trustee

10 A person is not qualified to be appointed as a trustee if

(a) the person is an incapacitated person,

(b) the person has been convicted of an offence involving dishonest conduct under an Act of Canada or any province or territory of Canada,

(c) the person is an undischarged bankrupt, or

(d) the person is a corporation that is in liquidation or otherwise disqualified by law or by the terms of the trust.

Temporary absence or incapacity of trustee

11(1) This section applies only where a trustee is temporarily unable to participate in the administration of the trust by reason of an absence or incapacity that does not result in the trustee ceasing to be qualified to hold office under section 20.

(2) If the trust instrument does not name an alternate trustee, a trustee referred to in subsection (1) may appoint another person as a temporary trustee for a specified period to exercise any or all powers, including distributive powers, and to perform any or all duties of the trustee.

(3) If a trustee referred to in subsection (1) is unable or unwilling to appoint a temporary trustee, a designated person may appoint a temporary trustee to

(a) administer all or part of the trust, or

(b) exercise the powers or perform the duties authorized by the designated person during the period that the trustee is absent or incapacitated.

(4) A person who is a co-trustee with a trustee referred to in subsection (1) is eligible for appointment as a temporary trustee under subsection (2) or (3) only if the appointment

(a) would be reasonable and prudent if the co-trustee were not a co-trustee, and

(b) would not result in the number of trustees being inconsistent with any express term of the trust.

(5) A trustee referred to in subsection (1) must not exercise trustee powers or perform trustee duties during any period in which a temporary trustee is appointed under subsection (2) or (3).

(6) Despite the period specified in an appointment under subsection (2) or (3), the trustee or designated person may revoke the appointment before the end of that period.

(7) The administration of the trust, exercise of powers or performance of duties by the temporary trustee is deemed to be as valid as if the absent or incapacitated trustee were not absent or incapacitated and had participated in the administration of the trust, exercise of powers or performance of duties.

Notice of temporary trustee

12(1) Where a temporary trustee is appointed or the appointment of a temporary trustee is revoked, a written notice must be delivered to the following within 15 days of the appointment or revocation:

(a) all trustees;

(b) all qualified beneficiaries;

(c) in the case of an appointment under section 11(2), the designated person as defined in section 9(1);

(d) in the case of an appointment under section 11(3), the absent or incapacitated trustee.

(2) A notice under subsection (1) must include the following information:

(a) the name of the absent or incapacitated trustee;

(b) the name of the temporary trustee;

(c) contact information for the temporary trustee, including one or more of the following:

(i) a mailing address;

(ii) an electronic mailing address;

(iii) a telephone number;

(d) the reason for the appointment or revocation;

(e) the date or event on which the appointment or revocation takes effect;

(f) in the case of an appointment, the date or event on which the appointment ends.

(3) The failure by a trustee or designated person to provide a notice under this section does not, by itself, invalidate any act of the temporary trustee, including the execution of any document.

Temporary trustee liability

13 A temporary trustee is a trustee for the purposes of this Act and may be liable for any loss to trust property arising from the temporary trustee's acts or omissions when exercising trustee powers or performing trustee duties.

Power to delegate by power of attorney

14(1) A trustee may, by power of attorney, appoint an attorney for a specified period to exercise any powers and perform any duties of the trustee.

(2) Subject to subsection (3), a trustee may appoint a co-trustee as attorney only if the appointment would have been reasonable and prudent if the co-trustee had not been a co-trustee.

(3) If there are only 2 trustees of a trust and the terms of the trust specify that there must be a minimum of 2 trustees, neither trustee may appoint the other trustee as attorney.

(4) A trustee who appoints an attorney under subsection (1) is liable for a loss arising from the acts or omissions of the attorney as if those acts or omissions were the acts or omissions of the trustee.

(5) Where an attorney is appointed, a written notice must be delivered to the following within 7 days of the execution of the power of attorney under subsection (1):

(a) any other trustee of the trust;

(b) a person who has the power under the trust instrument, whether alone or jointly, to appoint a new trustee;

(c) if there is no person to whom notice can be delivered under clause (a) or (b), the qualified beneficiaries.

(6) A notice under subsection (5) must include the following:

(a) the name of the trustee who appointed the attorney;

(b) the name of the attorney;

(c) contact information for the attorney, including one or more of the following:

(i) the mailing address for the attorney;

(ii) the electronic mail address for the attorney;

(iii) the telephone number for the attorney;

(d) a description of the powers and duties delegated to the attorney;

(e) the reason for the appointment;

(f) the date or event on which the appointment takes effect;

(g) the date or event on which the appointment ends.

(7) The failure by a trustee to provide a notice under this section does not, by itself, invalidate any act of the attorney, including the execution of any document.

(8) The *Powers of Attorney Act* does not apply in respect of an attorney appointed under this section.

Appointment of replacement trustee

15(1) A designated person may appoint in writing a replacement trustee in any of the following circumstances:

(a) a person who was trustee is deceased or a person appointed as trustee dies before taking office;

(b) the trustee is a corporation that is dissolved;

(c) a person disclaims the office of trustee;

(d) a person ceases to hold the office of trustee under section 18.

(2) A designated person, other than a temporary trustee,

(a) may be self-appointed as a replacement trustee under subsection (1), and

(b) may be appointed as a replacement trustee under subsection (1).

Court appointment of replacement or additional trustee

16(1) On application, the court may appoint a replacement trustee or an additional trustee if

(a) the court removes a trustee under section 22, or

(b) the court is of the opinion that

(i) the appointment of the replacement trustee or additional trustee is in the best interests of the objects of the trust, and

(ii) the appointment of a trustee would otherwise be inexpedient, difficult or impracticable.

(2) An application under subsection (1) may be made by

(a) a trustee,

(b) a beneficiary, or

(c) a secured party.

(3) This section prevails over any contrary provisions in a trust instrument.

Powers and duties of replacement or additional trustee

17 A replacement trustee or an additional trustee appointed in accordance with this Act has the same powers and duties and may in all respects act as if they had been appointed as a trustee by the trust instrument.

Division 2
Trustee Ceases to Hold Office

Ceasing to be trustee

18 A person ceases to hold the office of trustee if

(a) the person resigns the office in accordance with section 19,

(b) the person ceases to be qualified to hold the office under section 20,

(c) the person is removed as a trustee under this Act or under a power conferred by the trust instrument, or

(d) the person dies.

Resignation by trustee

19(1) A person resigning the office of trustee

(a) must give written notice of the resignation to

(i) the person nominated by the trust instrument for the purpose of appointing a replacement trustee, or

(ii) if the trust instrument does not nominate a person referred to in subclause (i), the continuing trustees, if any,

and

(b) where such notice is given, must be able to provide proof that the notice was given.

(2) If no person referred to in subsection (1)(a) exists, written notice of the resignation must be given to all qualified beneficiaries.

(3) A person resigning the office of trustee must provide a report under section 29 to all qualified beneficiaries and must be able to prove that the report was provided.

(4) A person resigning the office of trustee may apply to the court for an order discharging the trustee.

(5) A trustee's resignation is effective when a replacement trustee is appointed or the court discharges the trustee, whichever occurs first.

(6) This section prevails over any contrary provision in a trust instrument.

Disqualification of trustee

20(1) A person ceases to be qualified to hold the office of trustee if the person

(a) is an incapacitated person,

(b) is convicted of an offence involving dishonest conduct under an Act of Canada or any province or territory of Canada,

(c) is an undischarged bankrupt, or

(d) is a corporation that is in liquidation or is otherwise disqualified by law or by the terms of the trust.

(2) On application, the court may make an order disqualifying a trustee and establishing the date on which the disqualification takes effect.

(3) An application under subsection (2) may be made by a trustee or a beneficiary.

Removal by other trustees

21(1) A person may be removed as a trustee if

(a) the person

(i) fails to demonstrate the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person,

(ii) consistently fails to respond to communications from a beneficiary or another trustee, or

(iii) is otherwise unwilling or unable, or unreasonably refuses, to act cooperatively with other trustees,

and

(b) the person's conduct is detrimental to the efficient or proper administration of the trust.

(2) If there are 3 or more trustees, a trustee may be removed under subsection (1) if a majority of the other trustees provide a written resolution setting out the reasons for the removal.

(3) A resolution under subsection (2) is effective

(a) if the trustee that is the subject of the written resolution does not request a meeting under subsection (4), 15 days after a copy of the written resolution is delivered to that trustee, or

(b) if the trustee that is the subject of the written resolution requests a meeting under subsection (4), at the conclusion of the meeting, unless the written resolution is rescinded.

(4) Within the 15-day period after a copy of the written resolution is delivered to the trustee that is the subject of the written resolution, that trustee, by delivering a written request to another trustee, may request a meeting with the other trustees to respond to the reasons set out in the written resolution.

(5) A meeting requested under subsection (4) must take place as soon as practicable.

(6) After the trustee responds to the reasons set out in the resolution, the other trustees may rescind the written resolution.

Power of court to remove trustee

22(1) On application, the court may remove a person from the office of trustee if

(a) the person cannot be removed under section 21 because there are fewer than 3 trustees,

(b) the court is of the opinion that

(i) the removal of the person is in the best interests of the objects of the trust, and

(ii) the removal of the person under section 21 or under a power conferred by a trust instrument would be inexpedient, difficult or impracticable,

or

(c) the trustee has refused or failed to perform or exercise duties or powers in accordance with an order of the court under section 81(2).

(2) If the court considers a reduction in the number of trustees to be in the best interests of the objects of a trust, the court may

(a) reduce the number of trustees, and

(b) to give effect to the decision under clause (a), remove a person as trustee.

(3) An application under this section may be made by

(a) a trustee,

(b) a beneficiary, or

(c) a secured party.

(4) This section prevails over any contrary provisions in a trust instrument.

Power of court to reinstate trustee

23(1) A person removed as trustee, except a person removed under section 22 or 81, may apply to the court for an order under subsection (3) of this section,

(a) in the case of a person removed as trustee under section 21, within 2 months after the date the written resolution becomes effective, or

(b) in any other case, within 2 months after the earlier of

(i) the date of the appointment of a replacement trustee under section 15, and

(ii) the date that the removal as trustee comes to the attention of the person removed.

(2) On an application under subsection (1), the court may make an order under subsection (3) if

(a) the court is satisfied that the person was removed as trustee based on a mistake of fact or law, and

(b) the court considers making the order to be in the best interests of the objects of the trust.

(3) Subject to subsection (2), the court may

(a) reinstate the person as trustee on a specified date,

(b) declare that the person did not cease to hold the office of trustee during the period following the purported removal, or

(c) dismiss the application.

(4) If the court makes an order under subsection (3), the court may also give directions or make a declaration regarding the person's status as trustee or the liability of

(a) a replacement trustee appointed under section 15,

(b) a person who is the subject of the order, or

(c) any other person who was a trustee after the person making the application was removed as trustee.

(5) This section prevails over any contrary provisions in a trust instrument.

Liability of former trustee

24 Unless the court orders otherwise, if a person ceases to be a trustee, any consequential vesting of trust property in or transfer of trust property to a replacement trustee does not relieve the former trustee from liability from a breach of trust occurring while that person was a trustee.

Part 3
Vesting

Joint tenants

25(1) If trust property vests in more than one trustee, the trust property vests in the trustees as joint tenants.

(2) This section prevails over any contrary provisions in a trust instrument.

Vesting

26(1) If a person is appointed as an additional trustee, a replacement trustee or a temporary trustee, the trust property vests in that person at the time the appointment is effective.

(2) If a person ceases to be a trustee of a trust, the trust property ceases to be vested in that person and remains vested in each continuing trustee.

(3) If a person who is a sole trustee or the last remaining trustee of a trust ceases to be a trustee and a new trustee has not been appointed or there is otherwise no trustee of a trust, the trust does not fail because of the absence of a trustee.

(4) A vesting under this section has the same effect as if the property had been actually transferred to the person in whom the property is vested.

(5) No further declaration or order is required in respect of trust property that vests or ceases to be vested under this section.

(6) Without limiting subsections (4) and (5), a person in whom property vests under this section is entitled to perfect the transfer of the property in accordance with the *Land Titles Act* to the extent that the *Land Titles Act* is applicable.

(7) This section applies whether a person ceases to be a trustee, or is appointed as a trustee, in accordance with the terms of the trust or this Act.

(8) This section prevails over any contrary provisions in a trust instrument.

2022 cT-8.1 s26;2022 c20 s6

Part 4
Powers and Duties of Trustee

Division 1
Duties of Trustee

Duty of care

27(1) In the administration of a trust, a trustee must act in good faith and in accordance with the following:

(a) the terms of the trust;

(b) the best interests of the objects of the trust;

(c) this Act.

(2) Subject to section 35, in the performance of a duty or the exercise of a power, whether the duty or power arises by operation of law or the trust instrument, a trustee must exercise the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person.

(3) Despite subsection (2) but subject to section 35, if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of skill that is relevant to the administration of the trust and is greater than that which a person of ordinary prudence would exercise in dealing with the property of another person, the trustee must exercise that greater degree of skill in the administration of the trust.

Conflict of interest

28(1) A trustee must exercise the powers and perform the duties of the office of trustee solely in the interests of the objects of the trust.

(2) Without limiting subsection (1), a trustee must not knowingly permit a situation to arise

(a) in which the trustee's personal interest conflicts in any way with the trustee's exercise of the powers or performance of the duties of the office of trustee, or

(b) in which the trustee may derive any personal benefit or a benefit for any other person,

except so far as the law or the trust instrument expressly permits.

(3) On application by a trustee or qualified beneficiary who shows that acting or declining to act is in the best interests of the objects of the trust, whether or not the beneficiaries consent, the court may make an order, on terms and conditions the court considers appropriate,

(a) allowing the trustee to act or decline to act, whether or not the trustee may be in a situation that contravenes subsection (1) or (2), or

(b) excusing a trustee from liability for contravening subsection (1) or (2).

(4) An order under subsection (3)(b) may be made any time after the contravention of subsection (1) or (2).

(5) A trustee or qualified beneficiary must serve notice of an application under this section as follows:

(a) on all qualified beneficiaries of the trust, unless otherwise ordered by the court;

(b) if a beneficiary of the trust is a minor and has a vested beneficial interest, on the Public Trustee at least one month before the date set for the hearing of the application;

(c) if the trust is a charitable trust, on the Minister at least one month before the date set for the hearing of the application.

(6) On application by the trustee, a qualified beneficiary, the Public Trustee or the Minister, the court may vary an order under this section if

(a) additional information becomes available after the order is made, or

(b) the circumstances under which the order was made change.

(7) Nothing in this section limits the jurisdiction of the court under section 67, 68 or 84.

Duty to report to qualified beneficiaries

29(1) For each fiscal period of a trust, the trustee must deliver to the qualified beneficiaries a report in respect of the trust that includes the following:

(a) for the fiscal period in which the trust is created, a statement of the assets and liabilities of the trust and the value of those assets and liabilities at the time the trust is created;

(b) a statement of the assets and liabilities of the trust and the value of those assets and liabilities at the beginning and end of the fiscal period;

(c) the basis for the valuations of the assets of the trust, if the trustee considers it practicable;

(d) a statement of receipts and their sources for the fiscal period;

(e) a statement of disbursements and their recipients for the fiscal period.

(2) A report under subsection (1) in respect of a fiscal period must be delivered within 2 months after the end of the fiscal period.

(3) On the written request of a qualified beneficiary, the trustee must allow the beneficiary to inspect the source documents for the statements referred to in subsection (1).

(4) Subject to an order of the court under section 30(2), a trustee is not required to disclose information under this section if, in the opinion of the trustee, the disclosure would

(a) be detrimental to the best interests of any beneficiary or otherwise be prejudicial to the trust property or the administration of the trust,

(b) conflict with any duty owed by a trustee as a director of a corporation in which the trust has an ownership interest,

(c) reveal the reasons why a trustee did or did not exercise a power conferred by the trust instrument or an enactment,

(d) place an unreasonable administrative burden on the trustee, or

(e) place the trustee in breach of obligation, properly assumed by the trustee, to maintain confidence.

(5) A qualified beneficiary may waive, by delivering written notice to the trustee, the right to a report or to specific information in the report that is required to be given under this section.

(6) A qualified beneficiary may revoke a waiver by delivering written notice to the trustee.

Duty to provide information

30(1) Section 29 does not limit the duty under general trust law of a trustee to provide to a beneficiary, on request, accounts or trust information within a reasonable period of time.

(2) On application by a qualified beneficiary or a beneficiary who has requested information that has not been provided by the trustee, the court may order, on terms and conditions the court considers appropriate, the disclosure of any information regarding any of the following:

(a) the terms of the trust;

(b) the administration of the trust;

(c) the assets and liabilities of the trust.

Division 2
General Administrative Powers

Powers of trustee

31(1) Subject to this Act and the trustee's fiduciary obligations, a trustee has, in respect of trust property vested in the trustee, all the powers and capacity that an individual of full legal capacity would have if the property were vested in the individual absolutely and for the individual's own use.

(2) Without limiting the generality of subsection (1), a trustee may do any of the following:

(a) sell or lease trust property;

(b) borrow money for the purpose of carrying out the trust;

(c) grant a security interest in trust property.

(3) A trustee may do one or both of the following:

(a) with the consent of, and for the purpose of providing a residence for, a beneficiary, use income or capital to which the beneficiary is entitled

(i) to purchase or rent living accommodation, or

(ii) to construct a residence on land that is part of the trust property or purchased for the construction of the residence;

(b) with the consent of a beneficiary, effect a distribution in kind of specific trust property to satisfy, wholly or in part, the share or interest of the beneficiary.

Court may confer further powers on trustee

32(1) If a trustee lacks the power to make a transfer of trust property that the court is satisfied would be expedient and in the best interests of the objects of the trust, the court may, on application, confer the necessary power on the trustee, either generally or in relation to a specified instance and on any terms and conditions the court considers appropriate.

(2) An application under subsection (1) may be made by

(a) a trustee,

(b) a beneficiary, or

(c) a secured party.

(3) This section prevails over any contrary provisions in a trust instrument.

Division 3
Investment Power of Trustee

Power to invest

33(1) A trustee must invest trust funds prudently with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the trust.

(2) A trustee may invest trust property in any form of property in which a prudent investor may invest, including a security issued by a mutual fund as defined in the *Securities Act*.

(3) A trustee must review the trust investments at reasonable intervals for the purpose of determining that the investments continue to be appropriate to the circumstances of the trust.

(4) Without restricting the matters that a trustee may consider, in planning the investment of trust funds a trustee must consider the following matters, to the extent that they are relevant to the circumstances of the trust:

(a) the purposes and probable duration of the trust, the total value of the trust's assets and the needs and circumstances of the beneficiaries;

(b) the duty to act impartially towards beneficiaries and between different classes of beneficiaries;

(c) the special relationship or value of an asset to the purpose of the trust or to one or more of the beneficiaries;

(d) the need to maintain the real value of the capital or income of the trust;

(e) the need to maintain a balance that is appropriate to the circumstances of the trust between

(i) risk,

(ii) expected total return from income and the appreciation of capital,

(iii) liquidity, and

(iv) regularity of income;

(f) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the trust;

(g) the role of different investments or courses of action in the trust portfolio;

(h) the costs, such as commissions and fees, of investment decisions or strategies;

(i) the expected tax consequences of investment decisions or strategies.

Investment powers of corporate trustee or agent

34(1) Without limiting section 33, a corporation that is a trustee may invest trust money in its own securities.

(2) Without limiting section 33, if the trustee is a trust corporation or the trustee's agent is a trust corporation as defined by the *Loan and Trust Corporations Act*, the trustee may invest trust property in a common trust fund managed by the trust corporation.

Standard of care in investing

35(1) In investing trust property, a trustee must exercise the care, diligence and skill that a prudent investor would exercise in making investments.

(2) Despite subsection (1), if, because of a trustee's profession, occupation or business, the trustee possesses or ought to possess a particular degree of skill that is relevant to the investment of trust property and is greater than that which a prudent investor would exercise in making investments, the trustee must exercise that greater degree of skill in investing trust property.

Trustee not liable if overall investment strategy prudent

36(1) A trustee is not liable for a loss in connection with the investment of trust funds that arises from a decision or course of action that a trustee exercising reasonable skill and prudence and complying with section 35 could reasonably have made or adopted.

(2) Despite subsection (1), a trustee is liable for a loss arising from the investment of trust property if

(a) the trustee is a trustee referred to in section 35(2), and

(b) the conduct of the trustee that led to the loss did not conform to a plan or strategy for the investment of the trust property that

(i) comprised reasonable assessments of risk and return, and

(ii) would be adopted under comparable circumstances by a trustee.

(3) A court assessing the damages payable by a trustee for a loss to the trust arising from the investment of trust funds may take into account the overall performance of the investments.

Abolition of common law rules — anti-netting rules

37(1) The rule of law that requires the assessment of a trustee's decisions on an investment-by-investment basis is abolished.

(2) The rule of law for the assessment of damages for breach of trust that prohibits losses from being offset by gains is abolished.

Interpretation of older trust instruments

38(1) If the trust instrument expresses the powers of the trustee as powers to invest trust property in investments permitted under a former *Trustee Act*, the trust instrument is to be interpreted as authorizing the investments permitted under this Division and section 53.

(2) Despite subsection (1), if an investment is expressly prohibited by the trust instrument, the trust instrument is not to be interpreted as authorizing the investment.

(3) Subsection (1) does not affect a power of the trustee to invest trust property in an investment expressly permitted by the trust instrument.

Division 4
Allocation of Income and Capital by Trustee

Definition

39 In this Division, "outgoing" means an expenditure paid or incurred in administering a trust, including, without limitation, an expenditure arising from or made with respect to repairs, maintenance, insurance, taxes, security interests, debts, calls on shares, annuities and losses.

Duty to act impartially and prudently

40 Nothing in this Division affects the duty of a trustee

(a) to act impartially as between different classes of beneficiaries in the administration of a trust, or

(b) to comply with section 35 in respect of investments.

Abolition of common law rules of apportionment

41(1) The first branch of the rule in *Howe v Lord Dartmouth*, which states that a trustee must convert wasting, hazardous or speculative assets to authorized trustee investments if a will contains a residuary gift of personal property or a future or reversionary property interest for persons in succession, is abolished.

(2) The 2nd branch of the rule in *Howe v Lord Dartmouth*, which states that, if an estate's original assets other than authorized investments are to be converted under a trust for sale, a trustee must apportion the income from those assets between the income and capital beneficiaries until conversion takes place, is abolished.

(3) The rule in *Re Earl of Chesterfield's Trusts*, which states that, if future or reversionary property is included in a residuary gift under a will and is not yielding income before it is sold, the trustee must apportion the proceeds of sale, after it comes into possession, between the income and capital beneficiaries in a particular way, is abolished.

Apportionment of outgoings between income and capital

42(1) This section does not apply in respect of the following trusts unless the trust instrument expressly provides otherwise:

(a) an alter ego trust;

(b) a joint spousal or common-law partner trust;

(c) a post-1971 spousal or common-law partner trust;

(d) a pre-1972 spousal trust.

(2) A trustee may charge all or part of an outgoing to the income or capital of the trust as the trustee considers is

(a) just and equitable in the circumstances,

(b) in accordance with ordinary business practice, and

(c) in the best interests of the objects of the trust.

(3) If the amount of an outgoing charged under subsection (2) to the income or capital of the trust is not equal to the amount paid out of the income or capital in respect of the outgoing, a trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing.

(4) If trust property is subject to depreciation, a trustee may

(a) deduct from the income earned from the trust property an amount that the trustee considers is

(i) just and equitable in the circumstances,

(ii) in accordance with ordinary business practice, and

(iii) in the best interests of the objects of the trust,

and

(b) add the amount deducted under clause (a) to the capital of the trust.

Discretionary allocation trusts of receipts and outgoings

43(1) If a trustee is expressly directed by the trust instrument to hold trust property on discretionary allocation trusts, the trustee may allocate receipts and charge outgoings to the income and capital of the trust as the trustee considers is just and equitable in the circumstances.

(2) If the amount of an outgoing charged under subsection (1) to the income or capital of the trust is not equal to the amount paid out of the income or capital in respect of the outgoing, a trustee may allocate an amount between income and capital to recover or reimburse the payment in respect of the outgoing.

Total return investment

44(1) In this section,

(a) "assets" means trust property that is subject to a total return investment policy;

(b) "net value of the assets" means the amount equal to the fair market value of the assets less any liabilities in respect of those assets;

(c) "specified percentage" means

(i) a percentage specified in the trust instrument for the purpose of this section, or

(ii) if no percentage is specified in the trust instrument, the percentage specified by regulation;

(d) “total return investment policy” means a policy of investing property so as to obtain the optimal return without regard to whether the return is characterized as income or capital;

(e) “valuation period” means the valuation period determined under subsection (9) or varied by regulation.

(2) For the purposes of this section, in a trust instrument the following words constitute a reference to a total return investment policy:

(a) “on percentage trusts”;

(b) “total return”, when used with reference to investments.

(3) A settlor may direct, in a trust instrument, the trustee to adopt a total return investment policy with respect to all or part of the trust property.

(4) Subject to subsection (5), the trustee of a charitable trust, with respect to trust property, may adopt a total return investment policy with respect to that property, whether or not the terms of the trust contain a direction to that effect.

(5) A total return investment policy may not be adopted under subsection (4) if in the trust instrument the settlor expressly directs the trustee not to adopt a total return investment policy with respect to that trust property.

(6) If a total return investment policy is adopted, the trustee must determine the net value of the assets at the beginning of each valuation period.

(7) If a total return investment policy is adopted, the trustee must, in each fiscal period,

(a) pay to the persons who would otherwise be the income beneficiaries, or

(b) apply to the other objects

an amount equal to the specified percentage of the net value of the assets at the beginning of the valuation period.

(8) The trustee must

(a) pay or apply an amount required under subsection (7) from income earned during the fiscal period from the investment of the assets,

(b) if the income referred to in clause (a) is insufficient to pay or apply the amount required under subsection (7), pay or apply an amount from capital, and

(c) if the income earned during the fiscal period from the investment of the assets exceeds the amount paid or applied under subsection (7), add the amount of the excess to the assets.

(9) The valuation period for assets that are invested in accordance with a total return investment policy is determined as follows:

(a) the first valuation period begins

(i) one year after the date of the testator's death, in the case of a testamentary trust made in a will, or

(ii) in any other case, on the date of the settlement;

(b) the 2nd and subsequent valuation periods begin immediately after the end of the previous valuation period;

(c) a valuation period is the shortest of the following:

(i) subject to a period specified by regulation, 3 years;

(ii) the period specified in the trust instrument;

(iii) the period selected by the trustee.

Application of sections 43 and 44

45 Sections 43 and 44 do not limit any other power of a trustee to encroach on capital in favour of a beneficiary.

Division 5
Distributive Powers of Trustee

Interpretation and application

46(1) This Division does not apply in respect of the following trusts unless the trust instrument expressly provides otherwise:

(a) an alter ego trust;

(b) a joint spousal or common-law partner trust;

(c) a post-1971 spousal or common-law partner trust;

(d) a pre-1972 spousal trust.

(2) A direction in a provision of a trust instrument to accumulate income is not in itself evidence of a contrary intention sufficient to have the provision of the trust instrument prevail over a provision in this Division.

Power to pay income to or for benefit of individual

47(1) Subject to any interest or charge affecting the trust property, if property is held by a trustee in trust for an individual the trustee may do any of the following, as the trustee considers reasonable in the circumstances:

(a) if the individual is a minor, pay all or part of the income earned from the property towards the individual's past, present or future maintenance, education, benefit or advancement in life;

(b) if the individual has reached the age of majority and does not have an income or capital interest vested in interest and in possession, pay to, or for the maintenance, education, benefit or advancement in life of, the individual all or part of the income earned from the property.

(2) A trustee may pay the income earned from the trust property under subsection (1) whether the interest of the individual in the trust property is vested or contingent.

Power to pay amount from capital for benefit of individual

48(1) If property is held by a trustee in trust for an individual for any interest in capital, subject to this section and to any interest or charge affecting the trust property, the trustee may pay an amount in respect of the individual towards the following from the capital of the trust, as the trustee considers reasonable in the circumstances:

(a) if the individual is a minor, towards the individual's past, present or future maintenance, education, benefit or advancement in life;

(b) if the individual has reached the age of majority, towards the individual's maintenance, education, benefit or advancement in life.

(2) In order to pay an amount under subsection (1), the trustee may

(a) create a security interest in a capital asset of the trust, or

(b) otherwise transfer a capital asset of the trust.

(3) A trustee may pay an amount under subsection (1) or exercise the power under subsection (2) whether the interest of the individual in the capital

(a) is vested or contingent, or

(b) is in possession or in remainder or reversion.

(4) A trustee may pay an amount under subsection (1)

(a) to an individual with a vested interest in the capital, with or without court approval, and

(b) to an individual with a contingent interest in the capital, with court approval.

(5) If the court approves an amount under subsection (4)(b) in respect of an individual and a trustee pays an amount under subsection (1) in respect of the individual, the trustee must promptly give written notice of the following to any other beneficiary who, at the time of the payment of the amount, is entitled to receive income from the capital from which the amount was paid:

(a) the terms of the order made by the court under subsection (4)(b);

(b) the amount paid in accordance with the order.

(6) A trustee must not pay an amount under subsection (1)

(a) if the income or accumulated surplus income is available under the terms of the trust for the maintenance, education, benefit or advancement in life of the individual, unless the available income or accumulated surplus income is insufficient, or

(b) if the payment is detrimental to the pecuniary interest of a person who is entitled to a life interest or other interest, whether vested or contingent, in the amount to be paid, unless

(i) the person is of full capacity and consents in writing to the payment, or

(ii) the person is not of full capacity and the court approves the payment, on application by the trustee.

(7) If an amount is paid under subsection (1) in respect of an individual, the individual's interest in the capital of the trust must be reduced by that amount.

(8) If the individual referred to in subsection (7) does not have a vested interest in the capital of the trust when the amount is paid or applied under subsection (1), the reduction under subsection (7) is to be made when that interest is vested.

(9) This section has effect

(a) if a contrary intention is not expressed in the trust instrument, and

(b) subject to the terms of that instrument and the provisions contained in it.

Conditions on payment from capital

49(1) If a trustee pays an amount under section 48(1) or, under the terms of the trust, pays an amount from capital for the benefit of an individual, the trustee may impose conditions on the person receiving the payment or the benefit of the payment, including, without limitation, conditions relating to the following:

(a) the repayment of the payment to the trustee;

(b) the payment of interest to the trustee;

(c) the giving of security to the trustee by the person receiving the payment.

(2) The trustee may do any of the following in respect of a condition imposed under subsection (1):

(a) waive all or part of a condition;

(b) release a person from an obligation undertaken;

(c) release the security given.

(3) If an amount paid under section 48(1) is repaid to or recovered by a trustee in accordance with a condition under subsection (1) of this section, the amount repaid or recovered is deemed not to have been paid under section 48.

(4) When imposing a condition in respect of security under subsection (1), a trustee is not bound by any restrictions on the investment of the trust property.

(5) A trustee who has acted in accordance with section 27 in paying an amount under section 48 is not liable for a loss arising from the transaction, including a loss arising because a person breaches a condition imposed by the trustee.

Payment or transfer in respect of minor or incapacitated person

50(1) If a minor is entitled to trust money or trust securities, a trustee must pay the money to or transfer the securities to

(a) the trustee appointed by court order under the *Minors' Property Act,* or

(b) the Public Trustee.

(2) If an incapacitated person is entitled to trust money or trust securities, a trustee must pay the money to or transfer the securities to

(a) the attorney acting under the *Powers of Attorney Act*, or

(b) the trustee appointed by court order under the *Adult Guardianship and Trusteeship Act*.

(3) If an attorney or trustee is not appointed for an incapacitated person, then an attorney or trustee must be appointed for payment of the money or transfer of the securities.

Division 6
Delegation by Trustee

Appointment of agent and supervision

51(1) In appointing an agent, a trustee must

(a) personally select the agent,

(b) be satisfied of the agent's suitability to exercise the power or perform the duty for which the agent is to be appointed, and

(c) establish the terms of the delegated authority.

(2) A trustee must exercise reasonable and prudent supervision over an agent appointed by the trustee.

(3) A trustee may appoint a co-trustee as an agent only if the appointment would have been reasonable and prudent if the co-trustee had not been a co-trustee.

When trustee must not delegate

52 A trustee must not appoint an agent to

(a) exercise a discretion to distribute or transfer trust property to, or for the benefit of, a beneficiary of the trust, or

(b) perform the duties of the trustee in appointing and supervising an agent under section 51.

Delegation of investment authority

53(1) A trustee must not delegate to an agent appointed under section 51 any authority in respect of the investment of trust funds that a prudent investor would not be able to delegate in accordance with ordinary investment practice.

(2) Investment in a mutual fund referred to in section 33(2), a common trust fund referred to in section 34(2) or a similar pooled fund is not a delegation of authority with respect to the investment of trust property.

Delegation of administrative functions

54(1) If it is reasonable and prudent to do so, a trustee may delegate to an agent the authority to carry out administrative functions related to the trust.

(2) Without limiting subsection (1), a trustee may appoint a person as agent to do one or more of the following:

(a) execute documents;

(b) transfer or acquire money or other property;

(c) give a receipt for any money or other property received by the trustee.

Liability of trustee for agent

55 A trustee is liable for a loss in the value of the trust property caused by an act or omission of an agent only if the trustee is in breach of section 51 and the loss is a consequence of that breach.

Liability of agent

56 Where a trustee delegates authority to an agent and the trust suffers a loss because of the agent's breach of the terms of the agency contract, damages for the loss may be recovered from the agent in an action

(a) by the trustee, or

(b) by a beneficiary of the trust if the trustee fails to commence an action within a reasonable time after acquiring knowledge of the breach.

Sub-delegation by agent

57(1) An agent appointed by a trustee may delegate to a person a power or duty of the agent, subject to this Division and any restrictions relating to delegation that are established by the trustee in the terms of the appointment.

(2) In delegating a power or duty under subsection (1), the agent must

(a) personally select the delegate, and

(b) be satisfied of the delegate's suitability to exercise the power or perform the duty delegated to the delegate.

(3) An agent must exercise reasonable and prudent supervision over a person to whom a power or duty is delegated under subsection (1).

Division 7
Miscellaneous Powers and Duties of Trustee

Liability of trustee

58(1) Subject to this Act, a trustee is not liable for a breach of trust committed by a co-trustee unless the trustee participated in the breach of trust by the trustee's own acts or omissions in respect of the trust property.

(2) Subject to section 55, a trustee is not liable for a loss in respect of trust property by reason only of the fact that the trustee has signed a receipt with a co-trustee because the trust instrument imposes a requirement that trustees act unanimously.

Powers conferred and duties imposed on trustees jointly

59(1) If a power is conferred or a duty is imposed on 2 or more trustees, the power is conferred and the duty is imposed jointly.

(2) If a power is conferred or a duty is imposed on 2 or more trustees jointly, the power may be exercised or the duty may be performed

(a) in accordance with section 60, and

(b) by the survivor of them or, if there are more than 2 surviving trustees, by a majority of them.

Trustees may act by majority

60(1) If there are more than 2 trustees, the trustees may perform their duties and exercise their powers by a majority of the trustees holding office.

(2) A trustee who disagrees with a decision or act of the majority of trustees may deliver a written statement of disagreement to the other trustees but, unless the decision or act is unlawful, must join with the majority in doing anything necessary to carry out that decision or act if it cannot be carried out otherwise.

(3) A trustee who delivers a written statement in accordance with subsection (2) is not liable for a loss or breach of trust arising from the decision or act even if the trustee joins with the majority in accordance with that subsection in order to carry out that decision or act.

(4) This section does not apply in respect of a trust created by a trust instrument executed before this section comes into force, unless this section is consistent with the terms of the trust and the trustees agree this section should apply.

Trustee abstentions

61 If a trustee abstains from participating in a decision or act of the trustees because there is a conflict or potential conflict between the trustee's personal interest and the powers and duties of the office of trustee, the trustee is deemed not to be holding office for the purpose only of determining whether a decision is made or act is done by a majority of trustees holding office or unanimously by the trustees holding office.

Deposit of trust property for safekeeping

62 A trustee is liable for a loss in the value of the trust property caused by the conduct of a financial institution or another person with whom trust property is deposited or left for safekeeping only if the trustee fails to

(a) exercise prudence in the selection of the financial institution or other person, or

(b) exercise reasonable and prudent supervision over the financial institution or other person.

Insuring trust property

63(1) A trustee may

(a) insure against loss or damage to any building or other insurable property to any amount, and

(b) pay the premiums for the insurance out of the income of the property or out of the income of any other property that is subject to the same trusts without obtaining the consent of any person entitled wholly or partly to that income.

(2) Subsection (1) does not apply to any building or other property that a trustee is bound forthwith to convey absolutely to a person having a beneficial interest in the building or other property, on being requested to do so.

Allocation of insurance proceeds

64(1) A trustee must allocate insurance proceeds to the capital of the trust if

(a) the trustee entered into a contract of insurance against loss of, or damage to, any trust property,

(b) the trustee paid the premiums owing under the contract, and

(c) insurance proceeds under the contract are paid to the trustee.

(2) If a beneficiary of a trust enters into a contract of insurance against loss of, or damage to, any trust property, whether or not the beneficiary is required by the trust instrument or by a third party to obtain the insurance, and insurance proceeds under the contract are paid to the beneficiary,

(a) the beneficiary must pay the insurance proceeds to the trustee,

(b) the trustee must allocate the insurance proceeds to the capital of the trust, and

(c) the trustee must reimburse the beneficiary for expenses incurred by the beneficiary in entering into the contract of insurance, in the amount the trustee considers in the trustee's opinion to reflect the interests of the other beneficiaries in the trust property.

(3) A trustee may apply all or part of the insurance proceeds received by the trustee under subsection (1) or (2) to the rebuilding, reinstating, replacing or major repair of the trust property that has been lost or damaged.

(4) Nothing in this section affects the rights of a secured party, lessor, lessee or other person

(a) to receive insurance proceeds, or

(b) to require that the insurance proceeds be applied to the rebuilding, reinstating, replacing or major repair of the trust property that has been lost or damaged.

(5) This section prevails over any contrary provisions in a trust instrument.

(6) This section applies only to proceeds under a contract of insurance that are payable after this section comes into force.

Part 5
Variation and Termination of Trusts

Definitions

65 In this Part,

(a) "beneficiary" and "person" include an organization, a charitable trust and a non-charitable purpose trust;

(b) "variation" means

(i) a variation, resettlement or termination of a trust, or

(ii) a variation or deletion of, or an addition to, the powers of a trustee in respect of the management or administration of a trust.

Application of this Part

66 This Part applies to

(a) vested or contingent interests in the trust property of the object of the trust, and

(b) trusts that arise by trust instrument other than an enactment.

Variations

67(1) Subject to any terms in a trust instrument reserving the power to any person or persons to terminate or vary a trust, and except as provided in this section, a variation requires approval of the court.

(2) On application by a trustee or beneficiary, the court may approve a variation after taking into account the following factors:

(a) the nature of all interests and objects and the effect any proposed variation may have on those interests and objects;

(b) the benefit or detriment to any person that may result from the court approving or declining to approve any proposed variation;

(c) the intentions of the settlor, to the extent they can be ascertained;

(d) any other factors the court considers relevant.

(3) Subject to subsection (4), a trustee or beneficiary who makes an application under subsection (2) must have written consent to the application from all persons who are beneficially interested in the trust.

(4) On an application under subsection (2), the court may approve a variation despite that one or more of the following persons who are beneficially interested in the trust have not consented to the application:

(a) a person who is not capable of consenting because the person is a minor or is incapacitated;

(b) an unborn person;

(c) a person who after reasonable inquiry cannot be located;

(d) a 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;

(e) a person who has the capacity to consent to a variation but refuses to consent to the variation;

(f) a charitable organization that is legally incapable of consenting in its own right;

(g) a charitable trust or a non-charitable purpose trust;

(h) any other person, organization or trust from whom the court considers it to be impractical to obtain consent.

(5) Where a will or other testamentary instrument contains a gift or devise to a beneficiary who is a minor or is incapacitated and the will or other testamentary instrument contains no trust in respect of the gift or devise, the court may, on an application under subsection (2), approve a variation providing for the gift or devise to be held on trust for the beneficiary while the beneficiary is a minor or is incapacitated, if the court is satisfied, having regard to the circumstances and the terms of the gift or devise, that the variation is in the best interests of the beneficiary.

(6) The court may not approve a variation if the variation would reduce or remove any fixed indefeasible interest that has vested absolutely in a beneficiary.

(7) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may only self-appoint if the instrument provides for self-appointment.

(8) This section prevails over any contrary provision in a trust instrument.

Notice of application to approve variation

68(1) A person who applies to the court for an order under section 67(2) must serve notice of the application,

(a) in respect of a minor referred to in section 67(4)(a), on the trustee appointed by court order under the *Minors' Property Act* or the Public Trustee;

(b) in respect of an incapacitated person referred to in section 67(4)(a), on the attorney acting under the *Powers of Attorney Act* or the trustee appointed by court order under the *Adult Guardianship and Trusteeship Act*;

(c) in respect of an unborn person referred to in section 67(4)(b), on the Public Trustee;

(d) in respect of a person referred to in section 67(4)(c) who is a missing person as defined in the *Public Trustee Act*, on the Public Trustee.

(2) If there is no attorney or trustee appointed for an incapacitated person referred to in section 67(4)(a), then an attorney or trustee must be appointed.

(3) A person who applies to the court for an order under section 67(2) must, in respect of a charitable organization referred to in section 67(4)(f) or a trust referred to in section 67(4)(g), serve notice of the application on the Minister at least one month before the date set for the hearing of the application.

(4) The Minister is entitled to appear and be heard on an application under section 67(2) and is entitled to the costs the court orders.

Part 6
Trustee Compensation and Accounts

Compensation of trustee

69(1) A person is entitled to fair and reasonable compensation to be paid out of the trust property for services rendered as trustee of the trust.

(2) As part of the compensation to which a trustee is entitled under subsection (1), a trustee who

(a) has professional skills, and

(b) has rendered services to the trust, apart from those generally associated with the office of trustee, that required the exercise of those professional skills

is entitled to charge fees at reasonable rates for those services that are reasonably necessary for the purpose of carrying out the trust.

(3) The trustees of a trust are not presumed to be entitled to equal compensation under subsection (1).

(4) On application by a trustee or beneficiary during the administration of the trust or on the passing of accounts, the court may determine the amount of compensation to which the trustee is entitled under subsection (1).

(5) In determining a trustee's compensation, the court may consider the following matters:

(a) the terms of any relevant contract;

(b) the gross value of the trust property at the time compensation is claimed;

(c) any change in the gross value of the trust property since compensation was last claimed or the trust was created and the portion of that change attributable to decisions of the trustee;

(d) the amount of revenue received and expenditures incurred in administering the trust;

(e) the complexity of the work involved in administering the trust, including whether or not any difficult or unusual questions were raised;

(f) any unusual difficulties or situations encountered in administering the trust;

(g) whether or not the trustee had to instruct on litigation relating to the trust;

(h) whether or not the trustee was required to manage a business, be the director of a corporation or perform other additional roles in administering the trust;

(i) the amount of skill, labour, responsibility, technological support and specialized knowledge required in administering the trust;

(j) the number and complexity of tasks relating to the administration of the trust that were delegated to others;

(k) the time expended in administering the trust;

(l) the number of trustees;

(m) any other matter the court considers relevant.

(6) An application under subsection (4) may be made even if the trust instrument provides for the determination of the amount of compensation.

(7) The court may enforce or vary the terms of compensation provided to a trustee

(a) whether the terms are found in the trust instrument or another contract between the person making the trust and the trustee,

(b) whether the contract between the settlor and trustee is signed before or after the date of the trust instrument, and

(c) whether or not the contract between the settlor and trustee is incorporated by reference into the trust instrument.

(8) This section prevails over any contrary provisions in a trust instrument.

Interim compensation of trustee

70(1) During the administration of the trust and without prior authorization of the court, if there is at least one beneficiary who is of full legal capacity and who has a vested beneficial interest in the trust property, a trustee may take payment out of the trust property in an amount that, in the trustee's opinion, is fair and reasonable compensation for services rendered as trustee of the trust during the period to which the payment relates.

(2) Before taking a payment under subsection (1), a trustee must deliver to the qualified beneficiaries and any other trustees a written notice

(a) stating the amount of the payment,

(b) describing the services rendered, and

(c) stating that, within a specified period of not less than 2 months from the date the notice was delivered, a qualified beneficiary or trustee may apply to the court under subsection (3) to object to the payment.

(3) A qualified beneficiary or trustee may object to the payment under subsection (1) by bringing an application within the notice period specified in subsection (2)(c).

(4) A trustee who files an application under subsection (3) must serve notice of the application on all qualified beneficiaries and trustees.

(5) A qualified beneficiary who files an application under subsection (3) must serve notice of the application on the trustee, and the trustee must then serve notice of the application on the other qualified beneficiaries.

(6) In an application under this section the court may determine the amount, if any, that the trustee may be paid under subsection (1).

Reimbursement of expenses

71 During the administration of the trust and without prior authorization of the court, a trustee may take reimbursement out of the trust property for expenses incurred by the trustee in the administration of the trust.

Passing of accounts

72(1) On application by a qualified beneficiary or a trustee, the court may order that the trustee's accounts be passed on a single occasion or at intervals set by the court.

(2) A trustee making an application under subsection (1) must serve notice of the application on each of the qualified beneficiaries.

(3) A qualified beneficiary making an application under subsection (1) must serve notice of the application on the trustee and the trustee must then serve notice of the application on each of the other qualified beneficiaries.

(4) If a qualified beneficiary who receives notice under subsection (2) or (3)

(a) is a minor and the trustee appointed by court order under the *Minors' Property Act* or the Public Trustee, as the case may be, is not present at the passing of accounts, or

(b) is an incapacitated person and the attorney acting under the *Powers of Attorney Act* or the trustee appointed by court order under the *Adult Guardianship and Trusteeship Act*, as the case may be, is not present at the passing of accounts,

the court may determine, at the passing of accounts or at a subsequent hearing, that the qualified beneficiary is to be, or is deemed to have been, represented by another person who, at the passing of accounts, is of full legal capacity, has a substantially similar interest in the trust property and is not in a conflict of interest with the qualified beneficiary in respect of any aspect of the accounts.

Repayment by trustee

73 If a trustee's compensation as finally determined by the court is less than the total of the payments taken by the trustee without court authorization during the administration of the trust, the trustee must restore the difference to the trust property.

Part 7
Charitable Trusts and Non-charitable Purpose Trusts

Power of court to vary charitable trusts

74(1) Subject to a gift over or reversion expressly provided for in the trust instrument, on application by the trustee of a charitable trust where the trust instrument does not provide for the variation that is sought, the court may vary the terms of the trust in accordance with subsection (3) if the court is of the opinion that

(a) an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of the trust, or

(b) a variation of the trust would facilitate the carrying out of the charitable intent, whether general or specific, of the settlor.

(2) On an application under subsection (1) to vary the terms of a trust, the court must take into account the following factors:

(a) the nature of all interests and objects and the effect any proposed variation may have on those interests and objects;

(b) the intentions of the settlor to the extent these can be ascertained;

(c) any other factors the court considers relevant.

(3) In varying the terms of a trust under subsection (1), the court may

(a) vary, delete or add to any terms of the trust, whether dispositive or administrative in character, which must include the powers of a trustee in respect of the management and administration of the trust, and

(b) if the court is of the opinion referred to in subsection (1)(a), vary or add to the terms of the trust to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust.

(4) For the purposes of a variation under subsection (1)

(a) it is irrelevant whether the charitable intent of the settlor was general or specific, and

(b) if the terms of the trust expressly provide for a gift over or a reversion in the event of the lapse or other failure of a charitable purpose, the gift over or reversion, if otherwise valid, shall take effect and the court must not vary the terms of the trust under subsection (1).

(5) This section prevails over any contrary provisions in a trust instrument.

Power to order sale of property — charitable trust

75(1) On application, if a specific property held in trust for a charitable purpose may no longer be used advantageously for the charitable purpose or should for any other reason be sold, the court may authorize the sale of the property and give directions concerning the conduct of the sale and the application of the proceeds from the sale.

(2) An application under subsection (1) may be made by

(a) the Minister,

(b) the trustee, or

(c) a person appearing to the court to have a sufficient interest in the matter.

(3) This section prevails over any contrary provisions in a trust instrument.

Notice

76 If an application is made for an order under section 74 or 75 by a person other than the Minister, the order must not be made unless the applicant has served notice of the application on the Minister and any other persons as the court may require, at least one month before the date set for the hearing of the application.

Non-charitable purpose trust

77(1) A person may create a trust that

(a) is for a non-charitable purpose that

(i) is recognised by law as being capable of being a valid object of a trust, or

(ii) is sufficiently certain to allow the trust to be carried out, is not contrary to public policy and is

(A) for the performance of a function of government in Canada, or

(B) a matter specified by regulation,

and

(b) does not create an equitable interest in any person.

(2) A non-charitable purpose trust may exist indefinitely.

Court may vary non-charitable purpose trust

78(1) If, on application, the court is of the opinion that an impracticability, impossibility or other difficulty hinders or prevents giving effect to the terms of a non-charitable purpose trust, the court may, subject to subsection (5),

(a) vary or add to the terms of the trust to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust, or

(b) if the court is unable to provide for a purpose that is as close as is practicable or reasonable to an existing purpose of the trust, vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.

(2) Subject to subsection (5), if on application the court is of the opinion that a change in circumstances since the creation of a non-charitable purpose trust has resulted in a purpose of the trust being obsolete or no longer expedient, the court may vary or add to the terms of the trust to provide for a purpose that is consistent with the intention of the original settlement.

(3) In exercising the power under subsection (2), the court may consider the views of the settlor or the trustee concerning the obsolescence or expedience of the purpose of the trust and the proposed variation.

(4) On an application under subsection (1) or (2), the court must take into account the following factors:

(a) the nature of all interests and the effect any proposed variation may have on those interests and objects;

(b) the intentions of the settlor to the extent these can be ascertained;

(c) any other factors the court considers relevant.

(5) Subsections (1) and (2) do not apply if

(a) the trust instrument contains a valid direction concerning the ultimate disposition of the trust property, or

(b) the intention of the settlor concerning the ultimate disposition of the trust property can be inferred from the trust instrument and is valid.

(6) Despite subsections (1) and (2), if the court cannot determine a replacement purpose for a non-charitable purpose trust, the court may order that the trust property be returned to the settlor or to the settlor's personal representative.

(7) The court may make an order that it considers appropriate

(a) to enforce a non-charitable purpose trust, or

(b) to enlarge or otherwise vary the powers of the trustee of a non-charitable purpose trust.

(8) An application under this section may be made by

(a) the Minister,

(b) a person appointed specifically by the settlor in the trust instrument to enforce the trust,

(c) the settlor,

(d) the personal representative of the settlor,

(e) the trustee, or

(f) a person appearing to the court to have a sufficient interest in the matter.

Imperfect trust provisions — charitable and non-charitable

79(1) A trust is not void by reason only that the objects of the trust consist of a charitable purpose and a non-charitable purpose.

(2) On application by a trustee or beneficiary, the court may make one or more of the following orders:

(a) an order that a charitable purpose constitutes the object of a separate charitable trust, if the court determines that it is practicable to separate the charitable purpose from a non-charitable purpose;

(b) an order that a non-charitable purpose constitutes the object of a separate non-charitable purpose trust, if the court determines that

(i) a non-charitable purpose trust may be validly created under section 77(1), and

(ii) it is practicable to separate the non-charitable purpose from the other objects of the original trust;

(c) an order that the terms of the disposition of property relating to a non-charitable purpose must be construed in accordance with section 80, if the court determines that

(i) the non-charitable purpose does not meet the requirements of section 77(1), and

(ii) it is practicable to separate the non-charitable purpose from a charitable purpose;

(d) an order that a charitable purpose and a non-charitable purpose constitute the objects of a separate non-charitable purpose trust, if

(i) the court determines that

(A) a non-charitable purpose may be validly created under section 77(1), and

(B) it is not practicable to separate the charitable purpose from the non-charitable purpose,

and

(ii) the court makes an order under clause (a), (b) or (c) separating other objects of the original trust;

(e) an order that the terms of the disposition of property relating to a charitable and a non-charitable purpose must be construed as provided in section 80, if the court determines that

(i) the non-charitable purpose does not meet the requirements of section 77(1),

(ii) it is not practicable to separate the charitable purpose from the non-charitable purpose, and

(iii) the court makes an order under clause (a), (b) or (c) separating other objects of the original trust;

(f) an order that the trust takes effect as a non-charitable purpose trust, if the court determines that

(i) the non-charitable purpose meets the requirements of section 77(1), and

(ii) it is not practicable to separate any objects of the trust;

(g) an order that the terms of the disposition of property purporting to create a trust must be construed as provided in section 80, if the court determines that

(i) the non-charitable purpose does not meet the requirements of section 77(1), and

(ii) it is not practicable to separate any objects of the trust.

(3) If the court makes an order under subsection (2)(a), (b), (c) or (d), the trustee must, subject to any terms in the trust instrument regarding apportionment of the trust property or the manner in which a power of apportionment may be exercised, divide the trust property as the trustee considers reasonable in the circumstances between any new trusts and powers of appointment.

(4) Despite subsection (2)(c) and (d), if the objects of a trust consist of a charitable purpose linked conjunctively or disjunctively with a purpose that is not described specifically but is referred to only by an indefinite qualifying term, such as “benevolent”, “worthy” or “philanthropic”, the trust takes effect as a charitable trust.

(5) The trustee must apply all of the property of the trust referred to in subsection (4) as if only the charitable purpose had been set out in the trust instrument.

Disposition purporting to create non-charitable purpose trust construed as power to appoint

80(1) This section applies in respect of a disposition referred to in subsection (2) whether the disposition is made before, on or after the date this section comes into force.

(2) If the terms of a disposition of property purport to create a trust that

(a) does not create an equitable interest in any person, and

(b) is for a specific non-charitable purpose, other than a non-charitable purpose referred to in section 77(1),

the terms of the disposition must be construed, subject to this section, as constituting a power to appoint the income or the capital, as the case may be, for a period not exceeding 21 years.

(3) Despite subsection (2), the terms of a disposition referred to in that subsection must not be construed as constituting a power to appoint if the terms of the disposition provide for an illegal purpose or a purpose contrary to public policy.

(4) Despite subsection (2), if a disposition referred to in that subsection is expressed to be of perpetual duration, the court may declare the disposition to be void if the court is of the opinion that, by voiding the disposition, the result would be closer to the intention of the person disposing of the property than would the period of validity provided by this section.

(5) An order under subsection (4) may be made on application by a person referred to in section 78(8).

(6) If a disposition referred to in subsection (2) provides for the expenditure of all or a specified portion of the income or capital within an annual period or another recurring period that is less than 21 years and that income or capital is not fully expended within that period, the person who would have been entitled to the property that is subject to the power to appoint, if the power to appoint had terminated at the expiration of that period, is entitled to that unexpended income or capital.

(7) If the income or capital that is subject to a power to appoint under subsection (2) is not fully expended within a period of 21 years, the person who would have been entitled to the property that is subject to the power to appoint, if the power to appoint had terminated at the expiration of the 21-year period, is entitled to that unexpended income or capital.

(8) Nothing in this section applies to any discretionary power to transfer a beneficial interest in property to any person as a gift.

(9) For the purpose of this section, a trustee's power to appoint for a non-charitable purpose trust that has failed is a special power and a trust power.

(10) This section prevails over any contrary provisions in a trust instrument.

Part 8
Additional Powers of the Court

Non-performance by trustee

81(1) On application by a trustee or beneficiary, the court may determine whether a trustee has refused or failed

(a) to perform a duty imposed on the trustee, or

(b) to consider in good faith the exercise of a power conferred on the trustee.

(2) If the court is satisfied that a trustee has refused or failed to perform or exercise duties or powers as provided in subsection (1), the court may

(a) order the trustee to

(i) perform the duty, or

(ii) consider in good faith the exercise of the power and satisfy the court that the trustee has given due consideration to the exercise of the power,

or

(b) remove the trustee.

Trustee may apply to court for directions

82(1) A trustee may apply to the court for directions on any matter or question of fact, law or discretion arising in respect of a trust.

(2) Without limiting subsection (1), if trustees are deadlocked on any matter arising with respect of a trust, a trustee may apply to the court for directions respecting the resolution of the matter.

(3) The duty of a trustee who follows the directions given under subsection (1) or (2) is discharged with respect to the subject-matter of the directions, unless the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining the directions.

(4) This section prevails over any contrary provisions in a trust instrument.

Trustee may apply to court for order respecting distribution of trust property

83(1) On application by a trustee, the court may authorize the trustee to distribute trust property among the persons entitled to receive the trust property, with the trustee having regard only to

(a) the persons whom the trustee has been able to locate after making diligent efforts, or

(b) the claims or interests that the trustee has been able to determine after making diligent efforts.

(2) In making an order under subsection (1), the court may give directions respecting the procedure to be followed by the trustee in respect of a distribution of the trust property, including, without limitation, directions concerning the notice that must be given to persons who may have an interest in the distribution of the trust property.

(3) An order under subsection (1) does not prejudice the right of any creditor or claimant to follow the trust property into the hands of a person who receives it.

(4) This section prevails over any contrary provisions in a trust instrument.

Trustee may be relieved of liability for breach of trust

84(1) In this section, "exemption clause" means a provision of a trust instrument that excludes or restricts the liability of a trustee, including, without limitation, a provision that purports to do one or more of the following:

(a) make the enforcement of the liability of the trustee subject to restrictive or onerous conditions;

(b) permit a trustee to act despite a conflict between the trustee's personal interest and the powers and duties of the office of trustee;

(c) exclude or restrict any right or remedy in respect of the liability of a trustee, or prejudice any person who pursues such right or remedy;

(d) exclude or restrict rules of evidence;

(e) negate a duty that, in the absence of the provision, would otherwise be imposed on the trustee.

(2) The court may relieve a trustee or former trustee either wholly or partly from personal liability if the court is satisfied that

(a) the trustee or former trustee is or may be personally liable for a breach of trust, and

(b) the trustee or former trustee,

(i) has acted honestly and reasonably, and

(ii) ought fairly to be excused for the breach of trust.

(3) Subject to subsection (4), an exemption clause in a trust instrument is effective to relieve, according to its terms, a trustee of liability for a breach of trust.

(4) If the court is of the opinion that the conduct of a trustee

(a) constitutes a breach of trust, and

(b) has been so unreasonable, irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be relieved by an exemption clause from liability for the breach of trust,

the court may declare that any exemption clause contained in the trust instrument is ineffective in respect of that breach of trust, and that the liability of the trustee for breach of trust is as if the trust instrument did not contain the clause.

(5) An application under this section may be made by

(a) a beneficiary,

(b) a trustee, or

(c) a secured party.

(6) This section prevails over any contrary provisions in a trust instrument.

Contribution and indemnity

85(1) In this section, "breach of trust" includes any act or omission that gives rise to the liability of a trustee to the beneficiaries of the trust, regardless of whether the act or omission

(a) is intentional,

(b) is negligent, or

(c) would give rise to a right for contribution or indemnity apart from this Act.

(2) This section applies only with respect to a breach of trust

(a) that is the subject of a legal proceeding commenced after this Act comes into force, or

(b) if no legal proceeding has been commenced for breach of trust, for which a claim for contribution or indemnity is made after this Act comes into force.

(3) Except as provided in this section, a trustee is not obligated to contribute to or indemnify a co-trustee in respect of a breach of trust.

(4) If a trustee commits a breach of trust, the court, having regard to the responsibility of each trustee for the loss to the trust, may determine the amount the court considers appropriate

(a) for which each trustee is liable in order to make good the loss to the trust, or

(b) that a trustee must contribute to another trustee.

(5) The court may

(a) exempt a trustee from liability to make a contribution to another trustee, or

(b) order that any contribution due to, or to be recovered from, a trustee amounts to a complete indemnity.

(6) The powers conferred on the court by this section may be exercised despite that the trustee claiming contribution or indemnity or the trustee against whom the claim is made, or both of them, have acted fraudulently in breach of trust.

(7) If a trustee in breach of trust is insolvent, the court may apportion liability for making good the loss to the trust and any other losses as is appropriate among other solvent co-trustees who are found liable.

(8) If the beneficiaries have settled with a trustee who is in breach of trust and who subsequently seeks contribution from a co-trustee, the court, in making any contribution order and without limiting subsections (4) and (5), may consider whether the settlement was reasonable.

Beneficiaries instigating breaches of trust

86(1) If a trustee commits a breach of trust, and the breach was at the instigation or request or with the consent of some but not all of the beneficiaries, the court may order the beneficiaries who instigated, requested or consented to the breach to contribute to or indemnify the trustee or persons claiming through the trustee.

(2) If the court makes an order under subsection (1), the court may order that all or part of the interest of the beneficiaries in the trust is to be used to satisfy the obligation to contribute to or indemnify the trustee or persons claiming through the trustee.

Payment into court

87(1) A trustee may pay into or deposit in court trust money or trust securities.

(2) If a trustee is not available to receive payment or transfer of trust money or trust securities and give a receipt for the trust money or trust securities, the court may order, on application by a person in possession or control of the trust money or trust securities, that the trust money or trust securities be paid into or deposited in court.

(3) A receipt given by a clerk of the court for any money or securities paid into or deposited in court under subsection (1) or (2) relieves the trustee or other person paying or depositing the money or securities from any further obligations relating to the money or securities.

(4) The court may make any orders it considers necessary or appropriate regarding the trust money or trust securities paid into or deposited in court under subsection (1) or (2) and for the administration of the trust to which the money or securities are subject.

(5) This section prevails over any contrary provisions in a trust instrument.

Costs paid by party or out of trust property

88(1) The court may order costs of a proceeding under this Act, in the amounts or proportions the court considers appropriate, to be paid

(a) by or to a party to the proceeding, or

(b) out of the trust property.

(2) The court may order costs of a transfer of or other transaction respecting trust property, in the amounts or proportions the court considers appropriate, to be paid out of the trust property.

(3) For the purposes of subsection (1)(b) or (2), the court may designate all or part of the trust property as the source for the payment.

Part 9
General

Interpretation and evidence

89 For the purposes of determining the settlor's intention, the court may admit the following evidence:

(a) evidence as to the meaning, in either an ordinary or a specialized sense, of the words or phrases used in the trust;

(b) evidence as to the meaning of the provisions of the trust in the context of the settlor's circumstances at the time of the making of the trust;

(c) evidence of the settlor's intention with regard to the matters referred to in the trust.

Ability of person to have child

90(1) In this section, "physician" means

(a) a regulated member of the College of Physicians and Surgeons of Alberta under the *Health Professions Act* who is authorized to use the title "physician" and holds a practice permit issued under that Act,

(b) a professional corporation that is registered under the *Health Professions Act* with the College of Physicians and Surgeons of Alberta, or

(c) in respect of medical services provided in a jurisdiction other than Alberta, a person who is lawfully entitled to practise medicine under the laws of that jurisdiction.

(2) If, in the administration of a trust, a question arises that turns on the ability of a person to have a child at some future time, it must be presumed that

(a) a male is able to have a child at the age of 14 years or over, but not under that age, and

(b) a female is able to have a child at the age of 12 years or over, but not under that age or over the age of 55 years.

(3) Despite subsection (2), in the case of a living person, it may be presumed that the person is or will be unable to have a child at the time in question if

(a) that person provides information or a reason supporting why that person is or will be unable to have a child at that time,

(b) there is a decision of the court that the person is or will be unable to have a child at that time, or

(c) there is an opinion of a physician that the person is or will be unable to have a child at that time.

(4) Subject to subsection (5), if, in the administration of a trust, a question is decided by treating a person as able or unable to have a child at a particular time, then the person must be so treated for the purpose of any related question that may arise in the administration of the trust, even if the evidence on which the finding of ability or inability to have a child at the particular time is proved by subsequent events to have been erroneous.

(5) If, in the administration of a trust, a question is decided by treating a person as unable to have a child at a particular time and that person subsequently has a child at that time, the court may make an order that it considers appropriate to protect the right that the child would have had in the trust property as if

(a) that question had not been decided, and

(b) that child would, apart from the decision, have been entitled to a right in the trust property.

(6) For the purposes of this section, the possibility that a person may at any time have a child by adoption may not be considered in deciding a question that turns on the ability of a person to have a child at some particular time, but if a person does subsequently have a child by adoption, subsection (5) applies in respect of that child.

(7) Subject to subsection (8), a trustee is not liable for a loss arising from a payment of trust money or a transfer of trust property further to a decision to treat a person as unable to have a child at a particular time if, before the trustee has notice that the person subsequently had a child at the particular time, the trustee

(a) relies on a decision of the court that the person is or will be unable to have a child at that time, or

(b) relies on an opinion of a physician that the person is or will be unable to have a child at that time.

(8) Subsection (7) does not apply if the trustee is guilty of fraud, wilful concealment or misrepresentation in obtaining a decision or opinion referred to in that subsection.

Assumptions if notice of trust received

91(1) Subsection (2) applies to a person who receives notice of the existence of a trust by reason only of the production or registration of a document evidencing

(a) the appointment of a trustee,

(b) a trustee ceasing to hold office, or

(c) the vesting of property in a trustee.

(2) A person to whom this subsection applies may assume without inquiry that

(a) a former trustee possessed the powers the former trustee exercised or purported to exercise over the trust property, and

(b) a current trustee has the powers the current trustee has exercised or purports to exercise over the trust property.

(3) This section prevails over any contrary provisions in a trust instrument.

Purchaser takes property subject to trust if notice of defect

92(1) In this section, “purchaser” means

(a) a purchaser for value of trust property,

(b) a secured party, or

(c) any other person who for value received an interest in or a claim on trust property.

(2) Subject to the *Land Titles Act,* a purchaser takes the trust property subject to the terms of the trust if the purchaser, at the time of the purchase, has received notice that

(a) a former trustee did not possess, or a current trustee does not possess, a power purported to be exercised with respect to the trust property, or

(b) a former trustee or current trustee has acted in breach of trust with respect to the trust property.

(3) This section prevails over any contrary provisions in a trust instrument.

Person not liable if compliant with Act or order

93(1) Subject to this Act, a person who complies with this Act or with an order made under this Act is not liable for a loss arising from anything done or permitted to be done under this Act, unless it was done or permitted to be done in bad faith.

(2) This section prevails over any contrary provisions in a trust instrument.

Receipt relieves person from further obligation

94 A receipt given by a trustee for any money or other property received by the trustee relieves the person paying or otherwise transferring the money or other property from any further obligation relating to the money or other property.

Incapacitated persons and minors

95(1) If a beneficiary is an incapacitated person for whom an attorney has been appointed under the *Powers of Attorney Act* or a trustee has been appointed under the *Adult Guardianship and Trusteeship Act*, the attorney or trustee, as the case may be, is the representative of that beneficiary for the purposes of this Act.

(2) Without limiting subsection (1),

(a) any action required or permitted to be taken by the beneficiary,

(b) any notice or report required or permitted to be given to the beneficiary, and

(c) any consent or agreement required or permitted to be given by the beneficiary

is validly taken or given if it is taken by, given to or given by the attorney or trustee, as the case may be, on behalf of the beneficiary.

(3) If a beneficiary is a minor for whom a trustee has been appointed by court order under the *Minors' Property Act*, the trustee is the representative of that beneficiary for the purposes of this Act.

(4) Without limiting subsection (3),

(a) any action required or permitted to be taken by the beneficiary,

(b) any notice or report required or permitted to be given to the beneficiary, and

(c) any consent or agreement required or permitted to be given by the beneficiary

is validly taken or given if it is taken by, given to or given by the trustee on behalf of the beneficiary.

Notice to minor

96 If a beneficiary is a minor, notice must be given in accordance with the *Minors' Property Act* to the Public Trustee and, where required under that Act, to the beneficiary.

Agent of beneficiary

97 For the purposes of this Act,

(a) any action required or permitted to be taken by a beneficiary,

(b) any notice or report required or permitted to be given to a beneficiary, and

(c) any consent or agreement required or permitted to be given by a beneficiary

is validly taken or given if it is taken by, given to or given by an agent of the beneficiary acting within the scope of the authority conferred by that beneficiary.

Delivery of documents

98(1) In this section,

(a) "electronic" has the same meaning as in the *Electronic Transactions Act*;

(b) "recorded mail" means a form of delivery by mail or courier in which receipt of the document or notice is acknowledged in writing.

(2) Where this Act requires documents or notice to be delivered to a person, the documents or notice may be delivered

(a) in person or to a lawyer who is authorized to accept delivery on behalf of a person,

(b) by recorded mail, or

(c) by electronic transmission.

Regulations

99 The Lieutenant Governor in Council may make regulations

(a) respecting notices under sections 12 and 14;

(b) specifying a percentage for the purpose of total return investments under section 44;

(c) varying the length of a valuation period for the purposes of section 44(9)(c)(i);

(d) respecting matters for which a non-charitable purpose trust may be created under section 77(1);

(e) respecting any other matter or thing that the Lieutenant Governor in Council considers necessary to carry out the intent and purpose of this Act.

Transitional regulations

100(1) In this section, "former Act" means the *Trustee Act*, RSA 2000 cT-8.

(2) The Lieutenant Governor in Council may make regulations

(a) respecting the transition to this Act of anything from the former Act;

(b) to deal with any difficulty or impossibility resulting from this Act or the transition to this Act from the former Act.

(3) The Lieutenant Governor in Council may, by regulation, amend regulations made under any Act of Alberta for the purposes of making any changes the Lieutenant Governor in Council considers necessary or advisable as a result of the transition to this Act from the former Act.

(4) Regulations authorized by subsection (3) may be made despite that the regulation being amended was made by a member of the Executive Council or some other person or body.

Part 10
Consequential Amendments, Repeal and Coming into Force

101 to **103** *(These sections amend other Acts; the amendments have been incorporated into those Acts.)*

Repeal

104 The *Trustee Act*, RSA 2000 cT-8, is repealed.

Coming into force

105 This Act comes into force on Proclamation.

(NOTE: Proclaimed in force February 1, 2023.)

TAB 5

Re Urman

44 O.R. (2d) 248
3 D.L.R. (4th) 631

ONTARIO
COURT OF APPEAL
BROOKE, WEATHERSTON AND THORSON JJ.A.
14TH DECEMBER 1983.

Mortgages -- Assignment -- Registration -- Priorities -- Mortgage broker making general assignment of book debts to bank -- Bank registering financing statement under Personal Property Security Act -- Broker assigning mortgages to clients and syndicating mortgages among clients pursuant to trust agreements -- Assignments registered in land registry offices -- Assignees and trust beneficiaries not registering financing statements -- Receiving order made against mortgage broker -- Consideration of priorities -- Personal Property Security Act, R.S.O. 1980, c. 375, ss. 1(y), (m), 53 -- Registry Act, R.S.O. 1980, c. 445 -- Land Titles Act, R.S.O. 1980, c. 230.

Personal property security -- Priorities -- Real property mortgages -- Assignments -- Mortgage broker making general assignment of book debts to bank -- Bank registering financing statement under Personal Property Security Act -- Broker assigning mortgages to clients and syndicating mortgages among clients pursuant to trust agreements -- Assignments registered in land registry offices -- Assignees and trust beneficiaries not registering financing statements -- Receiving order made against mortgage broker -- Consideration of priorities -- Personal Property Security Act, R.S.O. 1980, c. 375, ss. 1(y), (m), 53 -- Registry Act, R.S.O. 1980, c. 445 -- Land Titles Act, R.S.O. 1980, c. 230.

Bankruptcy -- Priorities -- Bankrupt mortgage broker making general assignment of book debts to bank -- Bank registering financing statement under Personal Property Security Act -- Broker assigning mortgages to clients and syndicating mortgages among clients pursuant to trust agreements -- Assignments registered in land registry offices -- Assignees and trust beneficiaries not registering financing statements -- Consideration of priorities -- Personal Property Security Act, R.S.O. 1980, c. 375, ss. 1(y), (m), 53 -- Land Titles Act, R.S.O. 1980, c. 230.

The bankrupt, U, was a mortgage broker. His business involved the acquisition of mortgages, usually for resale to his clients either by direct assignment or by syndication under trust agreements. C Bank was U's banker and provided a revolving line of credit for U's business. As security it took a general assignment of book debts from U in respect of which it registered a financing statement under the Personal Property Security Act, R.S.O. 1970, c. 344 (P.P.S.A.) (now R.S.O. 1980, c. 375), which was still outstanding. It did not register any interest in any mortgages dealt with by U under the Registry Act, R.S.O. 1970, c. 409 (now R.S.O. 1980, c. 455), or under the Land Titles Act, R.S.O. 1970, c. 234 (now R.S.O. 1980, c. 230). The assignment of book debts provided that all moneys collected by U on any mortgages should be received as trustee for the bank and should be paid over to the bank forthwith. In fact the bank permitted U to assign mortgages he acquired to his clients in the ordinary course of business. After U's bankruptcy his trustee in bankruptcy made this application in four test cases for advice and direction to determine the priorities among the bank, the general creditors and the several assignees of mortgages and trust beneficiaries. In three of the test cases U assigned existing mortgages to secure loans to him and the assignees registered the assignments of mortgage in the appropriate land registry office. In the fourth test case U syndicated a mortgage loan among his clients with whom he entered into trust agreements. These agreements were not registered in the land registry office. In none of the four cases did the assignees or the trust beneficiaries register financing statements under the P.P.S.A. After U's default the assignees of the several mortgages and the trust beneficiaries gave notice to the mortgagors to make payments to them before the bank notified the mortgagors of the assigned and syndicated mortgages of its assignment of book debts.

It was held at first instance that the trustee in bankruptcy had priority over the assignees of the several mortgages and over the beneficiaries under the trusts and that they in turn had priority over the bank. On appeal in respect of one mortgage transaction in which U assigned two second mortgages to K Ltd. as security for a loan to him on terms that the mortgages would be reassigned on payment of the loan and interest, and in respect of a second mortgage which U syndicated among some of his clients under a trust agreement, held, the appeal should be allowed.

(1) Although the mortgagee's right to receive the mortgage moneys in the K Ltd. assignment was an intangible that secured payment or performance of an obligation, so that, on a literal reading of s. 1(y) and (m) of the P.P.S.A. it applied, in fact it did not apply, because the mortgage debt could not be separated from the land on which it was secured. Hence, the K Ltd. assignment was to be treated as an interest in land and the P.P.S.A. did not apply. The result was that K Ltd. had priority over the trustee in bankruptcy.

(2) Similarly, in respect of the syndicated mortgage, since the trust agreement declared U to be a trustee for the beneficiaries of undivided proportionate interests in the mortgage, their interests were interests in land, the P.P.S.A. did not apply, and they had priority over the trustee in bankruptcy.

(3) K Ltd. and the trust beneficiaries also had priority over C Bank, for while the assignment of book debts covered future debts, and registration of a financing statement gives notice by s. 53 of the P.P.S.A. to all persons claiming an interest in the collateral, K Ltd. and the trust beneficiaries were not affected by the notice, since their priority rights were governed, not by the rules respecting interests in personalty, but by those governing interests in land. This was so because C Bank effectively authorized U to give good title to the mortgagees and K Ltd. and the trust beneficiaries gave notice

of their interests to the mortgagors before the bank gave notice of its interest.

Taylor v. London & County Banking Co.; London & County Banking Co. v. Nixon, [1901] 2 Ch. 231; Jones v. Gibbons (1804), 9 Ves. Jun. 407, 32 E.R. 659, apld

Tailby v. Official Receiver (1888), 13 App. Cas. 523; Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 36 O.R. (2d) 703, 134 D.L.R. (3d) 369, 2 P.P.S.A.C. 22, sub nom. Re Huxley Catering Ltd., 41 C.B.R. (N.S.) 217, 17 B.L.R. 170; Re Wiarton Lumber Co. Ltd., Ex p. Canadian Bank of Commerce (1924), 4 C.B.R. 477, consd

Other cases referred to

Dedrick et al. v. Ashdown et al. (1888), 15 S.C.R. 227; W. H. Fraser v. Imperial Bank of Canada et al. (1912), 47 S.C.R. 313, 10 D.L.R. 232, 3 W.W.R. 649, 23 W.L.R. 445; Stave Falls Lumber Co. et al. v. Westminster Trust Co. et al., [1940] 4 D.L.R. 382, [1940] 2 W.W.R. 241, 55 B.C.R. 241; Evans, Coleman & Evans Ltd. v. R. A. Nelson Construction Ltd. (1959), 16 D.L.R. (2d) 123, 27 W.W.R. 38; Lettner v. Pioneer Truck Equipment Ltd. et al. (1964), 47 W.W.R. 343

Statutes referred to

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 47
Land Titles Act, R.S.O. 1980, c. 230
Personal Property Security Act, R.S.O. 1980, c. 375, ss. 1(m), (y), 2, 3(1)(e) (enacted 1981, c. 58, s. 1); 53(1)(a)
Registry Act, R.S.O. 1980, c. 445

APPEAL from a judgment of Steele J., 128 D.L.R. (3d) 33, 1 P.P.S.A.C. 340, 38 C.B.R. (N.S.) 261, 15 B.L.R. 165, 20 R.P.R. 161, determining priorities in a bankruptcy.

Garry J. Smith, Q.C., and Kenneth Prehogan, for appellants, Kreindel Investments Ltd.

Murray B. Page, Q.C., for appellants, Belle Seigal et al.

Richard S. Thomson, Q.C., and Kevin R. Aalto, for appellant, Canadian Imperial Bank of Commerce.

M. Sclisizzi, for respondents, unsecured creditors.

Michael B. Rotsztain, for respondent, trustee in bankruptcy.

The judgment of the court was delivered by

WEATHERSTON J.A.:-- A receiving order was made against Nathan N. Urman on August 13, 1980. He was a mortgage broker whose principal business seems to have been the purchase and sale of mortgages. Sometimes he sold mortgages outright, in which case he would simply assign them to the purchasers. We are concerned in this appeal with the priorities in respect of two mortgage transactions that were somewhat more complicated.

Urman financed his transactions by means of a revolving line of credit with the Canadian Imperial Bank of Commerce. The bank had as security a general assignment of book debts, dated April 21, 1976, and duly registered under the Personal Property Security Act, R.S.O. 1980, c. 375, the material parts of which were as follows:

> FOR VALUABLE CONSIDERATION the undersigned Nathan N. Urman of 161 Kenwood Avenue, Toronto, Ontario hereby assign(s) and transfer(s) all debts, accounts, claims, moneys and choses in action which now are or which may at any time hereafter be due or owing to or owned by the undersigned, and also all securities, bills, notes and other documents now held or owned or which may be hereafter taken, held or owned by the undersigned or anyone on behalf of the undersigned in respect of the said debts, accounts, claims, moneys and choses in action or any part thereof, and also all books and papers recording, evidencing or relating to said debts, accounts, claims, moneys and choses in action or any part thereof (all of the foregoing being herein called the "assigned premises")

to CANADIAN IMPERIAL BANK OF COMMERCE (herein called the "Bank") as a general and continuing collateral security for payment of all existing and future indebtedness and liability of the undersigned to the Bank wheresoever and howsoever incurred and any ultimate unpaid balance thereof, and as a first and prior claim upon the assigned premises.

. . . . .

5. All moneys collected or received by the undersigned in respect of the assigned premises shall be received as trustee for the Bank and shall be forthwith paid over to the Bank.

At all material times the bank was aware that Urman, in the ordinary course of his business, was acquiring mortgages for the most part for resale and the revolving line of credit was provided for this purpose. Repayment was expected to be from the sale of mortgages, payments on the mortgages and profits on the sale of mortgages.

By a document dated April 24, 1979, entitled "Assignment of Mortgage as Security", Urman assigned to Kreindel Investments Limited two second mortgages as security for a loan by Kreindel to Urman of $65,000. In form, the document was an absolute assignment of the mortgage debts, and a conveyance of the mortgaged lands, but it contained the following proviso:

Provided that if the Assignor shall pay to the Assignee the sum of $65,000 together with interest thereon at the rate of 11% per annum ... then the Assignee shall, at the request and cost of the Assignor, reassign the said Mortgage to the Assignor giving trustee covenants only.

This assignment was registered in the registry office but no financing statement was registered under the Personal Property Security Act. On April 24, 1979, Kreindel gave notice to the mortgagors of its assignment, requiring them to make payments to Urman until notified of default by Urman. In July, 1980, Kreindel notified them of Urman's default and required mortgage payments to be made to their solicitors. The bank notified the mortgagors of its assignment of book debts on August 29, 1980.

The other mortgage transaction with which we are concerned involved a second mortgage for $160,000 from Phyllis Eckhardt to Nathan N. Urman dated March 1, 1978. The principal sum secured by the mortgage was advanced by Urman on March 1, 1978. At various times between May 9, 1978 and April 30, 1979, clients of Urman paid him sums of money to participate in the mortgage loan. In each case Urman signed a "Trust Agreement", the terms of which I shall set out later.

No financing statement was registered under the Personal Property Security Act in respect of these Trust Agreements. Urman continued to collect the mortgage payments, depositing them in a trust account at the bank, and, from time to time, forwarding to the trust claimants "T 5" statements of investment income in respect of payments made by him to them for their respective shares of mortgage payments. The bank gave the mortgagor notice of its assignment on August 29, 1980.

On a motion for advice to determine the respective interests and priorities of the bank, the trustee in bankruptcy and of Kreindel and the trust claimants, Steele J. held that the bank had waived its rights under its assignment of book debts, and that the Kreindel assignment and the Trust Agreements created security interests within the meaning of the Personal Property Security Act which, since no financing statement was registered, were unperfected and so subordinate to the interest of the trustee in bankruptcy [128 D.L.R. (3d) 33, 1 P.P.S.A.C. 340, 38 C.B.R. (N.S.) 261].

Steele J. was of the opinion that because a mortgage is personal property, the Personal Property Security Act applied both to the assignment of a mortgage and to a debt secured by a real property mortgage. The effect of his ruling is that anyone acquiring an interest in a real property mortgage would be required to search under the Personal Property Security Act as well as under the Registry Act, R.S.O. 1980, c. 445, or the Land Titles Act, R.S.O. 1980, c. 230.

By s. 2 of the Personal Property Security Act, it is provided that the Act applies:

(a) to every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest, including, without limiting the foregoing,

(i) a chattel mortgage, conditional sale, equipment trust, floating charge, pledge, trust deed or trust receipt, and

(ii) an assignment, lease or consignment intended as security; and

(b) to every assignment of book debts not intended as security, but not to an assignment for the general benefit or creditors to which the Assignments and Preferences Act applies.

Section 1 has the following definitions:

(y) "security interest" means an interest in goods, other than building materials that have been affixed to the realty, fixtures, documents of title, instruments, securities, chattel papers or intangibles that secures payment or performance of an obligation, and includes an interest arising from an assignment of book debts;

. . . . .

(m) "intangible" means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments or securities;

A mortgage, by which a mortgagor mortgages his land to secure a debt, creates an interest in land. It does not create a "security interest" as defined by the Act, and so the Act does not apply to it. But mortgages are said to have a dual character, and the right of the mortgagee to receive the mortgage money is treated in equity as personal property and is therefore an "intangible". An interest in an intangible that secures payment or performance of an obligation is a "security interest". However, an absolute assignment of a mortgage does not secure payment or performance of an obligation and does not create a "security interest". It absolutely transfers the mortgagee's interest in the mortgage; it does not create an interest in the right to receive the mortgage money (an intangible) that secures payment or performance of an obligation. So the Act does not apply to the absolute assignment of a mortgage.

Here, the Kreindel assignment was not absolute. The mortgages were assigned as security for the mortgagee's own debt. The mortgagee's right to receive the mortgage moneys was an intangible that secured payment or performance of an obligation, and so, on its literal wording, the Act can be said to apply to this assignment.

But the dual character of real estate mortgages has not been universally applied. By a rule established as long ago as 1804, a mortgage debt is not to be separated from the land on which it is secured for the purpose of determining priority between competing assignees. In Taylor v. London & County Banking Co.; London & County Banking Co. v. Nixon, [1901] 2 Ch. 231, Stirling L.J. said at pp. 254-5:

> Although a mortgage debt is a chose in action, yet, where the subject of the security is land, the mortgagee is treated as having "an interest in land," and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty. The reason is thus stated by Sir William Grant in Jones v. Gibbons [(1804), 9 Ves. Jun. 407 at pp. 410-1, 32 E.R. 659]: "A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment" that is, of the mortgage "is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt; as the estate can never be taken from him except by payment of the debt."

Jones v. Gibbons, referred to by Stirling L.J., is remarkably similar to the present case. A West Indies merchant was in financial difficulties, and an arrangement was made with his creditors whereby he assigned to trustees several securities for debts due to him, including mortgage debts, as security for his own debts. He remained in possession of the assets, and the assignments of mortgages were not registered. Later, he became bankrupt, and a contest arose between the trustees for the creditors on the one hand, and the assignees in bankruptcy on the other hand, who attacked the earlier assignment as being fraudulent and void against the general creditors. The attack was resisted as to the mortgage debts. Sir William Grant M.R. held that the other debts and chattels covered by the assignment to trustees, since they remained in the possession, order and disposition of the bankrupt at the time of the bankruptcy, passed to the assignees in bankruptcy. Then came the passage in his judgment as to the mortgage debts that was quoted by Stirling L.J. He held that they passed by the assignment of the mortgages to the trustees for the first creditors, and the general creditors were not entitled to any account of them [p. 411]:

> With regard to the objection, that these deeds were not registered, the Registry Acts have no effect as between those claiming by conveyance and the assignees of the bankrupt, who made the conveyance. It was never held bad, because not registered; the object being purely for the protection of subsequent purchasers.

These two cases are sufficient authority to hold that the Kreindel assignment, although in effect a mortgage of a mortgage, is to be treated as an interest in land and not in an intangible, and, accordingly, the Act did not apply to it. Kreindel is entitled to priority over the trustee in bankruptcy to the extent of its security interest in the mortgages.

After Steele J. had given judgment on the motion before him, the Legislature enacted s. 3(1)(e) by the Personal Property Security Amendment Act (No. 2), 1981 (Ont.), c. 58, s. 1, by which it was provided that the Act does not apply

(e) to the creation or assignment of an interest in real property, including a mortgage, charge or lease of real property ...

This enactment must now be taken as merely a declaration of the existing law.

In respect of the Eckhardt mortgage, Steele J. emphasized that Urman had advanced the mortgage money before he received money from the trust claimants for participation in the mortgage. He said [at p. 45]:

The question is whether the bankrupt, in fact, made himself a trustee for the trust claimants. He did not receive the money in trust to be advanced on behalf of the trust claimants but received the money after he had advanced his own money for this purpose. He received money from the trust claimants and said that as security for that money he would hold an interest in the mortgage for their benefit. Clearly, these documents create a security interest in the moneys owing under the mortgage but such interest was not registered under the P.P.S.A. and is ineffective against the trustee in bankruptcy.

I have already shown that a mortgage debt is not to be separated from the land by which it is secured when determining the priority between an assignee of a mortgage and a trustee in bankruptcy of the mortgagor. The Act applied only if the Trust Agreement created an interest in an intangible; it did not apply if the Trust Agreement made the trust beneficiaries beneficial owners of undivided proportionate interests in the Eckhardt mortgage.

After reciting the terms of the mortgage loan, the Trust Agreement provided:

NOW THIS INDENTURE WITNESSETH that in consideration of the sum of TWO ($2.00) DOLLARS and other valuable consideration (the receipt whereof is hereby acknowledged) the Trustee doth hereby acknowledge and confirm as follows:

1. That the Trustee has received from you the sum of $10,000 for participation in the abovementioned loan, and that the securities for the said loan and the proceeds thereof shall be held by him on your behalf and on behalf of your co-investors in proportion to your respective participation in accordance with the terms hereof, as monies are advanced from time to time under the said loan. All participants shall rank equally according to their proportionate interest of the total amount advanced from time to time, notwithstanding the time at which any participant's funds were advanced.

2. That all payments and benefits to be received under the said loan were advanced by the Trustee and shall be remitted to the participants in their proportionate shares as soon as practicable after receipt; provided that, apart from any right of prepayment under the loan he may, in his sole discretion, repay to you at any time the amount of your participation still outstanding or any part thereof together with interest to the date of such repayment.

3. That upon any act of default occurring under the loan, the Trustee may take such action and exercise all such rights and remedies as he in his sole discretion deems advisable in the best interests of all participants.

4. That such further moneys which the Trustee deems necessary to be advanced in order to protect the security and all benefits and burdens respecting the said loan shall be advanced or shared by all participants in the loan to the extent of their proportionate participation in the monies advanced from time to time under the loan; provided that in the event of the default of any participant in advancing further moneys required as aforesaid, the Trustee and/or other participants may advance the required funds and in such event, the parties making such advance shall have a first lien and charge on the share and participation of the participant who does not advance such funds in the mortgage and other securities held by the Trustee and any benefits or proceeds thereof for the amount so advanced by them, together with interest thereon at the mortgage rate.

5. That the Trustee is vested with and authorized to exercise all of the powers, rights, and remedies which he is entitled to as Trustee on your behalf, including without limiting the generality of the foregoing, the right to release any of the securities in whole or in part on such terms, if any, as the Trustee shall deem advisable, and on behalf of your co-investors, at such time and in such manner as he shall determine in his sole and unfettered discretion.

6. The Trustee so long as he acts in good faith, shall not be responsible respecting the exercise and/or non-exercise of his powers, and he shall be indemnified and saved harmless respecting any claims or costs borne by him in connection with the loan.

In London & County Banking Co., supra, a dishonest solicitor misappropriated a sum of money of which he was a trustee, and, by entries in his books, under the heading of the trust, he purported to appropriate a mortgage which he held on his own account to cover the sum of which he had defrauded the trust estate. He did not communicate the purported appropriation either to his co-trustee or to the cestuis que trust. It was held by a majority of the court that this was a sufficient appropriation of the mortgage, so as to prevail over a subsequent legal assignment of the mortgage to the bank.

In the present case there is a far more formal acknowledgment by Urman as to the interests of the trust beneficiaries. It seems to me that in form and substance the Trust Agreement is an acknowledgment by Urman that he was a trustee for the trust beneficiaries of undivided proportionate interests in the Eckhardt mortgage. It is particularly significant that by para. 4 they may be called on to put up more money to protect their interests. It is true that the mortgage was set up in Urman's books of account as a debt owing by Phyllis Eckhardt to him, and that the trust claimants were recorded as his creditors. But payments under the mortgage were deposited in a special trust account at the bank, and he sent the trust claimants income tax forms that indicated the payments made by him to them were payments under the mortgage, not repayment of a loan. I think the trust claimants have the same rights as if absolute assignments of proportionate shares in the mortgage had been made to them.

Steele J. held that the Trust Agreement was a "trust receipt" within the meaning of s. 2(a)(i) of the Act, and that the beneficial interests were therefore unperfected security interests subordinate to the right of the trustee in bankruptcy. All counsel rightly conceded that the agreement was not a trust receipt. In my opinion the Act did not apply and the trust beneficiaries took priority over the trustee in bankruptcy, even without calling in aid s. 47 of the Bankruptcy Act, R.S.C. 1970, c. B-3, which provides that the property of a bankrupt divisible amongst his creditors shall not comprise property held by the bankrupt in trust for any other person.

It remains to consider whether the bank has priority over Kreindel or the trust claimants of the Eckhardt mortgage. The assignment to the bank was effective as to future debts; as soon as they came into existence the bank acquired title to them. The principle was stated by Lord Macnaghten in Tailby v. Official Receiver (1888), 13 App. Cas. 523 at p. 546:

> Long before Holroyd v. Marshall [(1862), 10 H.L.C. 191, 11 E.R. 999] was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust:" ...

The bank's security interest in debts owing or to become owing to Urman "attached" within the meaning of the Personal Property Security Act as soon as they came into being, and that security interest was perfected by registration: see Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 36 O.R. (2d) 703, 134 D.L.R. (3d) 369, 2 P.P.S.A.C. 22, sub nom.

In Re Wiarton Lumber Co. Ltd., Ex p. Canadian Bank of Commerce (1924), 4 C.B.R. 477, Fisher J. held that a general assignment of book debts was operative as an assignment to the bank of all moneys due and owing to the assignor under an agreement for the sale of land, and also the balance due for principal and interest on a mortgage secured on lands. That case is authority for the proposition that, as against a mortgagee's trustee in bankruptcy, a general assignment of book debts is effective to attach the mortgage debt.

The result is that the bank gained a perfected security interest (an equitable charge) in each mortgage debt as it came into existence, and which security interest was prior in time to the interest of assignees of the mortgages. By s. 53(1)(a) of the Personal Property Security Act, registration of a financing statement constitutes:

(i) notice of the security interest to which it relates to all persons claiming any interest in such collateral ...

Steele J. held that the bank's security interest was a floating charge, in that the arrangement between it and Urman was that Urman was advanced money to buy and sell mortgages, and must be taken to have been authorized to give good title to assignees, free of the bank's security interest. I agree with him. Although the bank's assignment was absolute in form, and, it could be said (leaving aside the effect of s. 53 of the Personal Property Security Act), the bank merely forbore to give notice of its assignment so as to enable competing assignees to gain priority, I think the working arrangement between the bank and Urman was that Urman was authorized to give good title to mortgagees so long as he was not in default. The bank's security interest was therefore a floating charge, notwithstanding its form. The court is entitled to look at the realities of the arrangement, and not merely at the form of the assignment: see Dedrick et al. v. Ashdown et al. (1888), 15 S.C.R. 227, per Gwynne J. at p. 243; W. H. Fraser v. Imperial Bank of Canada et al. (1912), 47 S.C.R. 313, 10 D.L.R. 232, 3 W.W.R. 649; Stave Falls Lumber Co. et al. v. Westminster Trust

Co. et al., [1940] 4 D.L.R. 382, [1940] 2 W.W.R. 241, 55 B.C.R. 241, contra; Evans, Coleman & Evans Ltd. v. R. A. Nelson Construction Ltd. (1959), 16 D.L.R. (2d) 123, 27 W.W.R. 38; Lettner v. Pioneer Truck Equipment Ltd. et al. (1964), 47 W.W.R. 343.

That floating charge did not crystallize until after the specific equitable interests had been acquired by Kreindel and the trust claimants and was therefore subject to those interests: see Gower's Principles of Modern Company Law, 4th ed. (1979), at p. 476; Kerr on the Law and Practice as to Receivers, 15th ed. (1978), p. 162.

For these reasons I find that Kreindel and the trust claimants take priority not only over the trustee in bankruptcy, but over the bank as well.

Steele J. appointed counsel to represent the unsecured creditors, since the trustee in bankruptcy could not take an adversarial position. We were asked to direct that costs be payable out of the proceeds of the mortgages in question, but I see no reason why the successful parties should, in effect, pay the costs of unsuccessful parties. I would direct that the costs of the unsecured creditors and of the trustee in bankruptcy be paid out of the bankrupt estate, but that no other order be made as to costs.

Appeal allowed.

TAB 6

WatersTrusts 24.II

Waters' Law of Trusts in Canada, 5th Ed.

24 — Rights of Intervention in the Administration of the Trust
Editor: Donovan W.M. Waters, Contributing Editors: Mark R. Gillen and Lionel D. Smith

24.II — REMEDIES

24.II — REMEDIES

This state of affairs therefore provokes the question of what remedies can be available to the trust beneficiary. The beneficiary's interest is itself an asset, in the sense that the beneficiary can give or sell it to others. Moreover, it relates to particular property, inasmuch as it expresses the right of the beneficiary under the trust terms to receive at some time the whole or a share of the income or capital. But what does that mean when one comes to speak of the beneficiary's remedies? The courts have always been in some difficulty in answering that question. The classic view is that the remedies of the beneficiary are personal; they lie against the trustee to compel that person properly to discharge his or her duties as a trustee. "Equity acts *in personam*", goes the old maxim. But there is clearly a sense in which the trust beneficiary has rights in the trust property; it is not for nothing that courts and commentators have for many years talked in terms of "Equitable title" and "Equitable interests".[2]

Equity has determined that a beneficiary has two kinds of remedies: personal and proprietary. A *personal* claim is not a claim to any particular property, but is directed to a particular defendant and requires that person to comply with his or her obligations, including, if necessary, meeting judgments entered against him or her. A *proprietary* claim in the context of trust law is a claim that alleges that particular property is trust property, and so subject to the terms of the trust and, in particular, to the beneficiary's rights under the trust. Let us look at each category in turn.

A. — Personal Claims

First and primarily, the beneficiary has personal remedies against the trustees to compel them to carry out their duties in a proper manner.[3] On this basis, the beneficiary can compel trustees to render an account of their administration. It is important to bear in mind that the beneficiary can demand an accounting without any allegation of breach of trust; it is a primary obligation of trustees to account for their stewardship. Of course, the courts will hold the trustees liable if the accounting shows that they are in breach of their duty to administer the trust property correctly. One of the beneficiary's principal rights is to require that the trustees, who have caused loss to the trust fund through their breach of trust, shall out of their own pockets indemnify the fund for its loss. This may have resulted from an unauthorized disposition of trust property, from a failure to monitor investments, or in other ways. The beneficiary can also require the trustees to give up any gains that they have improperly acquired through their office. Whether it is part of a proceeding to seek an accounting, or part of an action that alleges a breach of trust, improper losses and gains are traditionally quantified through the process of accounting.

The beneficiary can also seek an injunction if the trustees contemplate an action which would be in breach of trust or are refusing to carry out an act which it is their duty to discharge. Although injunctions are discretionary, trust obligations are presumptively specifically enforceable; a beneficiary does not need to show that damages would be inadequate. The beneficiary may also apply for the appointment of a receiver or the removal and replacement of the trustees on the grounds that, due to wrongful mismanagement or disagreement among the trustees, there is a serious danger to the trust property. Such remedies are in the discretion of the court.

Where trustees are held liable, it is up to them to recover, if they can, from any third party who was involved with them in their breach. This possibility allows us to notice that the beneficiary may, in some circumstances, be enabled to make a personal claim against third parties. This may be extremely important where the trustees are unable to make good a loss which they have caused to the trust fund. Broadly, there are two possibilities: direct and indirect claims. A direct claim can arise where the third party engages with the trustee in what the third party knows, or should know, to be a breach of trust. In such a case, the third party is treated as if he or she were a trustee. That is to say, Equity describes the party as "accountable as a constructive trustee" because he or she has knowingly intermeddled in the proper discharge of the trust. The party's conduct makes him or her liable as if he or she were a trustee appointed as such. Consequently, the third party is liable to a personal action at the direct suit of the beneficiary; it is no defence to such a party that he or she no longer has, or never had, the trust property. [4]

A beneficiary may have an indirect claim, where the *trustee* has a claim against a third party. This is a rarer sight in the law reports. Assume, for example, that a third party has carelessly damaged trust property. The right of action is in the trustee. [5] This right of action is itself trust property and the duty of the trustee is to use it as such, for the benefit of the beneficiaries. What if the trustee cannot or will not enforce this claim for the benefit of the trust? A recalcitrant trustee who has rights against a third party but will not enforce them can simply be joined as a defendant to the beneficiary's action which also names the third party as a defendant. [6] Notionally, the beneficiary is seeking an injunction against the trustee requiring the trustee to sue the third party, but the two proceedings are joined in one. Exceptionally, the beneficiary may be allowed to proceed without joining the trustee, but even here, the beneficiary's claim against the third party is an indirect one, in the sense that the beneficiary is allowed to enforce the *trustee's* right against the third party. In *Hayim v. Citibank NA*, [7] Lord Templeman said:

> These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate. [8]

In *Parker-Tweedale v. Dunbar Bank Plc (No. 1)*, [9] Nourse L.J. said of this passage:

> It is important to emphasise that when a beneficiary sues under the exception he does so in right of the trust and in the room of the trustee. He does not enforce a right reciprocal to some duty owed directly to him by the third party. [10]

B. — Proprietary Claims

This leads us to the proprietary remedies that may be open to the beneficiary. When the trustees are still in control of the trust property, we do not usually think in terms of proprietary remedies because, as we have seen, the beneficiaries have the right to enforce specifically the trust obligations against the trustees. What if the property has passed into the hands of a third party? Since the fifteenth century, the beneficiary has had the right to sue any third party who acquired the trust property and still is in possession, provided that party is not a *bona fide* purchaser for value from the breaching trustees. In other words, such a third party may acquire rights by derivative transfer from the trustees; but the rights acquired remain bound by the same Equitable interests that bound the ownership of the trustees while they still held the property. [11]

Rather like the indirect personal claim discussed above, such a proprietary claim is brought *on behalf of the trust* to recover the trust property. Once the property is restored to the trust, it obviously becomes subject once again to the trust terms. If the trust was a bare trust — and this would generally include constructive and resulting trusts — then the beneficiary will recover the property for his or her own benefit; but this is because the terms of such a trust were that the beneficiary was entitled to the property whenever he or she desired it. [12] By contrast, if the trust is a special trust, the result of the action will be that the court will order that the property be vested in trustees — probably new trustees, if the situation arose through a wrongful transfer — to hold on the original trusts. [13] A beneficiary cannot have access to trust property in contravention of the terms of the trust merely because it was transferred away in breach of trust. [14] On the contrary, the beneficiary in such a case brings the claim on behalf of all the beneficiaries. [15]

As we shall see, the nature and scope of the proprietary remedy is still evolving in English and Canadian law, but for practical purposes the important thing to remember is that the beneficiary has access to both personal remedies and proprietary remedies. [16] In this way the beneficiary can compel the trustees to perform their duties honestly and carefully, and can join in the task of recovering the trust property when the trustees, often through dishonesty, have fallen down on their duty of protecting the trust property for their beneficiaries. [17] In this manner the trust becomes a working machinery. The trustees own the trust property, and the beneficiary, through his or her Equitable interest, can compel the trustees to discharge their fiduciary role in relation to the powers and duties which they possess.

In the following chapters on "Breach of Trust", we examine in detail this aspect of the working of the trust. In chapter 25, we are concerned with the scope, and the significance for the trustees, of the beneficiary's personal remedies. In chapter 26, we address the nature and scope of the beneficiary's proprietary remedies.

Footnotes

2 See further, on the nature of the trust beneficiary's interest, D.W.M. Waters, "The Nature of the Trust Beneficiary's Interest" (1967) 55 Can. Bar Rev. 219; L. Smith, "Trust and Patrimony" (2009) 28 E.T.P.J. 332; B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 J. of Equity 1.

3 *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273, 2010 SCC 34, 2010 CarswellOnt 7450, 2010 CarswellOnt 7451, 84 C.C.P.B. 1, 324 D.L.R. (4th) 498, 60 E.T.R. (3d) 1, 2010 C.E.B. & P.G.R. 8408 (headnote only), D.T.E. 2010T-674, 406 N.R. 109, 268 O.A.C. 1, [2010] S.J. No. 34 (S.C.C.) at para. 87.

4 See L. Smith, "Constructive Trusts and Constructive Trustees" [1999] C.L.J. 294; S.B. Elliott and C. Mitchell, "Remedies for Dishonest Assistance" (2004) 67 M.L.R. 16; C. Mitchell and S. Watterson, "Remedies for Knowing Receipt", in C. Mitchell, ed., *Constructive and Resulting Trusts* (2010) 115; R. Chambers, "The End of Knowing Receipt" (2016) 2 Can. J. of Comp. and Contemp. Law 1; and the full discussion in chapter 11, Part III.

5 Although the beneficiary may have a direct claim against a third party who has wrongfully interfered with the *trust*, in the sense of participating in a breach by a trustee, the beneficiary does not have any direct claim against a third party who has tortiously interfered with the *trust property*: see *Leigh & Sillavan Ltd. v. Aliakmon Shipping Co.*, [1986] 1 A.C. 785 (U.K. H.L.); *M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe)*, [1998] 4 All E.R. 675 (Eng. C.A.). Nor can the beneficiary enforce contractual rights of the trustee that relate to the trust property: *Stoney First Nation v. Imperial Oil Resources Ltd.*, 2014 ABQB 408; *Price Security Holdings Inc. v. Klompas & Rothwell*, 2019 BCCA 36. This is one of the crucial features of the trust relationship, and one of the ways in which so-called Equitable ownership differs from legal ownership. Equitable ownership is always an encumbrance or obligation that binds the ownership of the trustee; it is not a direct interest in the trust property.

6 *Colour Quest Ltd. v. Total Downstream UK Plc*, [2010] EWCA Civ 180 at paras. 111-144; *Stoney Tribal Council v. Shell Canada Ltd.*, 2017 ABQB 314, at paras. 41-48.

7 *Hayim v. Citibank NA*, [1987] A.C. 730 (Eng. Prob. Ct.). See also *Mayer v. Osborne Contracting Ltd.,* 2012 BCCA 77, 2012 CarswellBC 475, 29 B.C.L.R. (5th) 232, 75 C.B.R. (5th) 1, [2012] 7 W.W.R. 1, (sub nom. *Mayer v. Mayer*) 317 B.C.A.C. 132, 540 W.A.C. 132 (B.C. C.A.) at paras. 126-130, 241; *Testa v. Testa,* 2015 ONSC 2381, 2015 CarswellOnt 5146, 10 E.T.R. (4th) 192 (Ont. S.C.J.) at paras. 31-32; *Price Security Holdings Inc.*, *supra*, note 5.

8 *Ibid.*, at 748F. And, conversely, the Manitoba Court of Appeal has held: "Beneficiaries of a trust have no status to commence an action for the protection or recovery of trust property if the trustee is willing and able to commence such an action." *Nelson House Indian Band v. Young*, 1999 CarswellMan 47, 169 D.L.R. (4th) 606, 134 Man. R. (2d) 134 (Man. C.A.).

9 *Parker-Tweedale v. Dunbar Bank Plc (No. 1)* (1990), [1991] Ch. 12 (Eng. C.A.).

10 *Ibid.*, at 19-20.

11 Chapter 11, Part II A; see also L. Smith, "Philosophical Foundations of Proprietary Remedies" in R. Chambers, C. Mitchell and J. Penner, eds., *Philosophical Foundations of Unjust Enrichment* (2009) 281.

12 See *Bronson v. Hewitt*, 2013 BCCA 367, 2013 CarswellBC 2452, 50 B.C.L.R. (5th) 303, 41 C.P.C. (7th) 10, 90 E.T.R. (3d) 1, [2013] 10 W.W.R. 654, 343 B.C.A.C. 160, 586 W.A.C. 160 (B.C. C.A.), additional reasons 2013 BCCA 488, 2013 CarswellBC 3448, 50 B.C.L.R. (5th) 368, 56 C.P.C. (7th) 196, 92 E.T.R. (3d) 1, [2014] 2 W.W.R. 70 (B.C. C.A.), additional reasons 2014 BCCA 514, 2014 CarswellBC 3896, 68 B.C.L.R. (5th) 211, 62 C.P.C. (7th) 39, 2 E.T.R. (4th) 191, [2015] 1 W.W.R. 635, 365 B.C.A.C. 200, 627 W.A.C. 200 (B.C. C.A.) at paras. 102-105 [2013 BCCA 367].

13 For the terminology of bare and special trusts, see chapter 2, Part VIII.

14 For an example of this principle in the case of allegedly improper withdrawals of trust funds, see *Potter v. Bank of Canada*, 2007 CarswellOnt 1816, 85 O.R. (3d) 9, 282 D.L.R. (4th) 553 (Ont. C.A.), in which it was alleged that improper withdrawals had been made from a pension trust. The plaintiffs claimed payments to them, and also reconstitution of the trust fund. The first claim was struck out, as it would have given the plaintiffs something they were not entitled to under the trust.

15 In such cases it is never suggested that the original trustee needs to be joined as a party; the third party, holding trust property that is still subject to the trust, is in fact a (constructive) trustee, and the beneficiary has direct rights against this person. If the transfer was in breach of trust and the original trustees are solvent, it might well be prudent to join them as defendants, as a way to increase the possibilities of recovery.

16 The proprietary remedies may also include an Equitable lien, or proprietary subrogation. These possibilities are discussed in chapter 26, Part II B 2.

17 Though it is axiomatic that the trust beneficiary is generally not liable to the third party, to whom the trustee may have contractual, tort, or other private law obligations, it is also sometimes possible for third parties to turn the tables and make beneficiaries liable. In *Botwood Investments Ltd. v. Johnson* (1982), 36 O.R. (2d) 443, 12 E.T.R. 55 (Ont. H.C.), the third party was permitted an action against the trust beneficiary when the trustee, who had contracted with the third party "in trust and without personal liability", subsequently repudiated the contract. There was a question here, however, whether the trustee was not in fact also an agent, and the beneficiary his principal; the two relationships do not normally co-exist, but they may do so where trustees are under the direction of beneficiaries. See also *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65, 49 D.L.R. (4th) 1 (Ont. C.A.), a principal-agency relationship where the agent held title as bare trustee, followed in *500 Glencairn Ltd. v. Farkas* (1994), 36 R.P.R. (2d) 270 (Ont. Gen. Div.), and *Advanced Glazing Systems Ltd. v. Frydenlund* (2000), 32 R.P.R. (3d) 162 (B.C. S.C.). See generally chapter 22, text to note 70, and also chapter 3, Part III D 1.

TAB 7

Court of Queen's Bench of Alberta

Citation: Stoney First Nation v Imperial Oil Resources Limited, 2014 ABQB 408

Date: 20140707
Docket: 9701 16074
Registry: Calgary

Between:

**Stoney Tribal Council, representing the Chiefs,
Councils and Members of the Bearspaw, Chiniki and Wesley Bands**

Appellant

\- and -

Imperial Oil Resources Limited

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice Bryan E. Mahoney**

Appeal from the Decision by
J.B. Hanebury, Master in Chambers
Dated the 7th day of September, 2012
(2012 ABQB 557, Docket: 9701 16074)

I. Introduction

[1] On April 25, 2013 Mr. Justice Ron Stevens heard this appeal from the decision of Master Hanebury. Mr. Justice Stevens passed away on Tuesday, May 13, 2014. Rule 13 .1 of the Alberta Rules of Court provides:

13 .1 One judge may act in place of or replace another judge if

(a) that other judge dies,

(b) that other judge ceases to be a judge, or

(c) it is inconvenient, improper, inappropriate or impossible for that other judge to act.

[2] Per Rule 13.1, Chief Justice Wittmann asked me to take conduct of this matter. Counsel for the parties were contacted and confirmed that this matter could be fairly decided on the record. This is my decision.

[3] This is an appeal from a Master's decision, dismissing an application by the Applicant Stoney Tribal Council ("**the Stoney**"), to continue a royalties compensation claim against the Respondent, Imperial Oil Resources Limited ("**Imperial**"). The claim concerns royalty payments made by Imperial for petroleum and natural gas mining rights on Stoney lands.

[4] Imperial sought summary dismissal of the Stoney claim before the Master. It argued that the Stoney had no standing to bring the action. Given the two previous related royalty claim settlements, Imperial also argued that there was no action left to bring. As the material facts were not in dispute, the Master decided the matter could be determined on the record. The Master summarily dismissed the Stoney's action. She found that there was no genuine issue to be tried.

[5] The Stoney now appeal the Master's decision.

II. Issue

[6] The issue for this Court to determine is whether or not to allow the Stoney's appeal and permit the Stoney to continue their claim against Imperial or to uphold the Master's decision granting summary judgment in favour of Imperial.

[7] The issues before the Master were:

1. Does the law of trusts apply to the arrangement existing between Canada and the Stoney for the collection of royalties?
2. If the law of trusts applies, do the Stoney have standing to pursue their claim against Imperial?
3. If the Stoney have standing, do they have a claim in light of the settlement agreements?

III. Facts

[8] The facts here are largely not in dispute. Although this is a hearing *de novo*, I find the Master's finding of facts, set out in paras 3-20 of her decision, are a fulsome and accurate summary of the relevant facts. I will briefly restate the most relevant facts here.

[9] This action was initiated by the Stoney Tribal Council, representing the Chiefs, Councils and members of the Bearspaw, Chiniki and Wesley First Nations, also known as the Stoney Nakoda Nations. I will refer to these parties collectively as the "**Stoney**".

[10] The Stoney received rights to certain lands pursuant to Treaty No. 7, with the underlying legal title in those lands vested in Her Majesty in right of Canada ("**Canada**").

[11] Between 1926 and 1992, the petroleum and natural gas mining rights within the Stoney reserve lands were surrendered by the Stoney to Canada "in trust to lease".

[12] On December 3, 1984, Canada as lessor entered into Mineral Lease No. OL-5409 with Imperial as lessee (the "**Lease**") with respect to mineral interests within the Stoney reserve lands. The Lease incorporated the provisions of the *Indian Oil and Gas Act*, RSC 1985, c I-7 (the "**Act**") and the *Indian Oil and Gas Regulations*, CRC 1978, c 963 (the "**Regulations**"). The Stoney are not a party to the Lease.

[13] Pursuant to the regulatory scheme under the Act and the Regulations, royalty payments under the Lease were to be paid to Canada as trustee for the Stoney and not to the Stoney directly. Effective August 1, 1995, Imperial sold its interest in the Stoney reserve lands and the Lease was assigned to a new owner.

[14] On September 30, 1993, the Stoney commenced an action against Canada (the "**Stoney-Canada Action**") in the Federal Court of Canada, alleging that Canada breached its trust and fiduciary obligations in respect of various matters, including the royalty interest payments in relation to the Stoney reserve lands. The Stoney argued that Canada failed to ensure that the Stoney received all of the royalties to which they were entitled.

[15] On November 16, 1997, the Stoney commenced this action against Imperial, seeking an accounting for all royalty monies due to the Stoney.

[16] On February 26, 1999, Canada on behalf of and as trustee for the Stoney, commenced proceedings in this Court against Imperial and other defendants (the "**Canada-Imperial Action**") seeking an accounting and judgment against Imperial (and other defendants) for improper deductions of royalty payments.

[17] Imperial ultimately settled the Canada-Imperial Action. It paid Canada in February 2005 $149,956.19 in consideration of a release by Canada of all allegations made against Imperial in the Canada-Imperial Action.

[18] In February 2008, the Stoney entered into a Settlement Agreement with Canada in the Stoney-Canada Action. Canada was released from liability for its breach of trust or fiduciary duties resulting from its failure to collect certain specified royalties. The Stoney were paid $28,500,000.00 for the underpayment of royalties for a number of wells, including those leased by Imperial.

[19] As part of the Settlement Agreement, the Stoney filed a partial discontinuance against Canada for the specified loss of royalties. The loss of royalties included the underpayment to the end of 1994 for all royalties from the Imperial wells on Stoney lands.

[20] The Stoney argued that Imperial did not prove it paid all royalties due and owing to Canada on behalf of the Stoney, and therefore the facts in this case are at issue.

IV. Master's Decision

[21] The Master considered whether there was a genuine issue for trial in relation to any of the three following issues between the parties:

1. Does the law of trusts apply to the arrangement existing between Canada and the Stoney for the collection of royalties?

2. If the law of trusts applies, do the Stoney have standing to pursue their claim against Imperial?

3. If the Stoney have standing, do they have a claim in light of the settlement agreements?

[22] On the first issue, whether the law of trusts applied to the arrangement existing between Canada and the Stoney for the collection of royalties, the Master held that in this particular situation, the common law of trusts can and should be applied. The Master reasoned that the law of fiduciaries and the law of trusts have developed in overlapping circles. The Supreme Court of Canada has applied the law of trusts to the fiduciary relationship between Canada and aboriginal peoples, and in particular to the obligation of Canada to collect royalties from surrendered lands.

[23] The Master also dismissed the Stoney's arguments that there was a genuine issue for trial as to the applicability of common law trust principles to their relationship with Canada vis-à-vis the surrender of their resource rights and the royalty regime under the *Indian Oil and Gas Act*. She stated at paras 63-64:

> In this case there has been no evidence led by the Stoney of anything arising from the history of aboriginals in Canada that would suggest it is inappropriate to apply the relevant common law of trusts to the facts in this case. Nor have they raised any other principle of law that could enable them to sue Imperial directly, despite their lack of privity of contract. If they do not base their argument on the common law of trusts, they have provided no other basis, either in law or because of unique facts, upon which to assert a right to sue Imperial.
>
> Without any evidence or argument that could suggest to this Court a need for further fact finding or analysis, and therefore a possible genuine issue for trial, I am of the view that the matter can be determined on the record before this Court. [Emphasis added. Paragraph numbers omitted.]

[24] On the second issue, whether the Stoney had standing to pursue their claim against Imperial, the Master found the Stoney had no standing. In her analysis, the Master observed that an action by a beneficiary of a trust against a third party is only allowed in certain circumstances when certain prerequisites are met. At para 69 of her decision the Master stated:

> There are three prerequisites to a beneficiary's action against a third party owing money to a trustee that could be an impediment to the Stoney bringing this action: the beneficiary must first ask the trustee to bring the action and be refused; the beneficiary must name the trustee as a defendant if it sues the third party; and, the beneficiary must exhaust its remedy against the trustee, in this case the Crown. [Paragraph number omitted.]

[25] On the first of the three prerequisites, the Master found that the Stoney did not ask Canada as a trustee to bring the action prior to launching their action against Imperial. However, the Master held that the point was moot, as Canada ultimately launched an action against Imperial.

[26] On the second of the three prerequisites, the Master found the Stoney were obliged but failed to name Canada as a defendant in their action against Imperial. Their failure to fulfill this prerequisite deprived them of standing to continue this action. However, the Master then noted the Stoney could seek to cure the deficiency by applying to add Canada to their action.

[27] On the third prerequisite, the Master found the Stoney had no claim against Imperial as they did not show a reason why they could not or did not exhaust their remedy against Canada.

[28] The Master found the Stoney's claim failed on all three of the prerequisites. The Stoney had no standing to continue their claim against Imperial. At para 85, the Master wrote:

> An action by a beneficiary of a trust against a third party is only allowed in certain circumstances and if certain prerequisites are met. One prerequisite is that the beneficiary is unable to obtain redress from the trustee. There is no genuine issue for trial on the ability of the Crown to provide redress to the Stoney for the lost royalty income owed by Imperial. The Stoney argued that their settlement with the Crown was not final as it left open the possibility that further funds were owing. <u>If that is the case, they are free to continue their action against the Crown. If that is not the case, that action is at an end. The net result, in either case, is that they have no standing to continue their claim against Imperial</u>. [Emphasis added. Paragraph number omitted.]

V. Standard of Review

[29] The standard of review on appeal from a Master's decision to this Court, on all issues, is correctness: *Bahcheli v Yorkton Securities Inc.*, 2012 ABCA 166 at para 30.

[30] Rule 6.14 of the *Rules of Court*, Alta Reg 124/2010 governs an appeal from a Master's decision. Subrules 6.14(3) and (4) state:

> (3) An appeal from a master's judgment or order is an appeal on the record of proceedings before the master and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.
>
> (4) The record of proceedings is
>
> > (a) the application before the master,
> >
> > (b) affidavits and other evidence filed by the parties respecting the application before the master,
> >
> > (c) any transcript of proceedings before the master, which must be ordered and paid for by the appellant, unless the Court determines, or the parties agree, that transcripts are not needed, and
> >
> > (d) the master's judgment or order and any written reasons given for the decision.

[31] An appeal from a Master's decision pursuant to rule 6.14 is a *de novo* hearing, as stated by Justice Bensler of this Court in *P. Burns Resources Limited v Locke, Stock & Barrel Company Ltd.*, 2013 ABQB 129 at para 12: "An appeal from a Master's decision is a *de novo* hearing and the standard of review is one of correctness […] The Judge may exercise any discretion anew and substitute their own views for that of the Master."

VI. Test for Summary Judgment

[32] After this action was heard before the Master, and after this appeal was argued, the Supreme Court of Canada's decision of *Hryniak v Mauldin*, 2014 SCC 7 (*sub nom Combined Air*

Mechanical Services Inc. v Flesch) was released. *Hryniak* revised the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is "a genuine issue requiring a trial". The parties were invited by this Court to make submissions on the application in this case of the new *Hryniak* test and its application by the Alberta Court of Appeal in *Windsor v Canadian Pacific Railway*, 2014 ABCA 108. Both parties submitted briefs.

[33] It bears mention *Hryniak* was an appeal where the Supreme Court considered rule 20 of the Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194. Ontario's rule 20 was revised in 2010 to allow judges a limited role in weighing evidence in summary judgment procedures and is broader than our Alberta rule 7.3.

[34] Ontario's subrules 20.04(2) and (2.1) are as follows:

> DISPOSITION OF MOTION
>
> General
>
> 20.04
>
> [...]
>
> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).
>
> Powers
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

[35] As Master Mason of this Court succinctly summarized in *Whitecourt Power Limited Partnership v Interpro Technical Services Ltd*, 2014 ABQB 135 at para 35, Ontario's rule 20 is different than rule 7.3 of the Alberta *Rules of Court*:

> The focus of the Court's reasons in ***Hryniak v. Mauldin*** is Ontario's two- stage approach to summary judgment contained in rules 20.04 (2) and 20.04(2.1-2.2). The first stage is similar to Alberta's rule 7.3. The recently added second stage involves the discretionary use of enhanced fact-finding powers to weigh the evidence, evaluate the credibility of a deponent, draw any reasonable inference from the evidence, and order the presentation of oral evidence. This second stage is not found in Alberta rule 7.3, but as pointed out by Brown J. in ***Orr v. Fort McKay First Nation*** at paragraph 19, is broadly comparable to an application by

way of summary trial under Alberta rule 7.5. [Emphasis added. Paragraph number omitted.]

[36] The Alberta Court of Appeal in *Windsor* recently applied *Hryniak* to Alberta's summary judgment rules, setting out the new test at paras 11-16:

> [11] Under the common law system, the default method for resolving disputes is the *viva voce* trial. Traditionally, interlocutory procedures that denied any party its "day in court" were strictly interpreted. When summary judgment procedures were first introduced, they were only considered appropriate when it was "plain and obvious", or "clear" or "beyond doubt" that there was no issue that should or could be put to trial. Likewise, the procedure for striking proceedings that did not disclose a cause of action was narrowly applied.
>
> [12] Modern civil procedure has come to recognize that a full trial is not always the sensible and proportionate way to resolve disputes. In ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 10, [2008] 1 SCR 372 the Supreme Court reacted to the traditional restrictive view by stating: "The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial." In ***R. v Imperial Tobacco Canada Ltd.***, 2011 SCC 42 at para. 19, [2011] 3 SCR 45 the Supreme Court made similar comments about striking pleadings: "The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial." The test is whether there is "a reasonable prospect that the claim will succeed", not whether it is "plain and obvious" that no claim is disclosed (paras. 17, 21).
>
> [13] This modern trend has now been confirmed in ***Hryniak v Mauldin***:
>
>> 1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>>
>> 2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

> 3 Summary judgment motions provide one such opportunity. . . .
>
> 4 In interpreting these [new summary judgement] provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> 5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

<u>Summary judgment is now an appropriate procedure where there is no genuine issue requiring a trial</u>:

> 49 <u>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</u>. 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.

<u>The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record</u>.

[14] While ***Hryniak v Mauldin*** applied Ontario R. 20, the principles stated in it are consistent with modern Alberta summary judgment practice as set out in Alberta R. 7.3:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

> Ontario R. 20 and Alberta R. 7.3 are both procedures for resolving disputes *without* a trial (as compared with Alberta's summary trial procedure which is a form of trial). As in Ontario, *viva voce* evidence may exceptionally be allowed in chambers applications: R. 6.11(1)(g). New R. 7.3 calls for a more holistic analysis of whether the claim has "merit", and is not confined to the test of "a genuine issue for trial" found in the previous rules. Since one of the objectives of class proceedings is to provide affordable access to justice, these principles relating to summary judgment are applicable to the class procedure as well.
>
> [15] The theory that disputes eventually "went to trial" was always something of a legal fiction. Even when the court implied that a trial was called for, and declined to grant summary judgment, or declined to strike pleadings, it was well known that trials were a rarity. ***Hryniak v Mauldin*** refers several times to the need for a change in culture. In other words, the myth of trial should no longer govern civil procedure. It should be recognized that interlocutory proceedings are primarily to "prepare an action for resolution", and only rarely do they actually involve "preparing an action for trial". Interlocutory decisions that can resolve a dispute in whole or in part should be made when the record permits a fair and just adjudication. ***Hryniak v Mauldin*** rejected the ruling by the Ontario Court of Appeal to the effect that the old test for summary judgment should continue to apply even in the face of the newly amended Ontario rule.
>
> [16] The decision under appeal was delivered before ***Hryniak v Mauldin*** was decided. As such, the case management judge used the traditional formulations of the summary judgment rule. On appeal it is appropriate to examine the summary dismissal application to see whether there is in fact any issue of "merit" that genuinely requires a trial. When the resolution of the dispute turns primarily on issues of law, summary judgment is often appropriate: ***Tottrup v Clearwater (Municipal District No. 99)***, 2006 ABCA 380 at para. 11, 68 Alta LR (4th) 237. Trials are for determining facts, and the facts underlying this dispute are not seriously in issue. [Emphasis added.]

[37] This Court therefore must examine the record to see if a disposition that is fair and just to both parties can be made on the existing record, in order to determine if there is any issue of merit that genuinely requires a trial.

VII. Position of the Parties regarding *Hryniak* and *Windsor*

[38] Imperial argued that this case readily meets both the previous test for summary judgment and the modern test proposed by *Windsor*: it is both plain and obvious that the Stoney lack standing to continue this action, and that this disposition can be made on the existing record. Imperial argued the Master correctly found the facts are not in dispute in this case and therefore the issues can be fairly decided on the filed record.

[39] Specifically, Imperial argued the Stoney as beneficiary do not have standing to continue this action against Imperial because the trustee, Canada, has already brought a claim against Imperial for the same cause of action, which claim was settled. Imperial argued the Stoney therefore have no cause of action left to pursue and furthermore, there is no basis to allow the Stoney to continue this action against Imperial. Imperial argued that there is no privity of estate

or privity of contract between the Stoney and Imperial, and the only exception open to the Stoney is that of trusts, which does not permit the Stoney to continue this action.

[40] The Stoney argued that the application of the principles enunciated in *Hryniak* and *Windsor* ought to be interpreted in favour of granting standing to the Stoney. According to the Stoney, a decision stating that they have standing to maintain this action against Imperial would result in a fair and just adjudication of the standing issues. Such a ruling would be proportionate and expeditious thereby promoting the *Hryniak* and *Windsor* propositions that courts should create environments conducive to: (1) the promotion of access to justice; and (2) the preparation of actions for resolution.

[41] The Stoney submitted that the Master's conclusion that the Stoney do not have standing is incorrect based on facts and law. It also runs contrary to the shift in culture that seeks proportionate processes that promote access to justice and the preparation of actions for resolution.

[42] The Stoney also argued that the Master incorrectly applied common law trust principles. The result of this error makes it extremely difficult for a First Nation to effectively enforce its legal rights against a party that is in breach of its obligations to that First Nation. The Stoney further submitted that this is especially so in the present case, where Imperial is the only party that has in its possession and control all of the records and information in relation to the calculation of the royalties.

[43] The Stoney argued that a fair and just adjudication of this action turns on an analysis of the proper legislative and contextual framework in which the issues before this Court must be addressed.

VIII. Analysis

[44] I find the Master's analysis and findings were legally correct in considering whether the Stoney's claim should be struck on the basis of being (i) frivolous, vexatious and an abuse of process, or (ii) by way of summary dismissal.

A. Summary Judgment

i. Can a Fair and Just Disposition Be Made on the Record?

[45] For the reasons that follow, I agree with the Master that a fair and just disposition on the merits of this summary judgment motion can be made on the record. There is no genuine issue requiring a trial.

[46] Here, as in *Windsor*, the decision being appealed was delivered before *Hryniak* was decided. I note our Court of Appeal's statement at para 16 of *Windsor* that: "When the resolution of the dispute turns primarily on issues of law, summary judgment is often appropriate. [...] Trials are for determining facts, and the facts underlying this dispute are not seriously in issue."

[47] I agree with the Master that the facts underlying this dispute are not seriously in issue. Rather, the resolution of the dispute turns primarily on issues of law. I find that granting the summary judgment motion in this case is a more proportionate, more expeditious and less expensive means to achieve a just result.

ii. Application of the Law to the Facts

a. *Summary Judgment Rule*

[48] Rule 7.3 provides for summary judgment in Alberta:

> **Application and Decision**
>
> **7.3(1)** A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.

b. *Common Law of Trusts Applies to the Facts*

[49] First, I agree with the analysis and findings of the Master. At paras 31-65 of her decision, the Master writes that the relevant common law of trusts applies to the facts of this case. I also agree that there is no genuine issue requiring a trial. The Master's analysis was thorough and reasoned. She based her decision on a consideration of the common law that has developed in relation to the application of common law trust principles to the relationship between aboriginal peoples and Canada and in particular to the obligation of Canada to collect royalties from surrendered lands.

[50] I accept the Master's conclusion at para 63 of her decision that there has been no evidence led by the Stoney of anything arising from the history of aboriginals in Canada that would suggest it is inappropriate to apply the relevant common law of trusts to the facts of this case. The Stoney have not raised any other principle of law that could enable them to sue Imperial directly.

[51] Notwithstanding the Stoney's submission that the Master incorrectly applied common law trust principles to this action, the Stoney failed on this appeal to raise anew any reason why the common law of trusts should not apply. Nor have the Stoney raised any other principle of law that could enable them to sue Imperial directly.

[52] On appeal, the Stoney argued their relationship with Canada was a *sui generis* trust relationship, and therefore the common law of trusts should not be applied to this relationship. This argument was also made before the Master, and I agree with the Master's response at para 52:

> The Stoney argue that the law in relation to trusts should only be applied with caution. If by that, the Stoney mean that it must be done thoughtfully, and not blindly, that view is in line with the reasoning found in ***Ermineskin***. [Paragraph number omitted.]

c. *Standing*

[53] I also agree with the Master that the Stoney do not have standing to pursue their claim against Imperial. The Master correctly identified the general rule set out in *Remmers v Lipinski*, 2001 ABCA 188 at para 57 that while beneficiaries have an *in personam* action against trustees for breach of trust, they cannot sue the debtor of a trust fund. The Master also correctly identified the exceptions to this legal rule set out in *Kwinter v Metrowest Development Ltd*, 2007 ABQB

713, which require that the beneficiary first meet certain prerequisites and that there be special circumstances for a beneficiary to sue a third party.

1. *Kwinter* Exceptions

[54] The exceptions set out in *Kwinter* at para 36 are:

> The following possible exceptions relevant to the case at bar have been identified:
>
> > 1. Where there is alleged to be fraud or collusion between the trustee and the third person (*Halsbury's*),
> >
> > 2. Where by reason of conflict of interest or duty it is impossible or difficult for the trustees to sue (*Halsbury's*),
> >
> > 3. Where there is a failure by the trustees in performing their duties as trustees to protect the trust estate or to protect the interests of the beneficiary in the trust estate (*Hayim v. Citibank N.A.*)
> >
> > 4. Where the beneficiaries are suing to recover trust property (as opposed to suing debtors of the trust) (*Remmers v. Lipinksi* (2001), 293 A.R. 156 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 502).
>
> To this list I would add statutory exceptions, such as those in the BCA allowing a beneficial owner of securities of a corporation to bring certain actions. [Paragraph number omitted.]

[55] The Stoney argued that they satisfy certain of the *Kwinter* exceptions and therefore should be allowed to sue Imperial. In relation to Kwinter exceptions 1, 3 and 5, the Stoney submitted that they have standing because they did not approve Imperial's 2005 settlement payment to Canada in trust for the Stoney of $149,956.10.

[56] In effect, the Stoney argued that the royalty calculation and payment from Imperial to Canada was reduced from $3,530,328.80 to $149,956.10 without their consent, that Canada failed to obtain their consent in accepting that 2005 settlement payment, and that the Stoney therefore meet the *Kwinter* exceptions #1 and #3. In essence, this argument is an allegation by the Stoney that the conduct of Canada in entering into the release with Imperial proves fraud, collusion or a failure of Canada to act in the Stoney's best interests. I do not accept this argument. The fact that no accounting was provided to the Stoney or the royalties paid are disputed once again may provide them with a claim against Canada, but not against Imperial.

[57] Imperial responded that the inability of the Stoney to determine how the royalties were calculated and paid by Imperial to Canada in respect of the resolution of the Canada-Imperial Action is not a sufficient basis to maintain this action. It is not appropriate to commence an action of this nature simply for disclosure purposes argued Imperial. I agree.

[58] On this point, the Master's statement at para 20 is relevant:

> The Stoney say that Imperial "has refused to verify the values of the specified royalties" attributed to it. While Imperial has apparently never provided this calculation to the Stoney, Canada has provided an estimate of $3,530,328.80, plus interest for the period 1977 to 1994. The Stoney say that an accounting could

> show that funds are still owing, and this action is to collect those funds. [Paragraph number omitted.]

[59] The mere fact that Canada entered into the release with Imperial is not sufficient to establish fraud or collusion between Canada and Imperial, nor does it establish a failure by Canada in performing its duties as a trustee. In fact, as Canada ultimately initiated the Canada-Imperial Action against Imperial, it clearly cannot be said that it is "impossible or difficult for the trustee to sue". I therefore reject this argument. It does not qualify as one of the *Kwinter* exceptions.

[60] The Stoney also submitted that the facts in this case satisfy the *Kwinter* exception 2 (conflict of interest or duty). I accept as a general principle the Supreme Court of Canada's statement in *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 96 that: "The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.)." However, it does not automatically follow from that statement that an "inherent conflict" exists between the Stoney and Canada, as the Stoney argued, nor have the Stoney offered any evidence that could establish such an "inherent conflict" in this case.

[61] The Stoney submitted at para 76 of their brief: "One must ask whether the Canada [*sic*] declined to assert the [Stoney-Canada] Action because Canada has other alleged public interests arising from its "inherent" conflicts or if Canada refused to assert the [Stoney-Canada] Action to its full extent due to a more immediate conflict of interest that Canada as trustee finds itself in." As already stated, the Stoney offered no evidence that Canada had either an "inherent conflict" or a "more immediate conflict of interest", whatever that more immediate conflict may be.

2. <u>Standing under the Lease</u>

[62] The Stoney submitted that they have standing to bring this action by virtue of the Lease, which incorporated section 4(1) of the *Act*, as well as section 4(2) of the *Act* which required that any agreement to reduce the royalties owed by Imperial under the Lease must be approved by the Stoney. The Stoney asserted that Canada first failed to sue, and subsequently "abandoned" that claim, while the Stoney continue to maintain the current action in order to recover the full amount of the disputed royalties.

[63] Section 4 of the *Act* provides as follows:

> Royalties
>
> 4. (1) Notwithstanding any term or condition in any grant, lease, permit, licence or other disposition or any provision in any regulation respecting oil or gas or both oil and gas or the terms and conditions of any agreement respecting royalties in relation to oil or gas or both oil and gas, whether granted, issued, made or entered into before or after December 20, 1974, but subject to subsection (2), all oil and gas obtained from Indian lands after April 22, 1977 is subject to the payment to Her Majesty in right of Canada, in trust for the Indian bands concerned, of the royalties prescribed from time to time by the regulations.
>
> Special agreements

> (2) The Minister may, with the approval of the council of the band concerned, enter into a special agreement with any person for a reduction or an increase, or a variation in the basis of calculation of royalties payable under subsection (1).

[64] Nowhere in section 4 of the *Act* is the Stoney granted standing to pursue an action such as this against Imperial.

[65] The language in subsection 4(2), requiring the Stoney approval to reduce any royalties payable under subsection (1), may create an action against Canada but not so with Imperial. As the Master stated at para 50:

> The Court [in *Ermineskin Indian Band & Nation v. Canada*, 2009 SCC 9] held that this legislation does not affect the Crown's obligations, which arise from the Surrenders. The *Act* merely confirms that royalties are to be paid to the Crown in trust for the bands. As it does not set out any terms of the trust or duties of the Crown, it does not limit the Crown's fiduciary duties to the bands. Ultimately the Court determined that any obligation of the Crown to invest the funds in the manner of a common law trustee was circumscribed by other legislation. [Paragraph number omitted.]

3. *Hryniak* and *Windsor*

[66] For reasons already given, I also disagree with the Stoney's argument that an interpretation of the principles enunciated in *Hryniak* and *Windsor* supports the conclusion that the Stoney should be granted standing to maintain this action.

[67] I also disagree with the Stoney's argument that a trial may be required to adjudicate the standing issues if a fair and just adjudication is not possible on the current record.

[68] Much of the Stoney's argument regarding the application of the summary judgment test in *Hryniak* was taken from the Supreme Court's discussion in *Hryniak* on the enhanced powers granted to motion judges under Ontario's new rule 20 (at paras 35-85). As previously stated, although the general principles stated by the Supreme Court regarding summary judgment procedures are the same as between Ontario and Alberta, much of the specific discussion in *Hryniak* on the enhanced powers of judges under Ontario's rule 20 is not applicable to summary judgment under Alberta's rule 7.3. The general principles enunciated by our Supreme Court in *Hryniak* must be read in conjunction with the Court of Appeal's application of those principles in *Windsor* to the summary judgment rules in Alberta.

[69] Although I agree with the Stoney's argument that the culture shift recognized by the Court in *Hryniak* and *Windsor* emphasizes a fair process that results in a just adjudication of disputes, I disagree with their conclusion that this principle results in a finding in their favour. I find quite the opposite: a fair process that results in a just adjudication of disputes militates in favour of granting summary judgment. Granting summary judgment in this case is the fair and just result based on all of the evidence.

[70] I disagree with the Stoney's argument that granting summary judgment is not a proportionate result and that it does not promote access to justice for the Stoney. Access to justice and proportionality must be considered in light of the relevant facts and law. As already stated, the Stoney have not put forward any principle of law that could enable them to sue Imperial directly. They may continue their action against Canada if they choose.

4. Privity of Estate or Privity of Contract

[71] The Stoney have not advanced any argument or legal authorities on appeal for the proposition that they may rely on either privity of estate or privity of contract to assert standing.

d. *Outstanding Royalties Owing to the Stoney*

[72] The Stoney also argued Imperial did not prove it paid all royalties to Canada on behalf of the Stoney. There is, therefore, a genuine issue to be tried.

[73] On this point, the Master's conclusion that the Stoney are free to continue their action against Canada is also relevant. I agree with the Master's statement at para 82 that:

> Regardless of the ultimate success of these arguments, the Stoney's first claim is and continues to be against Canada for its alleged failure to properly collect the entire amount owing for royalties from Imperial. They have shown no reason why the trustee could not or cannot be held responsible for any monies owing. [Paragraph number omitted.]

e. *Insufficiency of the Stoney's Evidence and Argument in the Present Action*

[74] I find that the Stoney's argument does not provide any basis that gives them standing in this action. As the Supreme Court of Canada stated in *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 11:

> If the defendant does prove [the test for summary judgment], the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. [Emphasis added. Paragraph number omitted.]

[75] In this application, the Stoney must put their best case forward as well as they can. I have not seen the necessary coherent evidence with an organized set of facts showing a real issue to be tried between the Stoney and Imperial. Having said that, the Stoney are free to bring their action against Canada, if it is the case that they are owed funds that Canada should have collected on their behalf from Imperial.

[76] The Stoney's argument does not establish the existence of any of the *Kwinter* exceptions.

[77] The Stoney did not adduce any reliable evidence establishing an issue of merit requiring a trial on the following potential issues in relation to their standing to sue Imperial in this action: an alleged fraud or collusion between Canada and Imperial; a conflict of interest or duty on the part of Canada that made it impossible or difficult for Canada to sue Imperial; a failure by Canada in performing its duties as trustee to protect the interests of the Stoney; possible standing granted to the Stoney by virtue of section 4(2) of the *Act*; potential outstanding royalties owing to the Stoney; or the settlement agreement between Canada and the Stoney.

[78] I agree with the Master's conclusion that the Stoney have not met the three prerequisites required for a beneficiary to bring an action against a third party owing money to a trustee, (see paras 70-84). Those three prerequisites identified and considered by the Master were: (i) whether the Stoney asked Canada to sue Imperial and were refused; (ii) whether the beneficiary named the trustee as a defendant to sue the third party; and (iii) whether the beneficiary exhausted its remedy against the trustee.

[79] The Stoney also failed to cure the deficiencies, namely to add Canada to their action as a defendant or to first exhaust their remedy against Canada.

[80] I agree with the Master that the Stoney's submission at para 45 of their brief (which argument was made both to the Master and again on appeal) that "Imperial is suggesting that the taxpayers of Canada compensate the [Stoney] for royalties that Imperial unlawfully refuses to pay" puts the cart before the horse. This consideration is simply irrelevant for the purposes of determining whether the Stoney have standing to bring the current action.

f. *Salvaging a Failed Summary Judgment Application/Case Management*

[81] The Stoney argued, based on the Supreme Court's reasoning in *Hryniak* (at paras 75-79), that Imperial's summary judgment application ought to be set aside and this Court should instead take this action into case management.

[82] The reasoning of the Court in paras 75-79 of *Hryniak* involves failed or partially successful summary judgment applications, and is therefore not applicable in this action. This is not a failed summary judgment application nor does it require case management.

B. Striking the Claim

[83] Rule 3.68 provides that a claim may be struck for being frivolous, irrelevant or improper, an abuse of process or disclosing no cause of action.

[84] It is not necessary to consider whether to strike the Stoney's claim based on rule 3.68 as I find the test for summary judgment is met.

IX. Conclusion

[85] For the foregoing reasons, I uphold the Master's decision granting summary judgment and dismiss the Stoney's appeal. If necessary, costs can be spoken to by arranging a date by contacting the Court within 30 days.

Heard on the 25th day of April, 2013 by Stevens, J. Written submissions were received by him on 17th May 2013. Further written submissions were received by Mahoney, J. on 26th June 2014.
Dated at the City of Calgary, Alberta this 4th day of July, 2014.

Bryan E. Mahoney
J.C.Q.B.A.

Appearances:

W. Tibor Osvath
for the Appellant

L. Easton/H.L. Treacy, Q.C.
for the Respondent

TAB 8

Court of Queen's Bench of Alberta

Citation: Kwinter v. Metrowest Development Ltd., 2007 ABQB 713

Date: 20071122
Docket: 0601 02495
Registry: Calgary

Between:

Shelley Rae Kwinter

Plaintiff

- and -

Metrowest Development Ltd., 789914 Alberta Ltd., Elaine Gayle Myron, Executrix of the Estate of William Schwartz, John Doe, Personal Representative of the Estate of William Schwartz, and Elaine Gayle Myron

Defendants

Corrected judgment: A corrigendum was issued on February 20, 2008; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on November 23, 2007; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

Introduction

[1] Shelley Rae Kwinter, the Plaintiff in these proceedings, is the sister of Elaine Gayle Myron, one of the Defendants in these proceedings. William Schwartz and Alyse Schwartz, the father and mother of these sisters created a family trust (the "Trust") pursuant to a Trust Indenture ("the Trust Indenture") in 1989. The sisters are the only named beneficiaries of the Trust. The Defendant Metrowest Developments Ltd("Metrowest")is a private corporation that carries on business as the owner and landlord of several properties in Calgary, Alberta. The value of the properties which Metrowest owns for the purpose of this application is approximately 35 million dollars.

[2] Since December, 1989 the issued and outstanding share capital of Metrowest has been divided into the following two classes of securities:

(a) 100 common shares (the "Common Shares"), each entitling their owner to one vote at all meetings of the Metrowest shareholders, and further entitling their owner to certain participatory rights in the profits earned by Metrowest; and

(b) 12,500 preferred shares (the Preferred Shares"), each entitling their owner to one vote at all meetings of the Metrowest shareholders, and further entitling their owner to monthly dividends having a maximum annual quantum of $1.2 Million CAD.

[3] Since December 18, 1989, the Trust has been the sole holder and registered owner of the Common Shares. The Plaintiff and Ms. Myron have been the only beneficiaries of the Trust since its creation on December 14, 1989.

[4] Prior to June 30, 2000, Mr William Schwartz alone, and before him, he and his wife Alyse Schwartz, were the sole holders and registered owners of the Preferred Shares. Since June 2000, the Defendant 789914 Alberta Ltd. ("789914") has been the sole holder and registered owner of the Preferred Shares. Mr Schwartz was the sole shareholder of 789914 until his death on June 17, 2003, following which all of the shares were transferred to Ms. Myron. Ms Myron is now acting as the sole director of 789914.

[5] The Trust Indenture specifies a distribution date of July 2, 2008 and a vesting date of the later of the deaths of Mr. Schwartz and Ms. Schwartz. Ms. Schwartz is still alive and as such time the vesting date has yet to accrue.

[6] Mr. Schwartz was a trustee of the Trust from its inception until his death. He was also the sole director and officer of Metrowest during that period.

[7] In February 2006, Ms. Kwinter filed a Statement of Claim. Counsel for Ms. Kwinter submits that the claim advances three causes of action at this time. They are:

1) a personal claim for oppression pursuant to Part 19 the Alberta *Business Corporations Act* ("BCA"),

2) a personal claim asking for a dissolution of Metrowest Developments Ltd. pursuant to Part 17 of the BCA, and

3) a personal claim against the Estate of William Schwartz (the "Estate") for breach of trust by Mr. Schwartz during his time as trustee, resulting in a constructive trust claim against both the Estate and Ms. Myron.

[8] Amongst the particular allegations in the Statement of Claim are allegations of improper expropriation of the profits of Metrowest, improper management of Metrowest, failure to report the financial situation of Metrowest, excessive management fee payments, improper payments of dividends and legal fees, and payments by Metrowest of personal expenses of Mr. Schwartz and Ms. Myron, including the acquisition and construction of a number of residential properties. All of these improprieties, it is claimed, occurred to the detriment of Ms. Kwinter as a Trust beneficiary.

[9] The Defendants Metrowest Development Ltd., 789914 Alberta Ltd. and Ms. Myron have brought an application to strike Ms. Kwinter's pleadings in whole or in part, pursuant to Rule 129(1)(a) of the Alberta *Rules of Court*. They argue Ms. Kwinter does not have standing to bring these claims, and that her Statement of Claim must therefore fail. In the alternative with respect to Ms. Myron they argue that the Statement of Claim discloses no cause of action against her. In addition and in the alternative, they seek to have the action stayed until Ms. Kwinter's standing as a complainant and interested person under the BCA has been judicially determined.

[10] The Defendant Ms. Myron, as Executrix of the Estate of William Schwartz also brought an application pursuant to Rule 129(1)(a) of the Alberta *Rules of Court*. Counsel for the Estate argues that the Statement of Claim discloses no cause of action against it. In the alternative the Estate argues that Ms. Kwinter does not have standing to bring the action against it. In the further alternative, the Estate seeks to have the action stayed until Ms. Kwinter obtains leave to bring an action on behalf of Metrowest and the Trust.

[11] The Applicants rely on Rule 221(1)of the Alberta *Rules of Court* and s. 18(2) of the *Judicature Act* in requesting the stay.

[12] The parties agree that the Statement of Claim incorporates the Trust Indenture for the purposes of the application pursuant to Rule 129(1)(a).

[13] For the following reasons, I find the Defendants have not met their burden under Rule 129(1)(a) to strike Ms. Kwinter's claim. They have also failed to meet the requirements for a stay of proceedings pending determination of Ms. Kwinter's status under either the BCA or as Executrix.

Issues

[14] The issues that must be addressed are:

1. Does Ms. Kwinter lack standing pursuant to Rule 129(1)(a) to bring the claims she is advancing. Specifically, should her claim be struck pursuant to Rule 129(1)(a) because:

   a. she lacks standing under the BCA

   b. she lacks standing under the terms of the Trust Indenture

   c. she lacks standing under the common law of trusts

   d. she has implicitly waived any right to advance such claims

2. Has Ms. Kwinter failed to disclose a cause of action against Mr. Schwartz or Ms. Myron such that her pleading should be struck pursuant to Rule 129(1)(a)

3. Should this court direct a stay of the action until such time as the issue of standing is judicially determined

1. Does Ms. Kwinter lack standing to bring the claims she is advancing

[15] In order to be successful on a motion to strike pleadings under Rule 129(1)(a) the Applicants must establish that "it is plain and obvious that the Statement of Claim discloses no reasonable cause of action" (*Hunt v. Carey Canada*, [1990] 2 S.C.R. 959, *Arcand v. Imperial Oil Limited*, 2006 ABCA 13). The test is onerous. The flaw in the pleadings must be plain, obvious and beyond doubt. A court is not to look outside of the pleadings and is to assume the facts claimed in the pleadings are true. A Rule 129 application is not the proper forum to decide difficult points or serious questions of law (*R. (B.) (Next Friend of) v. R. (L.)* (2004), 26 Alta L.R. (4th) 44 (Q.B.)). The pleadings are to be read broadly (*Tottrup v. Alberta (Minister of Environmental Protection)*, 2000 A.J. No. 435 (Alta. C. A.)).

[16] The Applicants argue that Ms. Kwinter does not have standing to pursue the claims she alleges in her Statement of Claim and therefore the pleading must be struck as disclosing no cause of action. They cite as authority for that proposition *First Alberta Mortgage Fund (V) Inc. v. Boychuk* (2002), 312 A.R. 1 (C.A.) where portions of pleadings were struck due to lack of standing on the part of the party advancing the claims.

[17] Although I agree that an individual must have standing to pursue claims, on a Rule 129(1)(a) application, the lack of standing alleged must meet the plain and obvious test.

[18] The Alberta Court of Appeal dealt with the issue of standing on a Rule 129(1)(a) application in *Instant Magic Holdings Ltd. v. Buchfink*, 2005 ABCA 371. In that case, a case management judge held that a claim for wrongful dismissal among other claims, should be struck. The plaintiff relied on the oppression provisions of the BCA to advance the wrongful dismissal claim. The plaintiff was a director of the corporation, however the chambers judge held that he did not lose his job as a result of his actions as a director and therefore he did not qualify as a "complainant" under the BCA.

[19] The Court of Appeal, after outlining the test for striking pleadings under s. 129(1)(a), noted that "in certain cases, dismissal can be considered an of act oppression." (Referring to *Naneff v. Con-Crete Holdings Ltd.* (1993), 11 B.L.R. (2d) 218.) Considering the fact that the plaintiff was a director, together with the residual discretion in s. 239(b)(iv) of the BCA, the Court of Appeal concluded that the "case management judge erred in concluding that Richard could not meet the definition of "complainant" ... it is not plain and obvious at this stage that Richard's claim is bound to fail." The pleadings were restored. Of note for the purposes of this case is that the Court of Appeal did not require a final determination of the status of the plaintiff as a "complainant." It applied the same "plain and obvious test" as it would if other substantive portions of the claim were attacked. Since it was not plain and obvious that the plaintiff could not meet the definition of "complainant" the application could not succeed.

[20] The question then that must be answered for the purpose of these applications is whether it is plain and obvious that Ms. Kwinter lacks standing to bring the claims she is advancing.

(a) Should her claim be struck because she lacks standing under the BCA

"Complainant"

[21] "Complainant" in s.239 of the Alberta *Business Corporations Act*, includes a "beneficial owner" of securities of a corporation. "Beneficial ownership" is described as including "ownership through a trustee, legal representative, agent or other intermediary".

[22] The Applicants argue that Ms. Kwinter does not meet the definition of "claimant" in s.239 of the BCA. I disagree. To use language parallel to that used by the Court of Appeal in *Instant Magic*, in certain cases trust beneficiaries can be considered to be beneficial owners (and therefore claimants) under the BCA.

[23] I accept that the common shares in question are property and therefore must have both legal and beneficial owners. Normally legal and beneficial ownership are not split, however in a trust situation they are. There is no dispute that the legal owners of the shares in question are the trustees. At issue is the determination of the beneficial owners for the purpose of Part 19 of the BCA. Here, I cannot see how the beneficial owners can be anyone other than the beneficiaries of the trust.

[24] The trust has a vesting date that is the later of Mr. Schwartz's and Ms. Schwartz's death. It has a distribution date of July 2, 2008. Neither of these events has occurred. The Trust Indenture, as amended during divorce proceedings in 1996, states that distributions can be made from the trust prior to the distribution or vesting dates with the condition that any distributions from the trust must be made to the beneficiaries in equal parts.

[25] The Applicants have argued that the trustees are both the beneficial and legal owners of the Metrowest shares until the earlier of the vesting or distribution date. I do not accept this submission. This would suggest that the trustees are entitled to full ownership of the shares and that would include to use the shares for their own personal benefit and enjoyment. The argument is antithetical to the very notion of a trustee, and is clearly at odds with the 1996 amendment specifying that any distributions are to be made equally to the named beneficiaries.

[26] Counsel for Ms. Kwinter argues that the beneficial owners of the shares and all of the trust property is the beneficiaries Ms. Kwinter and Ms. Myron. Counsel provided numerous examples to establish that, at the very least, it is not plain and obvious that Ms. Kwinter is not a beneficial owner under s. 239. For example, in *Csak v. Aumon* (1990), 69 C.L.R. (4th) 567 (Ont. H.C.) Lane J. gave "beneficial owner" an expansive interpretation, specifying that beneficial ownership can encompass situations beyond trust relationships. As pointed out by the Respondent, this implicitly confirms that the named beneficiary in a trust is generally assumed to be the beneficial owner of the trust property.

[27] The Applicants also argue that the beneficiaries must be able to immediately call for the trust property in order to be considered beneficial owners. I do not agree that this is the law.

[28] The fact that the named beneficiaries may lose their ownership should they die before the vesting date and that they are not able to call for the trust funds before the distribution date does not change the fact that at the present time, they are the beneficial owners. The Respondent uses examples from the Applicants' brief to illustrate. For example, in *Joncas v. Spruce Falls Power & Paper Co.* (2000), 48 O.R. (3d) 179 (S.C.J.), Cumming J. stated that "[t]here can be circumstances in which an <u>anticipated</u> shareholder is found to be a "beneficial owner" of shares.... there must be some form of legal entitlement.... This could... be by way of a beneficial interest through a trust."

[29] As another example in *Canada (Attorney General) v. LeBlanc*, [1991] 2 F.C. 257 (C.A.), the Court equated beneficial entitlement to beneficial ownership. Justice Stone quoted Justice MacKeigan CJNS in *MacKeen Estate v. Nova Scotia (1978) 28 N.S.R. (2d) 3.(CA)* with approval when he noted that although the beneficial owner can usually require the legal owner to deal with the property in specific ways, that will not be the case where there are restrictions through specific terms of a trust. The Court did not say that such restrictions would change the beneficiary's status as beneficial owner.

[30] Finally, even if Ms. Kwinter does not qualify as the beneficial owner of the shares in question. s. 239(b)(iv) of the BCA allows courts a residual discretion with respect to who can qualify as a complainant.

[31] In applying the plain and obvious test, I am only able to consider the Statement of Claim, and in this situation, the Trust Indenture which is incorporated into the Statement of Claim. Having reviewed the law on beneficial ownership, it is not plain and obvious from those documents that Ms. Kwinter is not a beneficial owner in the 100 common shares of Metrowest. This is especially true given the breadth of the oppression remedy and its remedial purpose. The Statement of Claim can not be struck on the basis that Ms. Kwinter lacks standing under Part 19 of the BCA.

"Interested Person"

[32] The Applicants conceded in argument that should Ms. Kwinter qualify as a complainant under Part 19 of the BCA, she would also qualify as an interested person under Part 17 of the BCA. Similarly, since it is not plain and obvious that Ms. Kwinter fails to be a complainant under Part 19 of th BCA, it is also not plain and obvious that she fails to qualify as an interested person under Part 17 of the BCA.

1 (b) Should her claim be struck because she lacks standing under the terms of the Trust Indenture

[33] The Applicants have argued that Ms. Kwinter is precluded from bringing these claims at this time because the terms of the trust agreement prevent her from doing so. Clause 5.14 of the Trust Indenture reads:

> 5.14 Power to Institute and Defend Actions
>
> The Trustees are hereby specifically authorized and empowered to make all tax returns required by law or which the Trustees deem necessary, whether on behalf of the Trust itself or on behalf of any Beneficiary hereof, and they are further authorized and empowered to institute, prosecute, defend, compromise, settle, pay and discharge all actions for or against the Trust and any Beneficiary hereof, or any action arising in connection with the administration of the Trust, including inheritance taxes, estate taxes and income taxes, and to give or receive appropriate receipts, releases, acquittances and discharges, and the decisions and acts of the Trustees shall be conclusive and binding upon all the parties interested in this Trust.

[34] The Applicants argue that this clause vests in the Trustees the exclusive right to pursue any and all legal claims on behalf of the beneficiaries. I disagree. I concur with the Respondents that this clause does not limit the ability of non-trustees to bring about suits, rather it simply states that the trustees possess this power should they require its use.

1 (c) Should her claim be struck because she lacks standing under the common law of trusts

[35] Counsel for the Applicants argue that before Ms. Kwinter can bring the claims she has advanced as a beneficiary of the Trust against non-trustees, she must ask the trustees to bring each of the claims and the trustees must refuse to do so. At that point leave of the Court is required in order for a beneficiary to bring a claim against third parties to the trust. Such a claim should be brought in the name of the trustees. Counsel cited *Sharpe v. San Paulo Railway Company* (1873), L.R. 8 Ch. App. 597 (C.A.), *Halsbury's Laws of England* and *Waters' Law of Trusts in Canada* in support of their argument.

[36] The following possible exceptions relevant to the case at bar have been identified:

1. Where there is alleged to be fraud or collusion between the trustee and the third person (*Halsbury's*),

2. Where by reason of conflict of interest or duty it is impossible or difficult for the trustees to sue (*Halsbury's*),

3. Where there is a failure by the trustees in performing their duties as trustees to protect the trust estate or to protect the interests of the beneficiary in the trust estate (*Hayim v. Citibank N.A.*)

4. Where the beneficiaries are suing to recover trust property (as opposed to suing debtors of the trust) (*Remmers v. Lipinksi* (2001), 293 A.R. 156 (C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 502).

To this list I would add statutory exceptions, such as those in the BCA allowing a beneficial owner of securities of a corporation to bring certain actions.

[37] The first two claims brought by Ms. Kwinter fall under statutory exceptions and as such the claims for oppression and dissolution brought under the BCA are not subject to the common law procedural rule advanced by the applicants. If I am incorrect, it is at least not plain and obvious in any case that Ms. Kwinter's situation does not fall under one of the exceptions listed above. For example, she alleges in her Statement of Claim that the current trustees were selected by Ms. Myron's financial advisors. This would potentially bring the first and second exceptions into play. In addition, it is not plain and obvious that Ms. Kwinter is not suing to recover trust property, triggering the fourth exception. Finally the allegations in the Statement of Claim relating to improper conduct by the directors of Metrowest potentially give rise to the third exception.

[38] We are left to consider Ms. Kwinter's claim for breach of trust by Mr. Schwartz, and the resulting claims for constructive trust against the Estate and Ms. Myron. These are *in personam* actions against trustees for breaches of trust. Beneficiaries are entitled to bring such actions

directly (*Remmers*). In any case, even if it can be argued that Ms. Kwinter is making constructive trust claims as a beneficiary against a third party to the Trust, it is again not clear that these claims do not fall under one of the exceptions listed above.

[39] In the result, Ms. Kwinter's claim will not be struck under Rule 129 as it is not plain and obvious that she lacks standing under the common law of trusts.

1(d) Should her claim be struck because she has implicitly waived any rights to advance such claims

[40] The Applicants argue that Ms. Kwinter has brought the oppression claim on behalf of the Trust and as such she can only advance those claims if the trustees possess the right to advance them. The Applicants go on to argue that the trustees have implicitly waived their right to bring an oppression claim by their forbearance to do so for the past 17 years.

[41] As outlined, the BCA allows Ms. Kwinter to bring the oppression claim independently of the trustees. In addition, it is not plain and obvious that the situation at bar does not fall under one of the exceptions listed in the previous section in which case Ms. Kwinter has the power to bring an action independently of the trustees. Any waiver by the Trustees would not be binding upon Ms. Kwinter.

[42] I agree with the Respondents that it is not clear from the Statement of Claim that the trustees have implicitly waived any rights to advance oppression claims through their acquiescence. For example, it is not clear that "one party communicated a clear intention to waive a right to the other party." (*Saskatchewan River Bungalows v. Maritime Life*, [1994] 1 S.C.R. 490.)

[43] In the result, the Applicants have failed to establish that the Statement of Claim should be struck for want of standing.

2. Has Ms. Kwinter failed to disclose any cause of action against Mr. Schwartz or Ms. Myron such that her pleading should be struck pursuant to Rule 129(1)(a)

[44] The Applicants have argued that the pleadings underlying the breach of trust claims against the Estate of Mr. Schwartz and Ms. Myron are deficient. They submit that the Statement of Claim does not allege sufficient facts to give rise to personal liability of Mr. Schwartz and Ms. Myron. Specifically, they submit that the Plaintiff is required to plead fraud, deceit, dishonesty or want of authority with respect to Ms. Myron in order to "pierce the corporate veil." The same is true of Mr. Schwartz they argue, since the breach of trust allegations against him are in essence attacks on his role as director of Metrowest.

[45] Mr. Schwartz was a trustee of the Trust from 1989 until 2003. He was also the director of Metrowest during that time. He was potentially in a position of conflict in that respect since actions taken or not taken by Metrowest could negatively impact the Trust. He therefore had an

obligation to be particularly vigilant in his duties as trustee. His actions in one role had the potential to colour his decisions in the other. It cannot be said at this stage that his decisions as director of Metrowest had no bearing on his role as trustee of the Trust. It is not necessary to pierce the corporate veil. It is not plain and obvious from the Statement of Claim that no cause of action for breach of trust is disclosed.

[46] The claim against Ms. Myron alleges a breach of duty as the trustee of a constructive trust arising when Mr. Schwartz allegedly breached his duty as trustee of the Trust. The claim is not concerned with her role as director of Metrowest or 789914 and there is again no need to pierce the corporate veil. Similarly, the claim against the Estate to the extent of the constructive trust allegation is not concerned with Mr. Schwartz's role as a director.

[47] Paragraph 81 of the Statement of Claim alleges that Mr. Schwartz "acted in a manner which preferred his personal interests over the interests of the Trust and its beneficiaries." Paragraphs 82, 83 and 84 set out more particulars including causing himself and Ms. Myron to be paid excessive management fees, improper dividends and personal expenses to the detriment of the Trust beneficiaries. Paragraph 86 alleges that Ms. Myron received monies and benefits that should have been attributed to the Trust "with full knowledge." It is not plain and obvious that these allegations disclose no cause of action for breach of trust against Mr. Schwartz and Ms. Myron.

[48] I am not permitted to look beyond the Statement of Claim in determining a Rule 129 application. Furthermore, I am to assume all of the allegations in the Statement of Claim can be proved by the Plaintiff. In doing so, I do not find that Rule 129(1)(a) is engaged.

3. Should this court direct a stay of the action until such time as the issue of standing is judicially determined

[49] The Applicants have requested in the alternative to striking the Statement of Claim that these proceedings be stayed pending a determination of whether Ms. Kwinter has standing to bring the action as a claimant or non-trustee. They seek this relief pursuant to Rule 221(1) or s. 18(2) of the *Judicature Act*.

[50] Rule 221(1) reads as follows:

> The court may order any question or issue arising in a proceeding whether of fact or law or partly fact and partly law to be tried before, at or after the trial and may give direction as to the manner in which the question or issue is to be stated, and may direct any pending application to be stayed until the question or issue has been determined.

[51] Section 18(2) of the *Judicature Act* reads as follows:

> Nothing in subsection (1) disables the Court from directing, if it thinks fit, a stay of proceedings in a proceeding pending before it, and any person, whether a party or not to any proceeding at any time pending in the Court
>
> (a) who would have been entitled formerly to apply to a court to restrain the prosecution of it, or
>
> (b) who may be entitled to enforce by attachment or otherwise a judgment, decree, rule or order contrary to which all or part of the proceedings may be taken,
>
> may apply to the Court by motion in a summary way for a stay of proceedings in the proceeding either generally or so far as might be necessary for the purposes of justice, and the Court shall on that application make any order that will be just.

[52] As the Applicants are specifically requesting the determination of an issue before trial, Rule 221(1) contains the more applicable relief.

[53] Courts are generally slow to sever issues but the question of standing is an issue that has been tried in a preliminary way for example in *Canadian Cancer Society v. Bank of Montreal* (1966), 57 W.W.R. 182 (Alta. App. Div.). In that case the issue was readily severable from other issues and the court was satisfied that the cost of a long trial could be saved by ordering a preliminary trial of an issue. That is rarely the case where an oppression remedy is sought since parties are often required to put forward essentially their entire case before a determination of status is reached.

[54] In most cases trying issues separately increases the time and cost involved in dispute resolution and creates more opportunities to appeal matters. Our courts have cautioned that separate trials of issues should occur only in exceptional circumstances where the facts are not disputed and the questions to be determined are not difficult (*Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1991), 79 Alta. L. R. (2d) 1 (C.A.)). This suggests that the Applicants under Rule 221(1) are required to demonstrate such exceptional circumstances. The Applicants have not impressed upon me any exceptional circumstances justifying a preliminary trial on the issue of standing.

[55] The Respondents provided me with a review of the law under Rule 221(1). In particular, *Tanguay v. Vincent*, 1999 ABQB 814 summarizes the principles to be applied. They are reproduced here, with comments following principals where appropriate:

> * The Courts do not encourage the piecemeal trial of actions, but where the issue is readily severable and where the Court is satisfied that the cost of a long trial may thereby be saved, the order will be granted: *Canadian Cancer Society v. Bank of Montreal* (1966), 57 W.W.R. 182 (C.A.), citing Jessel M.R. in

Emma Silver Mining Co v. Grant (1879), 11 Ch.D. 918; *Karlsen Shipping Co. Ltd. v. Sefel J. & Associates Ltd.* (1978), 88 D.L.R. (3d) 297 (Alta.C.A.).

I have discussed *Canadian Cancer Society* above. I do not believe the Applicants have demonstrated that the issue is readily severable.

* The test is whether there is some evidence which will make it at least probable that the issue will put an end to the action: *Emma Silver Mining Co v. Grant*; *Karlsen Shipping Co. Ltd. v. Sefel J. & Associates Ltd*.

The Applicants have not provided any evidence in support of their application, let alone evidence that will make it probable that the issue will put an end to the action. In light of the discussion above with respect to standing as it pertains to Rule 129(1)(a), I can not conclude that it is at least probable that severing the issue will put an end to the action. To the contrary, there appears to be a strong argument that Ms. Kwinter qualifies as a complainant under the BCA so that a trial of the issue will merely prolong the process and create another opportunity for appeal.

* There is a danger in granting such orders, and they should be granted only in exceptional circumstances where it is clear that the questions to be determined are completely severable, and where their determination will substantially expedite the litigation or materially curtail the cost of the same: *Keg River Metis Settlement v. R.*, [1978] A.U.D. 720 (C.A.); *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd*. (1991), 114 A.R. 27 (C.A.).

This is a substantially similar principal to the first one.

* Lord Denning's "just and convenient" test propounded in Coenen v. Payne et al., [1974] 2 All E.R. 1109 (C.A.) has not been adopted in Alberta: *Karlsen Shipping Co. Ltd. v. Sefel J. & Associates Ltd.; Moseley v. Spray Lakes* (1994), 26 Alta. L.R. (3d) 359 (Q.B.).

* The Courts should not attempt to determine substantial or difficult questions as preliminary issues: *Keg River Metis Settlement v. R.; Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*

There has been considerable argument already with respect to standing even as it pertains to Rule 129. The issue is substantial.

* Where it appears clear that the trial of the preliminary issues would not save time or money unless the Applicant wins them completely, it is worth asking whether such a complete win is

highly likely: *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.*

A complete win by the Applicants would be necessary in order to effect any savings. As discussed above, based on the arguments I have heard so far, I do not think such a complete win is likely to occur at a preliminary trial in the issue of standing.

* The amount of documentation to be produced should be considered, and the Court must be satisfied that the cost of a long trial would be saved by granting the order: *CMHC v. Canative Housing Corp.* (1988), 90 A.R. 303 (Q.B.).

Although there will likely be production issues in proceeding to trial, it is possible there will be similar problems if the issue is severed. Considering the potential for delay I am not convinced that there will be an overall savings if the issue of standing is severed.

* The following appear to be the relevant factors: 1. Will it end the suit, at least if decided one way; 2. Will there be a saving in time or money spent on litigation, again at least if decided one way; 3. Will it create an injustice; 4. Are the issues complex or difficult; 5. Will it result in a delay in the trial?: *Lim v. Home Insurance Company* (1995), 168 A.R. 308 (Q.B.).

I have discussed most of these factors already. If anything given the increased opportunity to appeal it is likely that a preliminary trial of this issue will result in a delay not savings.

* There is little that is unique or unusual in finding a Plaintiff with limited resources who faces the considerable expense of a long trial with multiple experts, nor is increased chance of settlement a persuasive factor: *Moseley v. Spray Lakes*.

[56] Overall, considering the principles set out in *Tanguay* the Applicants have not met their burden. I am not convinced that this is an exceptional case in which I should order a stay of proceedings so that the issue of standing may be considered.

[57] In exercising any residual discretion I may have under the *Judicature Act* I also decline to make any order pursuant to s. 18(2) therein as I do not see an abuse of process here.

Costs

[58] Costs follow the event and as such the Respondents are entitled forthwith to their costs herein.

Dated at the City of Calgary, Alberta this 22nd day of November, 2007.

K.M. Horner
J.C.Q.B.A.

Appearances:

A. Webster MacDonald Jr. Q. C. of Blake, Cassels & Graydon LLP
for the Plaintiff

Ariel Z. Breitman of McCarthy Tetrault LLP
for the Defendants Metrowest Developments Ltd., 789914 Alberta Ltd., and Elaine Gayle Myron

Christian J. Popowich of Code Hunter LLP
for the Defendant Elaine Gayle Myron, Executrix of the Estate of William Schwartz

Corrigendum of the Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

On page 1, the date was changed to 20071122.

Corrigendum of the Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

On page 6 the word *"claimant"* has been changed to *"Complainant*" below (a) and in paragraph [21].
On page 7 paragraph [29] MacKeigan C.J.F.C.A. noted, has been changed to now read Justice Stone quoted Justice MacKeigan CJNS in *MacKeen Estate v. Nova Scotia (1978) 28 N.S.R. (2d) 3. (CA)* with approval when he noted

TAB 9

1987 WL 491817 (PC), [1987] HKLR 960

JOSEPH HAYIM HAYIM v ANOTHER AND CITIBANK N.A. AND ANOTHER

Law Report Image

5 May 1987

(Privy Council)

PC

(Judicial Committee of the Privy Council) (Privy Council Appeal No. 17 of 1986)

Presiding Judges:

Lord Bridge of Harwich, Lord Templeman, Lord Oliver of Aylmerton, Lord Goff of Chieveley, Sir Robert Megarry.

Counsel In The Case:

E. G. Nugee, Q.C. and B. K Levy, instructed by Slaughter and May, for the appellants.

A. Morritt, Q.C and W. D Ainger, instructed by Norton, Rose, Botterell & Roche, for the second respondent.

The first respondent did not appear and was not represented.

Cases Cited in the Judgement:

Beningfield v. Banter (1886) 12 App Cas 167
Field v. Firmenich & Co. [1971] 1 WLR 555, [1971] 1 All ER 1104
Hastings-Bass, re [1975] Ch 25, [1974] 2 WLR 904, [1974] 2 All ER 193
Meldrum v. Scorer (1887) 56 LT 471
Sharpe v. San Paulo Railway Co. (1873) 8 Ch App 597
Travis v. Milne (1851) 9 Hare 141, 68 ER 449
Wong Yu-shi v. Wong Ying-kuen [1957] HKLR 420
Yeatman v. Yeatman (1877) 7 Ch D 210

Phrases:

Trusts - trusts created by concurrent wills - action for damages for breach of trust - effect of clause relieving trustee of any responsibility or duty in respect of trust property.

Facts:

The testator (T) died in 1977. He was survived by two sons (the appellants) and a brother (A) and sister (M). T left two valid wills, one relating to his property in the United States (the "American will") and the other relating to his property in Hong Kong (the "Hong Kong will"). The appellants were two of the three residuary beneficiaries under the American will: they were to receive the income during their lives with remainder to J.D.C., a Jewish charity. The respondents were the executor of the American will (Citibank) and the executor of the Hong Kong will (H.K.B.T.).

A and M had had lived with T for many years, first in Shanghai and, after 1959, in T's house in Hong Kong ("the house"). T was anxious to ensure that, in the event of his predecease, they continued to reside in the house but he did not wish to incur them in death duty which would be payable if he granted them life interests. The Hong Kong will therefore directed H.K.B.T. to hold the house on trust for sale with power to postpone sale in its absolute discretion and to pay the proceeds of sale to Citibank to be held by Citibank upon the trusts of the American will. By clause 10 of the American will, T directed that, in relation to his house in Hong Kong, Citibank should have "no responsibility or duty".

On T's death the American will and the Hong Kong will were duty proved by Citibank and H.K.B.T. respectively. A, who was about 92 and M who was about 87, remained in occupation of the house, at first with the consent in writing of Citibank, the appellants and J.D.C. On 1st June 1981, however, the appellants directed H.K.B.T. to sell the house because it was providing no income, and its value which was HK$3,000,000 at the date of T's death and had risen to HK $18,000,000 in 1981 was likely to diminish having regard to the uncertainties in 1981 of the future of Hong Kong real estate.

It was argued that H.K.B.T. had no right to postpone the sale of the house in order to provide a home for A and M who were not beneficiaries interested in the trusts of the house. The appellants offered to find alternative accommodation for A and M but Citibank took the view that they should not be required to leave the house. J.D.C. was content to rely on the discretion of the trustees. H.K.B.T. was instructed by Citibank not to sell the house.

The appellants commenced proceedings in Hong Kong against the respondents for an order that the house be sold and for damages against H.K.B.T. for breach of the trusts of ***961** the Hong Kong will by the delay in selling the house after

June 1981. The Court of Appeal of Hong Kong dismissed the action on the grounds that H.K.B T. had not committed any breach of trust (see [1986] HKLR 219). The appellants appealed.

Held:

1. If clause 10 entitled Citibank to ignore the interests in the house of the beneficiaries under the American will and to make a decision in the interests of A and M, then H.K.B.T. was bound to accept that decision and comply with the directions given by Citibank to postpone the sale of the house. (See p. 964 G.)

2. Clause 10 relieved Citibank of any responsibility or duty owed to the beneficiaries under the American will in respect of the house. Citibank, relieved of any responsibility or duty to the beneficiaries, was entitled to decide to direct H.K.B.T. to postpone the sale of the house in the interests of A and M. This was a direction which H.K.B.T. was bound to accept and implement. (See pp. 964 J and 965 A.) (Obiter): it was unusual for a testator to relieve the trustee of his will of any responsibility or duty in respect of trust property, but a testator might do as he pleased, and the provisions of clause 10 were explicable and understandable. (See p. 965 C.)

3. H.K.B.T. did not commit a breach of trust by complying with the directions of Citibank. The trusteeship of the American will could not be duplicated. The only trustee of the Amercian will was Citibank. H.K.B.T. owed a duty to Citibank and not a duty to the beneficiaries under the American will. (See p. 967 C.)

Appeal dismissed.

Details of Judgment:

Lord Templeman:
In the year 1959 the testator, Ellis Hayim purchased a house for his residence at 41 Island Road, Deep Water Bay, Hong Kong. The testator had two sons Joseph Hayim and the appellant George Hayim who were then about 40 years of age. The Hong Kong house was occupied by the testator, his wife who died in 1966, his mother who also died in 1966, his brother Albert, his sister Maisie and Maisie's husband Reubin Abraham who died in 1970. ***962** By his American will dated 13th July 1972 the testator disposed of his American estate defined as all his property in the United States of America and:

". . . all property which, pursuant to any inter vivos or any other testamentary disposition, shall at any time be added to and become a part of my American estate."

The testator appointed the first respondent, Citibank N.A., to be the executor and trustee of his American will and directed Citibank to divide the residue of his American estate into two equal moieties, one to be held upon protective trusts for the benefit of his son Joseph during his life and the other upon protective trusts for the benefit of his son George during his life. Subject to these dispositions and to legacies bequeathed to the sons' widows the residue of the American estate was given by the American will to the American Jewish Joint Distribution Committee Inc. in furtherance of its charitable purposes. Clause 10 of the American will was in these terms:

"At the time of my death I may be the owner of a residence in Hong Kong. If either of my brother, Albert Joseph Hayim, and my sister, Maisie Ruby Abraham, shall survive me, then I direct that my Executor and Trustee shall have no responsibility or duty with respect to such property, including, without limitation, any duty to take title to such property, to collect the proceeds from its sale or to collect any rent from said property; and my Executor's and Trustee's only duty and responsibility with respect thereto shall arise upon its receipt of the proceeds of said residence or upon the death of the survivor of my said brother and my said sister, whichever shall first occur, and shall extend only to such property as it exists at the time of the death of such survivor or to the proceeds thereof."

By his Hong Kong will dated 25th April 1975 the testator appointed the second respondent, Hong Kong Bank Trustee Limited, to be the executor and trustee of his Hong Kong will and gave all the residue of his property outside the United States of America to the Hong Kong Bank:

"UPON TRUST to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as my Trustee shall in its absolute discretion think fit without being liable for loss UPON TRUST to pay or transfer the proceeds of such sale calling in and conversion to (Citibank) or other the executor or trustee for the time being of my American will to be held by such executor of trustee upon the trusts of my American will or such of the same as shall then be subsisting and capable of taking effect."

The testator died on 6th June 1977 possessed of considerable wealth and his American will and his Hong Kong will were duly proved by Citibank and the Hong Kong Bank respectively. The Hong Kong residue included the Hong Kong house which became vested in the Hong Kong Bank upon trust for sale with power to postpone sale and to hold the net proceeds of sale and rents and profits until sale upon trust for Citibank to be held by Citibank upon the trusts of the American will. Albert who was about 92 and Maisie who was about 87 in 1977 when the testator died remained in occupation of the Hong Kong house at first with the consent in writing of Citibank, the testator's sons and the Jewish charity. On 1st June 1981 however the testator's sons by their legal advisers directed the Hong Kong Bank to sell the Hong Kong house because the house was providing no income for the testator's sons and the value of the house, which had been valued at HK$3,000,000.00 HKLR 963 at the date of the testator's death in 1977 and had risen to HK$18,000,000.00 in 1981, was likely to diminish having regard to the uncertainties in 1981 of the future of Hong Kong real estate. It was argued that the Hong Kong Bank had no right to postpone the sale of the Hong Kong house in order to provide a home for Albert and Maisie who were not beneficiaries interested in the trusts of the house. The testator's sons offered to find alternative accommodation for Albert and Maisie where they would be better looked after. Albert was however opposed to any move and Citibank took the view that it would be cruel to Albert and possibly fatal to Maisie whose health was declining to require them to leave the house. The Jewish charity on being apprised of the views of Citibank was content to rely on the discretion of the trustees. The Hong Kong Bank was instructed by Citibank not to sell the house. The testator's sons protested that the Hong Kong Bank owed a duty to the testator's sons and was not entitled to obey the instructions given by Citibank.

On 4th November 1982 the testator's sister Maisie died aged about 92. On 15th January 1983 the testator's sons began proceedings in the High Court of the Supreme Court of Hong Kong against Citibank and the Hong Kong Bank for an order that the house be sold and for damages to be awarded against the Hong Kong Bank for breach of the trusts of the Hong Kong will by the delay of the Hong Kong Bank in selling the house since June 1981. No relief was sought against Citibank. The testator's son Joseph died on 14th October 1984 aged 65 and the action was continued by George and by the personal representatives of Joseph. On 16th January 1985 Deputy Judge Barnett made the order sought by the testator's sons against the Hong Kong Bank. The testator's brother Albert died in May 1985 aged about 99. On the 26th July 1985 the Court of Appeal of Hong Kong (Sir Alan Huggins, V.-P., Cons and Fuad, JJ.A.) allowed an appeal by the Hong Kong Bank, set aside the orders made by Deputy Judge Barnett and dismissed the action brought by the testator's sons on the grounds that the Hong Kong Bank had not committed any breach of trust. The house was sold on 18th September 1985 for HK$10,000,000.00. George and the personal representatives of Joseph now appeal to Her Majesty in Council to restore the order made by Deputy Judge Barnett for the assessment and payment by the Hong Kong Bank of damages for breach of trust in postponing the sale of the house between 1981 and 1985.

For the purposes of these proceedings the laws of the United States applicable to the American will and the laws of Hong Kong applicable to the Hong Kong will are assumed, in the absence of any evidence to the contrary, to be of the same effect as the laws of England.

The first question is whether the Hong Kong Bank owed a duty to the beneficiaries interested under the American will not to obey the instructions of Citibank to postpone the sale of the Hong Kong house in the interests of Albert and Maisie. Subject to the payment of or provision for the funeral and testamentary expenses and debts of the testator, administration costs and remuneration, the Hong Kong Bank held the residue of the testator's property in Hong Kong and elsewhere outside the United States of America and the proceeds of sale upon trust for Citibank. The power of Hong Kong Bank to postpone the sale was also held in trust for Citibank and could only be exercised by the Hong Kong Bank in accordance with the lawful directions of Citibank. The interests and powers of Citibank relating to the Hong Kong property were held by Citibank upon the trusts and with the subject to the powers and provisions of the American will including clause 10 and the beneficiaries interested under the American will were the testator's sons and the Jewish charity. The residue of the Hong Kong property consisted of the Hong Kong house valued ***964** at HK$3,000,000.00 and stocks shares and other investments valued at HK $10,000,000.00. The Hong Kong Bank had no power or duty to decide whether any of the Hong Kong property should be sold or retained in the interests of Citibank. It was for Citibank to decide whether having regard to the trusts powers and provisions of the American will the Hong Kong property held by the Hong

Kong Bank in trust for Citibank should be retained or sold. In the case of Hong Kong investments to which clause 10 of the American will did not apply Citibank owed a duty to the beneficiaries interested under the American will to take advice and to decide whether the investments should be sold or retained in the best interests of the beneficiaries without regard to the interests of Albert and Maisie. Citibank was under a duty to the beneficiaries interested in the American will to communicate its decisions to the Hong Kong Bank and to ensure that those decisions were carried out even if necessary by obtaining the removal of the Hong Kong Bank as trustee of the Hong Kong will or by obtaining a transfer of the Hong Kong property from the Hong Kong Bank to Citibank or as Citibank directed. The Hong Kong Bank had no power or duty to interfere in the administration of the trusts of the American will. The Hong Kong Bank was bound to give effect to the lawful decisions of Citibank in relation to Hong Kong property. The Hong Kong Bank was not however entitled or bound to give effect to any decision of Citibank which constituted a breach of the duty owed by Citibank to the beneficiaries interested under the trusts of the American will. In the absence of clause 10, the decision of Citibank to direct postponement of the sale of the Hong Kong house in the interests of Albert and Maisie and contrary to the interests of the beneficiaries interested under the American will would have been a breach of the duty owed by Citibank as trustee of the American will to the beneficiaries under the American will and would have been unlawful. The Hong Kong Bank knew that Albert and Maisie were not beneficiaries and knew that the decision made by Citibank to direct postponement of the sale of the house was taken in the interests of Albert and Maisie and against the interests of the beneficiaries. In the absence of clause 10, the Hong Kong Bank would have known or should have known that the instructions by Citibank to postpone sale of the house were unlawful. The Hong Kong Bank would have been liable to the beneficiaries under the American will for unlawfully complying with the unlawful decision of Citibank. But if clause 10 entitled Citibank to ignore the interests of the beneficiaries under the American will in the Hong Kong house and to make a decision in the interests of Albert and Maisie then Hong Kong Bank was bound to accept that decision and comply with the directions given by Citibank to postpone the sale of the house.

The second and crucial question therefore is whether Citibank in giving directions to the Hong Kong Bank to postpone the sale of the Hong Kong house in the interests of Albert and Maisie was in breach of the duty owed by Citibank to act in the best interests of the beneficiaries interested under the American will. Without clause 10 Citibank would have owed a duty to the beneficiaries to decide whether the house should be sold or retained in the interests of the beneficiaries. Citibank would have been under a duty to ignore the interests of Albert and Maisie.

Clause 10 did not deprive Citibank of the power to decide and direct the Hong Kong Bank to sell or retain the house. Clause 10 did not extinguish or modify the duty of the Hong Kong Bank to give effect to any lawful decision of Citibank in respect of the house. Clause 10 relieved Citibank of any "responsibilities or duty with respect to" the house. The only responsibilities and duties of Citibank under the American will were responsibilities and duties owed to the beneficiaries interested under the American will. Clause 10 relieved ***965** Citibank of any responsibility or duty owed to the beneficiaries in respect of the house. Citibank, relieved of any responsibility or duty to the beneficiaries, was entitled to decide to direct the Hong Kong Bank to postpone the sale of the house in the interests of Albert and Maisie. In considering whether to decide to direct the Hong Kong Bank to postpone sale Citibank was entitled to consider the beneficiaries but owed no duty to the beneficiaries under the American will to consider them or decide in their favour and accordingly as against those beneficiaries Citibank committed no breach of trust. If Citibank made a decision to direct the sale of the house to be postponed in the interests of Albert and Maisie this was a decision which Citibank was entitled to make by clause 10 of the American will and it was a decision to which the Hong Kong Bank holding the house and the proceeds of the house and the power to postpone sale of the house in trust for Citibank was bound to accept and implement. It is of course unusual for a testator to relieve the trustee of his will of any responsibility or duty in respect of trust property, but a testator may do as he pleases and in the present case the provisions of clause 10 are explicable and understandable.

When the testator made his American will in 1972 and when the testator made his Hong Kong will in 1975 it was plain that if (as happened) the Hong Kong house remained a home for the testator and for Albert and Maisie and if the testator predeceased Albert and Maisie, someone must decide whether and when Albert and Maisie, who were in the event about 92 and 87 years of age respectively at the death of the testator, should be obliged to leave the house. There were several courses of action open to the testator if he did not wish to give an interest in the house to Albert and Maisie. First, the testator could have conferred on his two sons power to decide whether and when Albert and Maisie should be dispossessed.

By his American will or his Hong Kong will the testator could have directed that the house be not sold without the consent of his sons or of one of his sons. The testator did not confer any power of decision on both or either of his sons. Secondly, the testator could have allowed any decision with regard to Albert and Maisie and the house to be made by the beneficiaries interested in the American estate. If the testator had not inserted clause 10 of the American will, Maisie and Albert could have been allowed to remain in the Hong Kong house rent free with the consent of all the beneficiaries namely the testator's sons and the Jewish charity. There would have been no need to exonerate Citibank from any responsibility or duty in respect of the house. Clause 10 is inconsistent with any intention on the part of the testator to leave Albert and Maisie to the mercy of the beneficiaries. Thirdly, the testator could have allowed the decision with regard to Albert and Maisie and the house to be made by the Hong Kong Bank, but in that case something like clause 10 would have been inserted in the Hong Kong will. Fourthly, the testator could have allowed the decision with regard to Albert and Maisie and the house to be made by Citibank. It was logical that Citibank should make a decision which must necessarily concern the testator's sons on the one hand and Albert and Maisie on the other hand. Citibank would know whether the income of the American estate was sufficient to provide for the testator's sons without calling in aid any income from the Hong Kong house or from the proceeds of sale of the Hong Kong house. The inevitable conclusion is that clause 10 was intended to enable Citibank to decide that although Albert and Maisie were not beneficially interested in the house nevertheless Albert and Maisie should be allowed to remain in the house. The testator gave effect to that intention by a provision which relieved Citibank from all responsibility and duty to the beneficiaries in respect of the house.

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Mr. Nugee submitted that the only object and effect of clause 10 was to enable Citibank to wash its hands of any problems concerning the house so long as Albert or Maisie survived. But if the beneficiaries agreed, there was no need to relieve Citibank from responsibility. And if the beneficiaries did not agree then Citibank would have to decide. If one beneficiary wished Albert and Maisie to occupy the house free of rent while the second beneficiary wished Albert and Maisie to occupy the house but to pay a rack rent and the third beneficiary wished the house to be sold with vacant possession, then the Hong Kong Bank holding in trusts for Citibank and only concerned under the trusts of the Hong Kong will would be entitled and bound to apply to Citibank for a decision. Clause 10 of the American will and the terms of the Hong Kong will are not apt to transfer from Citibank to the Hong Kong Bank power to decide whether the Hong Kong house should be sold or retained in the interests of the beneficiaries under the American will or otherwise. If the testator had wished to place responsibility for a decision on the Hong Kong Bank he would have provided by the Hong Kong will that the Hong Kong Bank should hold the proceeds of sale of the house in trust for the beneficiaries. In fact the testator by the Hong Kong will directed the Hong Kong Bank to hold the proceeds of sale of the house in trust for Citibank and it was for Citibank to decide when the house should be sold. Clause 10 relieved Citibank of any responsibility or duty with respect to the house and therefore authorised Citibank to make a decision that the sale of the house should be postponed without regard to the interests of the beneficiaries-an unusual but understandable provision if the testator wished Citibank and no one else to decide whether and when Albert and Maisie should be required to leave the house. Citibank did not commit a breach of the trusts of the American will by directing the Hong Kong Bank to postpone sale. The Hong Kong Bank did not commit a breach of the trusts of the Hong Kong will in complying with the lawful directions of Citibank.

On behalf of the testator's sons, Mr. Nugee disputes these conclusions. He argues in the first place that Citibank committed a breach of trust of the American will by deciding to postpone the sale of the house. He says that clause 10 could not have been intended to absolve Citibank from any duty to the beneficiaries, because in that event Citibank could have used the house for its own purposes or allowed the Hong Kong Bank to commit a breach of duty with respect to the house, for example, the duty to insure. But clause 10 in express terms relieved Citibank from any duty in respect of the house. No doubt the testator was content to trust Citibank. If the Hong Kong Bank failed to insure or failed to implement any decision of Citibank then Citibank would have been entitled but not bound to take proceedings against the Hong Kong Bank. Clause 10 enabled Citibank to ensure that the house was retained by the Hong Kong Bank yielding no rent during the lives of Albert and Maisie though under the trusts of the American will Albert and Maisie were not beneficiaries. Clause 10 was in the circumstances designed to enable Albert and Maisie to remain in the house as long as Citibank thought fit. If clause 10 were exploited for any other purpose the beneficiaries could complain and the court could find that Citibank had not properly exercised the discretion conferred on Citibank to postpone the sale of the house either in the interests of the beneficiaries or in the interests of Albert and Maisie; see Re Hastings-Bass [1975] Ch 25 at 41. In the circumstances which prevailed at the date when the testator made his American will, clause 10 was intended to enable Citibank to be kind to Albert and Maisie without breach of any duty owed to the beneficiaries.

If Citibank did not commit a breach of trust of the American will by directing the Hong Kong Bank to postpone sale, nevertheless Mr. Nugee submits in the second place that the ***967** Hong Kong Bank committed a breach of trust by complying with those directions. The Hong Kong Bank, he said, was not absolved by clause 10 of the American will. Under the trusts of the Hong Kong will, it was submitted, the Hong Kong Bank owed a duty to administer the trusts of the house in the interests of the beneficiaries interested in the house under the American will; the Hong Kong Bank knew that those beneficiaries did not include Albert and Maisie. Their Lordships take the view that under the trusts of the Hong Kong will the house was not held by the Hong Kong Bank on the trusts of the American will. The house was held by the Hong Kong Bank in trust for Citibank. If for example Albert and Maisie had pre-deceased the testator, the power to decide whether the sale of the house should be postponed would have been exercised by the Hong Kong Bank in accordance with the directions of Citibank. It would have been for Citibank as trustee of the American will to decide whether the house should be retained as an investment or sold and converted into cash available for re-investment. The trusteeship of the American will cannot be duplicated. The only trustee of the American will was Citibank. Hong Kong Bank owed a duty to Citibank and not a duty to the beneficiaries under the American will.

The authorities cited by Mr. Nugee only demonstrate that when a trustee commits a breach of trust or is involved in a conflict of interest and duty or in other exceptional circumstances a beneficiary may be allowed to sue a third party in the place of the trustee. But a beneficiary allowed to take proceedings cannot be in a better position than a trustee carrying out his duties in a proper manner.

In Travis v. Milne (1851) 9 Hare 141 at p. 150 Turner, V.-C. observed that beneficiaries interested in the estate of a deceased partner can only sue the surviving partners in "special circumstances . . . where the relation between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners". In that case the executors were accused of breach of trust in carrying on business in partnership with the surviving partners and with the capital of the deceased partner. The executors could not prosecute proceedings against the surviving partners without involving themselves in conflicts of interest and duty.

In
Sharpe v. San Paulo Railway Co. (1873) 8 Ch App 597
at pp. 609 and 610 James, L.J. said that:

". . . a person interested in an estate or a trust fund could not sue a debtor to that trust fund, or sue for that trust fund, merely on the allegation that the trustee would not sue; but that if there was any difficulty of that kind, if the trustee would not take the proper steps to enforce the claim, the remedy of the cestui que trust was to file his bill against the trustee for the execution of the trust, or for the realisation of the trust fund, and then to obtain the proper order for using the trustee's name, or for obtaining a receiver to use the trustee's name, who would, on behalf of the whole estate, institute the proper action, or the proper suit in this court."

In
Yeatman v. Yeatman (1877) 7 Ch D 210
it was held that a mere refusal by a personal representative to sue for the recovery of a debt owed to the estate would not, in the absence of special circumstances, justify a residuary legatee or next of kin in suing the debtor. At p. 216, Hall, V.-C. said that the court would have to be satisfied that "it was a proper case for proceedings to be taken, although not necessarily and absolutely certain that they would be successful . . .".

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In Beningfield v. Baxter (1886) 12 App Cas 167 at p. 178 Lord Selborne said:

"When an executor cannot sue, because his own acts and conduct, with reference to the testator's estate, are impeached, relief, which (as against a stranger) could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty."

In
Meldrum v. Scorer (1887) 56 LT 471

Kay, J. at p. 473 considered "it to be quite settled that a mere refusal to sue on the part of a trustee does not entitle a cestui que trust to sue in his own name". A beneficiary under a settlement inter vivos of a legacy of #8,000.00 was allowed to sue the personal representatives who, with notice of the settlement, paid the legacy, to one out of two of the settlement trustees and therefore did not obtain a good receipt from the trustees. The sole trustee who had been paid the legacy absconded.

In Wong Yu-shi v. Wong Ying-kuen [1957] HKLR 420 the estate of a son included a share in the estate of his father. A beneficiary interested in the son's estate obtained an order for an account against the personal representatives of the father and against the personal representatives of the son on the basis of wilful default but only because both sets of personal representatives had been guilty of breaches of trust.

In Field v. Firmenich & Co. [1971] 1 All ER 1104 a plaintiff was allowed to sue on a cause of action vested in personal representatives where the personal representatives refused to sue and there was no one interested in the estate except the plaintiff and the widow of the deceased and the widow had a personal interest in the defeat of the action.

These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate. By the Hong Kong will the testator conferred on Citibank the power to give instructions binding on the Hong Kong Bank to sell or to retain the Hong Kong house. By clause 10 of the American will the testator relieved Citibank from any responsibility to the beneficiaries interested in the American estate in respect of the Hong Kong house. As a result of clause 10 Citibank did not therefore owe any duty to the beneficiaries. Citibank lawfully instructed the Hong Kong Bank to postpone sale and the Hong Kong Bank lawfully complied with those instructions. Mr. Nugee referred to principles which applied to trusts, bailments, contracts and torts respectively. In the view of their Lordships the principles relied upon are not inconsistent with the principles which their Lordships consider to be applicable to the present appeal. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

E.P.

[1987] HKLR 960

TAB 10

Date: 19990217
Docket: A972569
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ERON MORTGAGE CORPORATION, in its capacity as Trustee, and others

PETITIONERS

AND:

ERON MORTGAGE CORPORATION, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, ERON FINANCIAL SERVICES LIMITED and all investors as set out in Schedule "A" attached to the Petition

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE TYSOE

Counsel for PricewaterhouseCoopers Inc., Judicial Trustee in respect of all Eron investments except the Fort McMurray investment: Allan P. Seckel

Counsel for Manning Jamison Ltd., Judicial Trustee in respect of the Fort

McMurray investment:	Peter C. Lee
Counsel for investors in Eron Mortgage Corporation favouring pooling:	David A. Hobbs
Counsel for investors in Eron Mortgage Corporation opposed to pooling:	David G. Fredricksen
Counsel for certain investors claiming an interest in the Fort McMurray investment:	Bruce B. Clark
Counsel for certain investors claiming an interest in the Gateway investment:	Karen S. Thompson
Various investors on their own behalves	
Dates and place of hearing:	February 4 & 5, 1999 Vancouver, B.C.

[1] Eron Mortgage Corporation ("Eron") ceased carrying on business on October 3, 1997 when the Registrar of Mortgage Brokers suspended its mortgage broker's licence and I appointed Price Waterhouse Limited (now Pricewaterhouse - Coopers Inc.) as Judicial Trustee in respect of security over which Eron or its related companies had been trustee. Manning Jamison Ltd. subsequently became Judicial Trustee in respect of one of the Eron mortgages covering a commercial building located in Fort McMurray.

[2] The issues presently before the Court relate to the distribution of the assets under the control of the Judicial Trustees to the investors who provided funds to Eron (or numbered companies incorporated by it) for investment in loans arranged by Eron. The subject issues were not considered to be in question until the hearing of a distribution issue last June involving one of the related companies, Eron Investment Corporation, when the decision in *Holden Financial Corp. v. 411454 Ontario Ltd.*[1] was relied upon in support of the position that funds in Eron Investment Corporation should be pooled and distributed to investors on a pro rata basis. Until that time, the Judicial Trustees had been acting on the basis that funds collected on a loan would be distributed to those investors who had contracted with Eron Mortgage Corporation to participate in that loan. The *Holden Financial* case raised the issue of whether the ability of the investors to trace their funds to the loans in which they intended to participate would make a difference to the method of distributing the monies recovered by the Judicial Trustees on the loans.

[3] By Reasons for Judgment issued on July 13, 1998[2], I ordered that all investors who had advanced monies to Eron Investment Corporation should be pooled and should share on a pro rata basis in the assets of Eron Investment Corporation. In making my ruling I followed the approach taken by the Manitoba Court of Appeal in *Re Winnipeg Mortgage Exchange Ltd.*,[3] which I preferred over the reasoning in *Holden Financial*. In addition, I appreciated the potential impact of *Holden Financial* on the distribution of the recoveries on loans made through Eron Mortgage Corporation and I did not want to make a ruling in connection with Eron Investment Corporation which could affect all of the remaining Eron investors without giving them an opportunity to be heard.

[4] On September 11, 1998 I directed PricewaterhouseCoopers Inc., the principal Judicial Trustee, to prepare a report providing information to assist the Court in determining the appropriate scheme of distribution to the Eron investors. The report was issued in December 1998 and it posed 40 sets of questions relating to the method of distribution. At a hearing on December 18, 1998, after counsel were appointed pursuant to my direction to represent the two main points of view, I ordered that there be a hearing for the determination of six of the 40 sets of questions. Counsel agreed that many of the remaining 34 sets of questions could be resolved easily once these six sets of questions were

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[1] *Holden Financial Corp. v. 411454 Ontario Ltd.*, [1992] O.J. 1783 (Q.L.) (Ont. Gen. Div.), overturned in part [1993] O.J. 3048 (Q.L.) and affirmed in part [1993] O.J. 3999 (Q.L.) (Ont. C.A.).
[2] Now reported at (1998), 2 C.B.R. (4th) 184.
[3] *Re. Winnipeg Mortgage Exchange Ltd.* (1982), 43 C.B.R. 119 (Man. C.A.).

answered and that it would be too cumbersome to attempt to deal with all 40 sets of questions at one hearing. These six sets of questions relate to the main pooling issue and I will set them out after I have reviewed Eron's factual background (which is derived from the report of the principal Judicial Trustee or statements by counsel for the principal Judicial Trustee).

<u>BACKGROUND FACTS</u>

[5] Eron carried on the business of a mortgage broker. The traditional function of a mortgage broker is to match up one borrower with one lender. The lender makes a loan to the borrower on the security of a mortgage against real estate granted by the borrower to the lender. The mortgage broker is paid a brokerage fee by the lender and often has no other involvement. The borrower makes the payments due on the mortgage directly to the lender (unless the mortgage broker has agreed to administer the mortgage on behalf of the lender).

[6] Eron took the role of mortgage broker to a more sophisticated level. It acted as broker for large syndicated loans. It arranged for numerous lenders (or investors) to pool their funds for the purpose of making a single loan to a borrower. The borrowers were usually developers of commercial real estate. The loan was funded through Eron or a numbered company which Eron incorporated for this purpose. The mortgage or other security was taken in the name of Eron, or the numbered company, which signed a declaration stating that it held the security for the investors. Eron administered the loans on behalf of the investors and made monthly interest payments to the investors. Approximately 4,000 people invested monies through Eron and its related companies in this fashion. At the time Eron's mortgage broker's licence was suspended, there were 76 outstanding loans with financing provided by Eron's investors in the aggregate of approximately $222 million.

[7] Eron typically gave an investor several choices of financing opportunities. It gave each potential investor a "hot sheet" for each of several projects giving details such as the proposed mortgage amount, term of the loan, rate of return and value of the project. The investors did varying degrees of due diligence with respect to the proposed loan. In some cases the investor did nothing more than pick from the various "hot sheets" provided by Eron. In other cases the investor viewed the properties and requested additional information from Eron. In all cases involving investment through Eron (as distinct from Eron Investment Corporation) the investor was requested to choose a particular loan in which to participate.

[8] Once an investor had decided to participate in a loan, the investor provided his or her funds in return for a term sheet. The heading of the term sheet identified the borrower and the amount of the financing. In signing the term sheet, the investor was agreeing to participate in the loan which was acknowledged to be a syndicated loan. The investor agreed to the terms under which he or she was participating - those terms usually included the amount of principal advanced by the investor, the interest rate, the term of the participation and the amount of monthly payments. The term sheet also contained a description of the security to be taken in respect of the loan.

[9] As the loans were syndicated, it was necessary for Eron to collect all of the funds from the investors and to then advance the loan to the borrower. The funds were normally collected in an account which Eron maintained with Bank of Montreal. The account was denoted as a trust account on the bank statements and Eron did not deposit any of its general funds into the account. There was not a separate account for every loan and funds relating to many of the loans were deposited and withdrawn from this account, which I will refer to as the "Pooled Trust Account" (there was a separate account for U.S. dollar investments, which I will refer to by the same term for the sake of convenience).

[10] The other methods by which funds were collected from investors are as follows:

1. Approximately 25 of the loans utilized separate bank accounts in the name of the numbered company which was used to hold the security for the investors. The funds were collected from the investors and deposited into the separate account, and the loan was then advanced to the borrower from the account. However, investors often made their cheques payable to Eron, which deposited them into the Pooled Trust Account and then forwarded a like amount from the Pooled Trust Account to the separate bank account.
2. A number of investors wanted to invest funds in their registered retirement saving plans ("RRSP") and this was done through Laurentian Bank of Canada. Laurentian established an RRSP account for the investor and forwarded the monies to a lawyer. The lawyer did one of three things with the monies: (i) he or she advanced it as part of the loan to the borrower; (ii) he or she caused it to be deposited into the separate account of the numbered company, from which it was then advanced to the borrower; and (iii) he or she provided it to Eron which deposited it into the Pooled Trust Account. Sometimes the investor made his or her cheque payable to Eron, which deposited the cheque into the Pooled Trust Account and then sent a cheque in like amount to Laurentian.
3. Some investors advanced their funds to their own lawyer or Eron's legal counsel. The funds were generally released when it was acknowledged that the investor was participating in the loan. Various forms of undertaking were imposed in connection with the release of the funds.
4. An investor sometimes participated in a loan by replacing an existing investor. The incoming investor advanced his or her monies directly to the outgoing investor. In other cases, despite the absence of replacement investors, existing investors were paid out by Eron prior to the expiry of their terms or were allowed to transfer to other loans.

[11] After the loan was funded to the borrower and the security was taken in the name of Eron or one of its numbered

companies, Eron would typically send to the investors a declaration or a declaration of trust stating that Eron or the numbered company held the security as agent for the use, benefit and advantage of the investors (who were listed on a schedule) as tenants-in-common in accordance with the interests as set forth in the schedule or as determined by the amount of principal advanced by each investor as set out in the schedule. The amounts stated in the declaration would generally conform to entries made in project ledgers maintained by Eron in respect of each of the loans. The declaration stated that Eron or the numbered company could only deal with the security in accordance with a majority vote of the investors (determined by dollar value).

[12] Several deficiencies have been noted by the principal Judicial Trustee with respect to the declarations. One example is that declarations were not always completed for a loan. Another example is that the declarations were not always updated when an investor was paid out and replaced by another investor.

[13] The reason giving rise to the potential applicability of *Holden Financial* is that Eron committed many breaches of trust with respect to the Pooled Trust Account. The first breach occurred a very short time after the account was opened in 1993. The nature of the breaches of trust included the following:

(a) most of Eron's loans were non-performing in the sense that the borrower was not making the stipulated monthly interest payments and Eron made monthly interest payments to the investors from the Pooled Trust Account (i.e., from monies contributed by other investors in respect of other loans);

(b) loan advances were made to a borrower before the necessary funds had been collected from the investors in respect of that loan (which meant that the loan was being partially funded with monies contributed by investors in respect of other loans);

(c) investors were paid out from monies in the Pooled Trust Account when no replacement investor had been found; and

(d) expenses such as brokerage and legal fees, which are normally payable by the borrower, were paid from monies in the Pooled Trust Account.

[14] Eron loans were both underfunded and overfunded. They were underfunded in the sense that the amount of the loan advanced to the borrower exceeded the amount collected from investors in respect of that loan. The difference was made up from monies collected from investors in respect of other loans. Loans were overfunded in the sense that Eron collected more monies from investors in respect of a loan than the amount advanced to the borrower. These excess funds were used by Eron for other purposes, primarily the payment of interest to investors in respect of other non-performing loans.

[15] The loans outstanding at the time of the suspension of Eron’s mortgage broker's licence do not appear to have been very prudently made. Some of the loans will be repaid in full but there will be little, if any, recovery on many of the loans. It is presently estimated that of the $222 million invested through Eron, approximately $40 million will be recovered. The return to the individual investors will range from 0% to 100% unless all of the investors are pooled and the distribution to them is made on a pro rata basis.

<u>ISSUES</u>

[16] The six sets of primary questions posed in the report of the principal Judicial Trustee are as follows:

1. *Prima facie,* are the investors whose funds were deposited to the Pooled Trust Account entitled to (or limited to) a return on their advance based on the recovery on the specific mortgage to which their advance was credited in the project ledger, or are all proceeds from projects that received funds from the Pooled Trust Account to be pooled and paid pro rata to all investors regardless of the term sheet they received or the accounting in the project ledgers?
2. *Prima facie,* are the investors whose funds were deposited directly to the separate accounts maintained by the trustees of the security entitled to (or limited to) a return on their advance based on the recovery of the specific mortgage? Do these investors rank in priority to investors who advanced their funds to the Pooled Trust Account?
3. *Prima facie*, are the RRSP investors whose funds were forwarded to Laurentian, along with project-specific lists, entitled to (or limited to) a return on their advance based on the recovery on the specific mortgage?
4. Are RRSP investors whose funds were initially deposited into the Pooled Trust Account or separate accounts maintained by the trustees of the security entitled to (or limited to) a return on their advance based on the recovery of the specific mortgage?
5. *Prima facie*, are the investors whose funds were advanced by their own legal counsel directly to the project with their advances being recorded on the project ledger entitled to (or limited to) a return on their advance based on the recovery on the specific mortgage?
6. *Prima facie,* are the investors who by a direct payment to another investor in substitution for their own advance to a project entitled (or limited to) a return on their advance based on the recovery on the specific mortgage? Do the new investors assume the priority of the investor they replaced?

<u>DISCUSSION</u>

[17] Counsel made more detailed submissions and relied upon more authorities than was the case at the hearing involving Eron Investment Corporation. Briefly stated, Mr. Hobbs advocated pooling on the basis of the authority of *Holden Financial* and other decisions, and he

also took the position that no valid trusts were created in favour of the investors. Mr. Fredricksen opposed pooling on the basis that the trusts were valid and that the reasoning in *Holden Financial* was in error. The other counsel all supported the position of Mr. Fredricksen and made additional arguments against pooling.

(a) Validity of the Trusts

[18] Mr. Hobbs challenged the validity of the trusts claimed by the investors over the Eron mortgages. If there are no valid trusts of the mortgages created by the documentation issued by Eron or its numbered companies, there would have to be pooling of the loan recoveries unless investors are able to trace their funds into particular investments. Mr. Hobbs submitted that all funds which were deposited into the Pooled Trust Account cannot be traced as a result of Eron's breaches of trust.

[19] It is common ground that three essential elements of a trust are (i) certainty of intention, (ii) certainty of subject matter and (iii) certainty of objects. In my view, all three elements were satisfied in the typical case where Eron or its numbered company issued a declaration or declaration of trust after it had taken the security and advanced the loan to the borrower. In the cases where no such declaration was issued, the principal Judicial Trustee will have to assess whether a trust was created and, if necessary, it may apply to Court for further directions in that regard.

[20] Mr. Hobbs effectively conceded that it was the common intention of Eron (or its numbered company) and each investor that Eron (or its numbered company) would hold an interest in the mortgage or other security in trust for the investor. Huband J.A. discussed the requirement for certainty of intention at length in his dissenting judgment in *Winnipeg Mortgage* and he concluded in similar circumstances that there was an intention to create trusts. Although the majority in *Winnipeg Mortgage* decided to disregard the trusts and to pool all of the mortgage assets because the allocation of the mortgages to the investors was arbitrary, the majority did not disagree with the general principles relied upon by Huband J.A. with respect to the creation of trusts.

[21] Mr. Hobbs submitted that there was no certainty of subject matter because (i) the term sheets were not sufficiently specific in identifying the security to be held in trust and (ii) one of the forms of trust declaration stated that the interest of each investor was to be based on the principal funded by them and the breaches of trust by Eron in the operation of the Pooled Trust Account prevented any investor whose money was deposited into the Pooled Trust Account from proving that their money was advanced to the borrower.

[22] I agree that there were deficiencies in the term sheets. However, the trusts were created by the trust declarations, not the term sheets. The mortgages and other security were sufficiently described in the trust declarations. Typically, the mortgage was described by reference to the legal description of the mortgaged property and the number under which the mortgage was registered in the appropriate Land Title Office.

[23] The initial trust declaration generally contained an accurate list of the investors who were to be beneficiaries of the trust, and the trust was validly created at the time the trust declaration was issued. The entire trust was not made invalid as a result of the fact that some investors were paid out and other investors joined in the loan. There may be issues as to whether subsequent investors became beneficiaries of the trust, particularly when a loan was overfunded, but these issues will not cause the trust to become invalidated.

[24] Although it is unlikely that many, if any, of the investors whose funds were deposited into the Pooled Trust Account will be able to trace their monies to the loan made to the borrower, such tracing is not required in order to create a trust. I will discuss this issue in greater detail when I deal with the decision in *Holden Financial*. Further, the schedule to the trust declaration set out the amount funded by each investor and it is possible to ascertain the interest of each investor by referring to the amounts set out in the schedule.

[25] Mr. Hobbs submitted that there was no certainty of objects because the trust beneficiaries cannot be ascertained with certainty. In some cases the trust declaration was updated each time an investor was paid out and a new investor took his or her place. However, in many cases, the trust declarations were not updated as the investors changed. In addition, many of the loans were overfunded, with the aggregate amount collected from investors in respect of the loan exceeding the sum advanced on the loan to the borrower.

[26] In *Law of Trusts in Canada*,*4* the author discusses the requirement for the certainty of objects:

> Persons, human or incorporated, are the familiar objects of trusts, and the problem of certainty which they present is whether it is possible to say that the persons intended as objects are ascertainable. Ascertainable is a somewhat ambiguous word, but in this context it means two things: first, that it is possible to determine, if the intended beneficiaries are not referred to by name but by a class description, whether any person is a member of that class, and, secondly, that the totality of the membership of that class is known. Ascertainment means certainty, and it is certainty on both those matters that must be established if the trustees have no discretion as to distribution among the class members, but hold the property for beneficiaries who have interests whose amount or quantum is set out in the instrument creating the trust. (pp. 122 - 3)

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

[27] The topic is also discussed in *Law Relating to Trusts and Trustees*:5

> A fixed trust is void unless at the outset it can be seen clearly that all the beneficiaries thereunder are then ascertainable or will be ascertainable when the time comes under the trust to distribute capital or income. Just as a trust for A for life remainder to B absolutely is valid, so is a trust for A (a bachelor) for life remainder to his children equally and a trust to divide a fund equally between such persons as shall on X's death be his statutory next of kin or his dependants. However, a trust to divide a fund equally between next of kin and dependants of persons currently or formerly employed by ICI Ltd or by any company on the board of which an ICI Ltd director currently sits will be void unless a comprehensive list of such beneficiaries can be drawn up so as to enable an equal division to be made. Except where the potential number of beneficiaries is very high and the value of the trust fund relatively low it will usually be possible to draw up a comprehensive list of the persons ranking as beneficiaries at the time for distribution of the trust fund. (pp. 46 - 7)

[28] In the present case, the beneficiaries are ascertainable. The Judicial Trustees have prepared lists for all of the loans showing the investors for each loan based on documentation in Eron's records. This is not a situation where the beneficiaries are named by a class description which is uncertain. Here, the beneficiaries were listed in schedules to the trust declarations with the result that the beneficiaries were ascertainable when the trust was created. Despite the fact that the trust declarations were often not updated when investors were changed or added, the Judicial Trustees believe that they have been able to ascertain all of the beneficiaries at the present time. While there may be some issues which will have to be resolved regarding the identity of beneficiaries, they will not be sufficiently insurmountable so as to make the beneficiaries unascertainable.

[29] As there is sufficient certainty of intention, subject matter and objects, I find that the trusts created by the declarations are valid unless there is an overriding equitable principle which should cause the Court to disregard the trusts.

(b) Equitable Considerations

[30] In support of his argument for pooling, Mr. Hobbs relied on the general principles of equitable tracing discussed at length in *Re Diplock*6 and other authorities dealing with situations which have some resemblance to the present case. Mr. Fredricksen countered that the law of tracing is not relevant to the issue of pooling in this case and that the Court should not interfere with the trusts established by Eron and its numbered companies.

[31] In *Holden Financial*, Rosenberg J. based his decision in favour of pooling on the inability of the investors to trace their funds. Holden Financial was a mortgage broker which held mortgages for its investors. The vast majority of investors left the investment of their funds entirely with Holden Financial and played no part in selecting mortgages allocated to them; nor did they receive any documentation evidencing an allocation of their investment to any particular mortgage. However, one investor, a Mr. Harnden, did play an active role in the selection of the mortgages in which his funds were to be invested. He inspected the property to be mortgaged and made his own risk assessment before agreeing to invest. Three mortgages related to Mr. Harnden. One was registered directly in his name and was considered to fall outside of Holden Financial's trust assets. The second mortgage was registered in the name of Holden Financial in trust for Mr. Harnden. The third mortgage was registered in the name of Holden Financial with no reference to Mr. Harnden.

[32] Rosenberg J. stated that Mr. Harnden had the strongest case of all of the investors. However, as funds were improperly removed from Holden Financial's trust account between the time Mr. Harnden's funds were deposited into the account and the time the mortgage transaction was closed, Mr. Harnden was not able to trace his funds to the investments in question. Rosenberg J. concluded that it was necessary for Mr. Harnden to trace his funds to the investments in order to have a valid trust and that, as neither Mr. Harnden nor any other investor could trace their funds, the "trust assets" of Holden Financial were to be treated as being acquired by a single common fund and should be distributed on a pro rata basis among the investors. The reasoning of Rosenberg J. was as follows:

> While the Manitoba Securities case differs with respect to the form of the proceedings, it is a precedent with regard to the legal problem arising in the HFC case in that it defines the requirements to establish a trust. At p. 260 O'Sullivan J. stated:
>
> > It may be that there are some few persons who may be able to establish some trust such as a trust arising out of the collection of money in those rare cases where an investor took an assignment of a mortgage and appointed the company as their agent to collect, but there would be in any event formidable difficulties in the way of tracing such trust money.
>
> These words apply even more strongly to the present case where no investor, even Mr. Harnden, can establish that their funds were the specific funds used to advance under a specific security. In every case money was removed from the trust account between the time that their cheque was deposited and the document indicating the trust was created ... Once the trust fund and trust investments have been improperly dealt with and monies improperly taken each of the investors is in the position of being unable to trace their specific funds and therefore the trust with regard to that specific amount attributable to each investor has been mixed and cannot be traced. HFC cannot reinstate the trust relationship in favour of some investors against other investors by then registering assignments in favour of some investors in trust and designating some securities on the books of HFC as belonging to certain investors.

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5 Underhill and Hayton, *Law Relating to Trusts and Trustees*, 14th ed. (London: Butterworths, 1987).
6 *Re Diplock*, [1948] Ch. 465 (Eng. C.A.).

[33] With the greatest of respect to Rosenberg J., it is my view that his reasoning is flawed (although the result reached by him is probably the right decision for the vast majority of Holden Financial's investors). Tracing of funds is not a requirement to establish a trust. Trusts are commonly created with no payment of funds from the beneficiary to the trustee. Tracing is not an ingredient of a trust but, rather, it is an equitable remedy available in respect of trust assets.

[34] As an example, suppose that A gives money to B for the purpose of acquiring an asset which B is to hold for A and that B uses the money for some other purpose and absconds. A will have to rely on the remedy of tracing if he or she wants to recover their funds or some other asset acquired with the funds. By contrast, suppose that A gives money to B for the purpose of acquiring an asset which B is to hold for A and that B does acquire that asset and holds it for A (whether using A's funds or otherwise). A is entitled to the asset because it is held in trust by B for A, and A does not need to rely of the doctrine of tracing to establish entitlement to the asset. The latter is what occurred in Eron, with the asset being an interest in a mortgage.

[35] In stating that tracing is a requirement for the establishment of a trust, Rosenberg J. relied on comments made by O'Sullivan J.A. in *Re Manitoba Securities Commission v. Winnipeg Mortgage Exchange Ltd.7* That was the first decision of the Manitoba Court of Appeal dealing with Winnipeg Mortgage ("*Winnipeg Mortgage No. 1*"). The decision to which I referred in paragraph 3 of these Reasons for Judgment in connection with Eron Investment Corporation was the second decision of

[7] *Re Manitoba Securities Commission v. Winnipeg Mortgage Exchange Ltd.* (1980), 113 D.L.R. (3d) 257 (Man. C.A.).

the Manitoba Court of Appeal dealing with Winnipeg Mortgage ("*Winnipeg Mortgage No. 2*").

[36] I believe that Rosenberg J. misunderstood the comments of O'Sullivan J.A. in *Winnipeg Mortgage No. 1.* O'Sullivan J.A. did not think that the documents created a trust in respect of the mortgages because they made reference to the creation of mortgages of mortgages, which is not consistent with the creation of trusts in respect of the mortgages themselves (which is essentially what Huband J.A. concluded in *Winnipeg Mortgage No. 2* for all but a few of the trust documents). In making the comments quoted by Rosenberg J., O'Sullivan J.A. was referring to a form of trust other than one created by the documentation and he was giving as an example a trust arising out of the collection of money by Winnipeg Mortgage which the investor would have to trace in order to successfully claim.

[37] Ironically, the argument which Rosenberg J. accepted in *Holden Financial* (based on the comments of O'Sullivan J.A. in *Winnipeg Mortgage No. 1)* was expressly rejected by Huband J.A. in *Winnipeg Mortgage No. 2*:

> The lack of identification of the moneys paid in by a customer with a particular mortgage acquired by W.M.E. does not affect the validity of the trust. The question of identifying or tracing trust property arises only after the declaration of trust has been made. It matters not that the customer's money has become "lost" prior to the declaration being made. Up to the time the declaration is made the customer is simply a creditor of W.M.E. But W.M.E. has assets, and in recognition of its financial obligation to the customer, W.M.E. is entitled to declare that it holds some part of its assets as trustee for the customer, from whom W.M.E. had received funds. (p. 144)

[38] I agree with the submission of Mr. Fredricksen that when a trustee has been given monies to acquire an asset and the trustee appropriates or ear marks such an asset for the beneficiary, the beneficiary will have a trust interest in the asset without the necessity of tracing his or her money to the asset. In addition to the above comments of Huband J.A., this proposition is demonstrated in cases involving insolvent stock brokers: see, for example, *Re Stobie-Forlong-Matthews, Limited*[8] and *Re Waite, Reid & Co. Ltd*.[9]

[39] In the Waite, Reid decision, while the Court held that the customers were entitled to securities appropriated to them, the Court did order a pro rata division of the securities which had not been appropriated to customers. A similar example is the case of *Barlow Clowes International Ltd. (in liquidation) v. Vaughan*.[10] In that case, the Court held that shares acquired with investors' monies were intended to form a common fund and were not to be allocated to individual investors. The Court held that the application of the rule in *Clayton's Case*[11] (i.e., first in, first out) would be impractical and would result in injustice between the investors, with the result that the assets were ordered to be shared by the investors *pari passu* in proportion to the amounts owed to them. This resembles the initial situation in Eron Investment Corporation where the investors gave the money to Eron Investment Corporation with the intention that all investor funds would be pooled and invested in numerous Eron mortgages without allocation among the investors. However, it is distinguishable from the situation in Eron Mortgage Corporation where it was the intention at all times that the mortgages (or interests therein) would be appropriated to the investors in accordance with their agreements with Eron.

[40] In *Re Urman,*[12] a trust between a mortgage broker and multiple investors was upheld without requiring the investors to trace their funds. The Court did not specifically deal with the issue of tracing but, in holding that there had been a sufficient appropriation, it relied on the decision in *Taylor v. London & County Banking Co.*[13] In that latter case, a solicitor had misappropriated trust money and on his trust ledger he made a note that a mortgage which he held in his own right was to cover the amount he had defrauded from the trust. This notation was held to be a sufficient appropriation of the mortgage to create a trust in favour of the defrauded trust estate. The defrauded trust estate was obviously unable to trace its trust funds into the mortgage because the funds were not used by the solicitor to acquire the mortgage.

[41] In addition to *Winnipeg Mortgage No. 2* and the other decisions which I have discussed above, the authorities relied upon by Mr. Hobbs in support of his position for pooling were (i) *Re Ontario Securities Commission and Greymac Credit Corp.*,[14] (ii) *Chering Metals Club*

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8 *Re Stobie-Forlong-Matthew, Limited*, [1931] 1 W.W.R. (Man. C.A.).
9 *Re Waite, Reid & Co. Ltd.* (1969), 5 D.L.R. (3d) 229 (Ont. S.C.).
10 *Barlow Clowes International Ltd. (in liquidation) v. Vaughan*, [1992] 4 All ER 22 (Eng. C.A.).
11 *Clayton's Case, Devaynes v. Noble,* [1814-23] All ER Rep. 1.
12 *Re Urman* (1983), 44 O.R. (2d) 248 (Ont. C.A.).
13 *Taylor v. London & County Banking Co; London & County Banking Co. v. Nixon,* [1901] 2 Ch. 231.
14 *Re Ontario Securities Commission and Greymac Credit Corp.* (1986) 55 O.R. (2d) 673 (Ont. C.A.).

Inc. (Trustee of) v. Non-Discretionary Cash Account Trust Claimants,*15* (iii) *Ontario (Securities Commission) v. Consortium Construction Inc.*,*16* (iv) *Re Major Trust Co.*,*17* (v) *Re Winsor and Bajaj18* and (vi) *Re Can Corp. Financial Services Ltd.19* Other than *Can Corp. Financial* (and *Winnipeg Mortgage No. 2*), I do not find these authorities to be of assistance because they involve situations where the trust corpus was mixed and had not been allocated to beneficiaries.

[42] In *Greymac Credit*, the contest was between four beneficiaries who had provided monies to the trustee which had mixed the funds and then dissipated part of them. The Court held that the rule in *Clayton's Case* (i.e., first in, first out) did not apply and that the funds should be distributed on a pro rata basis to the beneficiaries.

[43] In *Chering Metals*, the trust corpus was bullion which had been purchased with monies provided by investors. The bullion was not appropriated among the investors and the Court directed that there be a pro rata distribution.

[44] *Consortium Construction Inc.* was a decision by Rosenberg J., the judge in *Holden Financial*. The investors provided monies for the purchase of real estate projects. The Consortium Group did not account for revenues and expenses on a project-by-project basis, and funds were combined and commingled. Rosenberg J. approved a scheme of distribution proposed by the Receiver-Manager of the Consortium Group which provided that investors in certain projects would be paid pro rata from the realization of those projects and that the remaining investors would be treated as unsecured creditors. Rosenberg J. concluded that all of the investors' monies in respect of certain projects were deposited into separate bank accounts in two instances and, therefore, those investors collectively had a constructive trust with respect to those projects. The remaining investors could not establish a constructive trust and they were held to rank as unsecured creditors.

[45] In *Re Major Trust Co.*, a trust company accepted monies for the purchase of guaranteed investment certificates. These monies were mixed in a common fund with other monies of the trust company. The Court held that although the monies paid by the holders of the investment certificates were held in trust by the trust company, the holders of the certificates were not entitled to be paid from the mixed fund in preference to the other claimants because they could not trace their monies once they were mixed with the other funds.

[46] *Re Winsor and Bajaj* involved a shortfall in a solicitor's mixed trust account. The Court ruled that the clients whose monies were deposited into the trust account should share in the remaining funds on a pro rata basis.

[47] That brings me to *Winnipeg Mortgage No. 2*, the case which I followed in connection with Eron Investment Corporation, and *Can Corp. Financial*, which also followed *Winnipeg Mortgage No. 2.* As I mentioned above, Huband J.A. found that the documentation created valid trusts of the mortgages (except where they made reference to the creation of mortgages of mortgages) but the majority choose to disregard the trusts on the basis that the allocation of the mortgages had been done arbitrarily. The investors had put their faith in Winnipeg Mortgage and they had no input as to the mortgages allocated to them by the trust agreements.

[48] The reasoning of Freedman C.J.M., speaking for the majority, was thus:

> In light of the facts emerging from that extract [i.e., that the investors had no control over the mortgages allocated to them], it would be grossly unfair to give a preferred position to those who happened to have been allocated "good" mortgages, and a subordinate position to those who were allocated "bad" mortgages. Our disposition of the controversy should reflect two things - (1) the intention of the parties when the transactions were entered into, and (2) the necessity for fairness in the ultimate result. Concerning the first, it cannot be doubted that if, on the day before the bubble burst, the investors had been asked whether each of them stood on the same level as the others, the answer would assuredly have been in the affirmative. An answer suggesting that the investors stood on different levels would have been inconsistent with the intention both of the investors and of the companies. As for the second, to make preferred creditors out of those who by sheer luck received "good" mortgages would be to make ourselves slaves to contingency and to deny ourselves the power to do justice in accordance with the maxim that equality is equity. I would treat all the investors equally by pooling the available assets and dividing them among the investors according to their respective claims as proved. (p. 123)

[49] I followed this reasoning in relation to Eron Investment Corporation. The investors gave their money to Eron Investment Corporation with the knowledge that their funds would be mixed with the money received from other investors and that the mixed funds would be invested in Eron mortgages at the discretion of Eron Investment Corporation. There was no allocation of investors to particular mortgages and no trust declarations were completed. When the governmental regulators raised questions and legal advice was obtained, Eron Investment Corporation unilaterally allocated its interests in Eron mortgages to most of the investors, while giving some of the investors a choice between

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[15] *Chering Metals Club Inc. (Trustee of) v. Non-Discretionary Cash Account Trust Claimants* (1991), 7 C.B.R. (3d) 105 (Ont. Gen. Div.).

[16] *Ontario (Securities Commission) v. Consortium Construction Inc.,* [1993] O.J. No. 1408 (Q.L.) (Ont. Gen. Div.).

[17] *Re Major Trust Co.* (1972), 33 D.L.R. (3d) 481 (P.E.I.S.C.).

[18] *Re Winsor and Bajaj* (1990), 75 D.L.R. (4th) 198 (Ont. Gen. Div.).

[19] *Re Can Corp. Financial Services Ltd.* (1991), 6 C.B.R. (3d) 216 (Ont. Gen. Div.).

various mortgages. There were other defects in the allocation process. I ruled that the initial pooled character of the investment should prevail over the flawed allocation of the mortgage interests.

[50] This approach was also followed in *Can Corp. Financial*, which was not cited to me when I made my decision in connection with Eron Investment Corporation. That case involved a mortgage broker which used investors' monies to make mortgages. The mortgage broker provided the investors with documents entitled "Declarations of Trust" and "Mortgage Participation Agreements". However, the mortgage broker was authorized to transfer an investor's participation from one mortgage to another with no consultation. Chadwick J. concluded that the above quoted comments of Freedman C.J.M. in *Winnipeg Mortgage No. 2* had equal application to the case before him and he ordered that the assets of the mortgage broker be distributed by way of a pooling arrangement.

[51] Should I likewise utilize this approach in the present situation and order a pro rata distribution despite the existence of the trust declarations? The answer to this question, in my view, is found in the second paragraph of Freedman C.J.M.'s reasons in *Winnipeg Mortgage No. 2*:

> Central to an understanding of this case is the recognition that the investors became such under circumstances that were markedly different from the usual case of this kind. Ordinarily, a person wishing to invest his money in a mortgage will be concerned with the nature of the mortgage - What property is it on? What is the value of that property? Is there a sufficient margin between the amount of the proposed mortgage and the total value of the property? Is the personal covenant of the mortgagor reliable as an added protection in the event that things go sour and resort to that covenant becomes necessary? These are the kinds of questions which will engage the attention of a prospective investor in the ordinary case. But not so here; and that is what makes this case unique, that is why it must be uniquely treated. (p. 120)

While the typical Eron investment may not represent the ordinary case in view of the syndicated nature of the loans, it is the ordinary case in the sense that the investor made a risk assessment at some level and made a conscious decision to invest his or her money in a particular mortgage (which was subsequently appropriated to the investor by way of the trust declaration). Mr. Fredricksen made the distinction between obtaining an interest in a mortgage by choice or by chance, and I agree with this distinction.

[52] The Eron investors choose to invest in the mortgages allocated to them by way of the trust declarations and there is no equitable reason to deprive them of their choices. There are "good" mortgages and "bad" mortgages but the investors were the ones who made the choices to invest in them. There is no reason why they should not enjoy the benefits or bear the adverse consequences of their decisions. The intention of the parties when they entered into the transactions was that the investors would have an interest in the mortgage loan which they selected and that all investors would not stand on the same footing. In this case, equality among the investors would constitute an inequity because it would represent a variation of the contracts and trust arrangements between Eron (or its numbered companies) and the investors without proper justification at law or in equity. Accordingly, the reasoning in *Winnipeg Mortgage No. 2* does not apply to the present situation.

[53] The last authority to which I will refer is *Yorkshire Trust Company v. Empire Acceptance Corporation Limited*,[20] another decision which was not cited to me when I made my decision in relation to Eron Investment Corporation. In that case, this Court held that there was no triable issue with respect to a pooling of investors who were allocated to mortgages by the mortgage broker as a matter of chance. Although this case supports my conclusion, I choose not to rely on it because its reasoning is not reconcilable with *Winnipeg Mortgage No. 2,* which I consider to be a more fully reasoned and authoritative decision.

<u>CONCLUSION</u>

[54] The Judicial Trustees are directed to distribute the monies recovered on each mortgage in accordance with the trust declarations relating to the mortgage irrespective of the account into which the investors' funds were deposited. An incoming investor who directly paid out an outgoing investor will be in the same position as was the outgoing investor. The Judicial Trustees are at liberty to apply for further directions if there is no trust declaration for a mortgage (or other security) or if there are issues relating to the identity of the beneficiaries under the trusts. The Judicial Trustees are also at liberty to apply for directions with respect to any of the remaining 34 questions posed in the report of the principal Judicial Trustee which have not been answered or rendered moot by these Reasons for Judgment.

"D. Tysoe, J."
D. Tysoe, J.

[20] *Yorkshire Trust Company v. Empire Acceptance Corporation Limited* (1978), 28 C.B.R. 225 (B.C.S.C.).

TAB 11

2012 SKCA 36
Saskatchewan Court of Appeal

Figley v. Figley

2012 CarswellSask 193, 2012 SKCA 36, 214 A.C.W.S. (3d) 314, 393 Sask. R. 44, 564 W.A.C. 44, 77 E.T.R. (3d) 1

James Anthony Figley, Knighton Van Bryce, Stanley Ray Figley, Ronald Ira Figley, and Bonny Gayle Marie Rossler, Appellants (Applicants) and Eugene Walter Figley, personally and as executor of the estate of Raymond Kenneth Figley, deceased, and the estate of Mervin Dale Figley, deceased, and as trustee-director of Figley Farms Ltd., Respondent (Respondent)

Lane, Richards, Herauf JJ.A.

Heard: October 25, 2011
Judgment: March 19, 2012
Docket: 1966

Counsel: Robert Stevenson, for Appellants
Eugene Figley, for himself

Subject: Estates and Trusts
Related Abridgment Classifications
Estates and trusts
I Estates
  I.11 Powers and duties of personal representatives
    I.11.m Supervision of personal representatives by court
      I.11.m.i Removal
        I.11.m.i.A Grounds
Estates and trusts
I Estates
  I.11 Powers and duties of personal representatives
    I.11.m Supervision of personal representatives by court
      I.11.m.ii Appointment of receiver or judicial trustee
Headnote
Estates and trusts --- Estates — Powers and duties of personal representatives — Supervision of personal representatives by court — Removal — Grounds
Testator's will appointed son G as sole executor and included him as beneficiary of residue of estate — Will did not transfer testator's farm to sons S and R ("siblings") as testator allegedly agreed to do — Executor took certain actions that created hard feelings amongst siblings — Beneficiary siblings brought unsuccessful application to remove executor from that position and to appoint Public Guardian and Trustee (PGT) as executor, trustee and litigation guardian — Chambers judge found that there was no real evidence that estate was not being properly administered — Siblings appealed — Appeal allowed in part — Executor was removed from his position — PGT was appointed to administer estate — Fact that executor was also residuary beneficiary was not automatic disqualifying conflict of interest — Executor's actions in relation to siblings' farming operations did not amount to disqualifying conflict of interest — Actions were consistent with terms of will, although inconsistent with alleged agreement between testator and siblings — Executor lacked good faith and fidelity required of trustee — Executor had intense ill feelings toward family and had history of unwarranted outbursts of anger — It would be hard for executor to fairly administer estate when he had intention to punish his siblings — Executor refused to let siblings see will — Executor had failed to provide accounting of his actions under testator's power of attorney before testator's death.

Estates and trusts --- Estates — Powers and duties of personal representatives — Supervision of personal representatives by court — Appointment of receiver or judicial trustee

Public Guardian and Trustee — Testator's will appointed son G as sole executor and included him as beneficiary of residue of estate — Will did not transfer testator's farm to sons S and R ("siblings") as testator allegedly agreed to do — Executor took certain actions that created hard feelings amongst siblings — Beneficiary siblings brought unsuccessful application to remove executor from that position and to appoint Public Guardian and Trustee (PGT) as executor, trustee and litigation guardian — Chambers judge found that there was no real evidence that estate was not being properly administered — Chambers judge expressed concerns about cost of having PGT administer estate — Siblings appealed — Appeal allowed in part — Executor was removed from his position — PGT was appointed to administer estate — Granting rest of order sought by siblings was more problematic and not appropriate at this time — Appointing PGT to administer brother's estate was unnecessary as estate was small and made more sense to order executor to provide accounting of that estate — PGT was not appointed as litigation guardian for estate as executor was no longer in charge of litigation involving estate.

Table of Authorities

Cases considered by *Richards J.A.*:

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Statutes considered:

Trustee Act, R.S.S. 1978, c. T-23

Generally — referred to

s. 85 — referred to

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Generally — referred to

Pt. IV — referred to

s. 14 — considered

APPEAL by beneficiary siblings from judgment dismissing their application to remove executor from that position and to appoint Public Guardian and Trustee as executor, trustee and litigation guardian.

***Richards J.A.*:**

I. Introduction

1 This appeal is rooted in family conflict. The conflict features Eugene Figley, the respondent, on one side and five of his siblings, the appellants, on the other. Their disagreements flow largely from the terms of their late father's will and from Gene's actions as executor of their father's estate. But, as explained below, there are other difficulties as well.

2 In April of 2010, the appellants commenced proceedings by way of originating notice and asked the Court of Queen's Bench, most centrally, to remove Gene from the position of executor. They sought, among other things, to have the court appoint the Public Guardian and Trustee (the "Public Trustee") to (a) administer the estate of their father, (b) serve as a trustee of Figley Farms Ltd. (the father's farming company), and (c) act as a litigation guardian for their father's estate in relation to several

ongoing court proceedings concerning the validity of their father's will and other matters. In general terms, the appellants alleged various kinds of improper actions and motivations on Gene's part.

3 The Chambers judge dismissed the application. The appellants say he erred in his assessment of the situation and ask that his decision be reversed.

4 I conclude, for the reasons set out below, that the appeal should be allowed in part. Gene must be removed from his position as executor and the Public Trustee appointed to administer the estate.

II. Background

5 The full details of the factual underpinnings of this case are quite involved. I propose only to broadly sketch as much of them as is necessary to explain the appellants' arguments and my conclusions.

6 Raymond Figley (the "Father") farmed in the White Bear district of Saskatchewan. He and his wife Evelyn Figley (the "Mother") had eight children: Jim, Knighton, Merv, Stan, Ron, Gene, Rod and Bonny. (In order to simplify matters, I will refer to these individuals by their first names throughout these reasons.)

7 The farm grew to some four sections in size by 1969. At that time, Figley Farms Ltd. was incorporated and the farming assets were transferred to it.

8 One of the children, Merv, was injured in an accident in 1971 and lived in care homes in Saskatoon thereafter. The Father moved to Saskatoon to be near him and never returned to live on the farm.

9 Ron and Stan remained on the farm and did the necessary farm work. The Mother and the Father separated in 1974.

10 Ron and Stan say the Father orally agreed in the fall of 1980 that, in return for their work and services, Figley Farms Ltd. would be theirs when he died. They stayed on the farm and operated it until the Father's death. Their farming efforts included significant work and expenditures on improvements, equipment and so forth. They say there was a "crop share" arrangement between them and Figley Farms Ltd.

11 In 1997, the Father pressured Ron and Stan to sign written purchase agreements for the land on threat of selling it out from under them. Ron refused to do this but Stan agreed to purchase six quarters of land from Figley Farms Ltd. None of the farm land was transferred to Ron or Stan during the Father's lifetime. Ron says he believed that his father would ultimately "do the right thing."

12 Merv died in 2006. The Father was apparently greatly affected by this. Merv's will named Gene as the sole executor of his estate. At about the same time, the Father appointed Gene as his trustee pursuant to a power of attorney.

13 The Father died in October of 2007 and the appellants say that, during the last months of the Father's life, Gene worked to alienate him from them and to alienate them from each other.

14 The Father's will, made on September 17, 2007, appointed Gene as sole executor and trustee. The will also directed Gene to vote the Father's shares in Figley Farms Ltd. so that he would become the sole director of the company. The will did not transfer the farm land to Ron and Stan as they had expected. Rather, in simplest terms, it provided that: (i) all amounts owing by Stan's company under the 1997 agreement to purchase land from Figley Farms Ltd. would be forgiven and the lands transferred to Stan's company, (ii) Stan's share of the residual legacy would be reduced by the combined total of the amount owing by Stan's company under the agreement and $60,000 (representing the supposed value of some surface leases and easements), (iii) Ron would receive the lesser of the monies paid by him in "rent" from 1993 to 2007 and his share of the residue, (iv) all remaining farming assets would be sold, and (v) Ron's bequest would be further reduced by some roughly $37,000 (representing the value of a truck). A codicil executed on September 21, 2007 provided that all of the Figley Farms Ltd. lands had to be sold as a single parcel.

15 The Mother died in March of 2009 without a will.

16 Gene took various courses of action, described more fully below, which created some extremely hard feelings between him and his siblings.

17 Four pieces of litigation have flowed out of the circumstances described above:

(a) Q.B. No. 797/2007 - a proceeding commenced by Gene, acting as executor of Merv's estate, for a declaration that, at the time of his death, Merv was the sole owner of a small gift shop in the facility where he lived and for an order directing that some $6,100 held by a bank for the shop be released to Merv's estate.

(b) Q.B. No. 621/2007 - an application by Ron alleging the Father lacked testamentary capacity and was under undue influence when he made his will and asking that (i) the will be proven in solemn form, and (ii) Gene make an accounting in relation to actions under his power of attorney for the Father and of all legal fees and disbursements.

(c) Q.B. No. 1435/2009 - an action commenced by Gene, in the name Figley Farms Ltd., asking that Jim be ordered to pay some $66,000, the balance said to be owing on a promissory note.

(d) Q.B. No. 90/2010 - an action commenced by Ron, Stan, Stan's company, Bonny and Jim asking, most centrally, that (i) an order be made for the specific performance of the farming agreement said to have existed between the Father and Stan and Ron, (ii) the Father's will be set aside on the basis that the Father was of unsound mind when he made it, (iii) Gene be removed as executor of the Father's estate, (iv) Gene account for his actions as administer of the Father's estate, (v) Gene be discharged from his position with Figley Farms Ltd., and (vi) Gene be ordered to pay substantial damages.

18 In March of 2008, Dovell J. granted a consent order in relation to Q.B. No. 621/2007 which provided, most significantly, that:

(a) Gene be required to prove the Father's will in solemn form with the trial to consider both undue influence and testamentary capacity.

(b) Gene make a full accounting of his actions as power of attorney from the date of his appointment to the date of the Father's death.

(c) Gene make a full accounting of all legal fees paid and be restrained from making further payments until further order of the court.

(d) Gene be restrained from the dissipation of any of the assets of Figley Farms Ltd. or the Father's estate until further order of the court.

(e) The *status quo* be maintained with respect to the farm assets and farm land until further order of the court.

19 Q.B. No. 621/2007 was back before the Court of Queen's Bench, in July of 2008, this time before Mills J. He, in effect, clarified Dovell J.'s order as it related to Gene's expenditure powers as executor by providing that:

1. Eugene Figley is authorized to continue utilization of the estate accounts in accordance with the banking agreements currently in place;

2. No payment is to be made directly to Eugene Figley personally or in his capacity as the executor of the estate for services rendered;

3. No payment is to be made to counsel for Eugene Figley personally or to counsel for the estate for services rendered; and

> 4. Within seven days of writing any cheque or withdrawing any funds from the estate account, notification shall be given to the solicitor for Ronald Figley of the use of the account, which will include the date of access to the account, the amount of the cheque or withdrawal from the account, the purpose of the utilization of the funds and the name of the person to whom the funds were paid.

20 In response to various concerns raised by Ron about Gene's actions, Mills J. refused to find Gene in contempt of Dovell J.'s order but commented that, if there were concerns about Gene's actions as executor, an application should be made to remove him from that position:

> [8] The situation where the parties do not trust each other nor do they get along on any matter relating to the estate does not mean that the Court will step in on every perceived wrongdoing, no matter how minor. If the respondent is not fit to act as the executor of the estate as a result of his conduct, then the application should be to remove him, not to deal with petty matters of management on an ongoing basis.

III. The Decision Under Appeal

21 The disputes among the Figleys were before the Court of Queen's Bench again in May of 2010.

22 First, the Chambers judge dealt with an application on Q.B. No. 621/2007, by Gene, seeking an accounting from Ron for the 2008 and 2009 crop years. The order was granted.

23 Second, the Chambers judge considered an application by Gene for possession of the land farmed by Ron and Stan or, alternatively, for an order requiring the payment of rent by Ron and Stan. This request was denied because the record did not suggest an appropriate rental rate and because the consent order issued by Dovell J. had contemplated continued possession of the land by Ron and Stan.

24 The Chambers judge also dealt with Q.B. No. 383/2010 - the proceeding directly underpinning this appeal. It was an originating notice asking, most significantly, for an order that:

> (a) Gene be removed as executor of the Father's estate, the executor of Merv's estate and as "trustee-director" of Figley Farms Ltd.
>
> (b) The Public Trustee be appointed to administer the estates of the Father, Merv and the Mother and, as well, to act as litigation guardian with respect to their interests in Q.B. No. 621/2007, Q.B. No. 797/2007, Q.B. No. 90/2010 and Q.B. No. 1435/2009.

25 The Public Trustee agreed to administer the Father's estate if necessary but expressed significant reservations about taking on anything more.

26 The appellants' application was accompanied by numerous affidavits. Relief was sought on the basis of allegations that Gene was acting in such a way as to endanger the property held in the estate and was wrongly attempting to interfere with the farming operations of Ron and Stan. It was also alleged that Gene had failed to carry out his responsibilities, shown a lack of proper capacity to execute his duties and failed to act with reasonable fidelity and reliability. The Chambers judge summarized the particulars of these complaints as follows:

> [11] Ronald and Stan Figley point to the following activity by Eugene as grounds for removal as executor: 1) he alienated his father towards the other children, 2) he practised secrecy with respect to a power of attorney granted to him by the father, 3) he failed to account on the power of attorney granted to him by his father, 4) he continued the secrecy after the death by not disclosing the existence of the will in representations to his brother Stan, 5) he has taken money from the estate for fees contrary to the order I had previously made, 6) he has destroyed documents relating to the estate, 7) he failed to produce the will of Mervin and Raymond's estate.

27 In the end, and as already noted, the Chambers judge concluded that the application should be dismissed. In his view, there was no real evidence that the estate was not being properly administered. He also expressed concerns about the cost involved in having the Public Trustee to administer the estate. The Chambers judge explained his thinking in this way:

> [12] Of considerable concern to me is the allegation that Eugene is taking money for executor's fees contrary to my previous order made. Given the material now filed I am satisfied this is not occurring. All of the other complaints that have been raised while valid on an emotional basis as it relates to the relationship between the siblings provide little support for an application to remove him as executor of the estate. Eugene has been administering the estate in accordance with previous orders made by this Court. The simple fact of dislike and distrust is not a ground for removal of him as executor. Any executor appointed will eventually have to provide an accounting for their activities in relation to the estate. There is one allegation, but no real evidence that the estate is not being administered appropriately by Eugene Figley at this time.
>
> [13] A secondary concern relates to the cost of administration of the estate by appointing of the Public Trustee. Significant resources in relation to the estate have already been expended and the Public Trustee's fees will further erode funds otherwise payable to the beneficiaries. The application is dismissed.

IV. Analysis

28 In this Court, counsel for the appellants argued that the Chambers judge had not properly appreciated the significance of Gene's actions or come to terms with the detail of the evidence before him. He advanced three main lines of argument and, in so doing, I expect may have advanced his clients' position in a more nuanced and persuasive way than he had done before the Chambers judge. The first involved what are said to be Gene's significant and disqualifying conflicts of interest. The second concerned alleged misconduct and lack of fidelity on Gene's part. The third was a contention that, at a minimum, the Chambers judge should have directed the trial of an issue so as to put all of the facts relevant to Gene's possible removal and replacement before the court for consideration.

29 After briefly outlining the legal framework in which the central issues raised by this appeal must be resolved, I will examine each of these arguments in turn.

A. The Governing Legal Principles

30 The appellants grounded their originating notice on s. 85 of *The Trustee Act*, R.S.S. 1978, c. T-23 and the inherent jurisdiction of the Court of Queen's Bench. I note, however, that *The Trustee Act* has been repealed and replaced by *The Trustee Act, 2009*, S.S. 2009, c. T-23.01. Part IV of this new *Act* deals with the "Appointment and Removal of Trustees" but s. 14 thereof specifically provides that "[t]his Part does not apply to the appointment and removal of executors or administrators."

31 But, in the end, none of this is fatal to the appellants. It has been repeatedly held that the Court of Queen's Bench has an inherent jurisdiction to remove executors. See, for example: *Ocean Man Trust, Re* (1993), 113 Sask. R. 179 (Sask. C.A.). This seems to be the proper jurisdictional basis from which to approach the appellants' application.

32 The leading case with respect to the removal of executors is *Letterstedt v. Broers* (1884), (1883-84) L.R. 9 App. Cas. 371 (South Africa P.C.). There, Lord Blackburn referred with approval, at pp. 385-86, to a passage from *Story's Equity Jurisprudence*:

> Story says, s. 1289, "But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But, <u>the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity."</u>
>
> It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed ...

> It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate ...
>
> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.
>
> [emphasis added]

33 This general approach appears to have been consistently applied by the courts of this Province and elsewhere. See, for example: *Welch v. Travis* (1997), 159 Sask. R. 275 (Sask. Q.B.) at paras. 9-11; *Matiko v. Matiko Estate*, 2002 SKQB 273 (Sask. Q.B.); *Mitchell v. Mitchell*, 2006 SKQB 267, 280 Sask. R. 151 (Sask. Q.B.).

B. Conflicts of Interest

34 In arguing that the Chambers judge failed to appreciate Gene's conflicts of interest, counsel for the appellants began by emphasizing that the Father's will names Gene as sole executor and also includes him as a beneficiary of the residue of his estate. This, indeed, is how the will is constructed. Clause 2.1 appoints Gene as "the Executor and Trustee of this my Will" and, under clause 3.5.1, Gene is entitled to share equally in the residue of the estate along with Stan, Ron and Rod. But, this sort of arrangement is not in any way unusual. Beneficiaries are regularly appointed as the executors of estates and such appointments, in and of themselves, do not involve disqualifying conflicts of interest. There must, as indicated by *Letterstedt v. Broers*, be something more.

35 The appellants endeavour to put meat on the bones of their conflict of interest argument by pointing to evidence in the affidavits of Ron and Stan that there had been an agreement between the Father and Ron and Stan concerning the transfer of farm land and indicating that the payments made by Ron and Stan to the Father were not in the nature of "rent" but were in the nature of payments for the purchase of the land. Be this as it may, I see no conflict of interest here for Gene. As executor, Gene is obliged to take the will as he finds it. The question of whether the farm land is, or is not, part of the Father's estate is the subject of Q.B. No. 90/2010 and will be resolved in the course of that litigation. It is not clear to me how Gene can, or should, presume the outcome of the proceedings on this subject.

36 The appellants also point to some of Gene's actions in relation to Ron's and Stan's farming operations. Specifically in this regard, they refer to an application brought by Gene to evict Ron from the land, the application to Mills J. made in an effort to collect rent and the taking of grain from the farm and the damaging of a door on a grain bin. The materials provide very little detail with respect to these matters and, for my part, they do not make sufficiently clear how all or any of the actions complained of amount to a disqualifying conflict of interest on the part of Gene in his capacity as executor.

37 It may be worth pausing here to underscore a point. One of the root sources of the bad feelings concerning the administration of the estate is that the Father's will does not take account of what Ron and Stan, in particular, say was an agreement between them and the Father concerning the transfer of the farm land. This is important because it means the steps taken by Gene which are consistent with the terms of the will are difficult to characterize as constituting a conflict of interest simply because they have negative implications for Ron and Stan.

38 Thus, at the end of the day, the heart of what the appellants characterize as a conflict of interest really amounts to not much more than Gene's refusal to respect the alleged agreement among Ron, Stan and the Father - an agreement which is not reflected in the terms of the will. Simply put, Gene is not in a disqualifying conflict of interest in relation to the administration of the will merely because he proceeds on the basis of the will as it is drafted. He is under no obligation, as executor, to act in Ron and Stan's best interests if those best interests are defined by reference to a farming agreement not recognized in the will.

39 Parenthetically on this point, I should note here an apparent concern on the part of the appellants that their lack of success before the Chambers judge will somehow work to prejudice Ron's and Stan's arguments in Q.B. No. 90/2010 with respect to the

agreement they say was in place with the Father. For my part, I am unable to see a basis for any such concern. The Chambers judge was not asked to decide whether there had been an agreement and he made no finding of any sort on this question. As a result, the appellants need not have any worries on this front. The existence and impact of the alleged agreement remains unresolved.

40 The appellants also cite Q.B. No. 797/2007 (concerning Merv's gift shop) and Q.B. No. 1435/2009 (concerning monies said to be owing by Jim to Figley Farms Ltd.) as demonstrating a conflict of interest on Gene's part. Both cases were commenced by Gene - the former in his capacity as executor of Merv's estate; the latter through his authority as the sole director of Figley Farms Ltd. However, at least on the basis of the materials filed, I am not persuaded that the two cases reveal a conflict of interest. Q.B. No. 797/2007 has no direct connection to the administration of the Father's estate. As for Q.B. No. 1435/2009, it might have created hard feelings between Jim and Gene by causing Figley Farms Ltd. to recover amounts allegedly owing to it but that does not put Gene's personal interests out of line with his responsibilities as executor. Importantly, clause 3.4.2(d) of the will specifically directs the Father's trustee to ensure that amounts owing under the promissory note given by Jim are paid.

41 Finally, and more generally, the appellants point to the extraordinarily difficult personal relations between them and Gene as creating or representing a conflict of interest. I do not propose here to map out the full detail of their concerns on this front because, in my view, this aspect of the appellants' case is most usefully characterized, not as involving a conflict of interest, but as involving a lack of good faith and fidelity on Gene's part. It is to this issue which I now turn.

C. Good Faith and Fidelity

42 Counsel for the appellants' second line of argument is that Gene has engaged in conduct, and revealed an agenda, which warrant his removal from the position of executor. It is on this point, in my opinion, that the appellants are entitled to succeed. A careful review of the affidavit materials before the Court establishes that Gene lacks the good faith and fidelity required of a trustee. The most significant considerations in this regard are summarized below:

(a) Several of the appellants depose to the fact of Gene's intense ill feelings towards his family and describe a history of unwarranted outbursts of anger on Gene's part. Indeed, some of this behaviour is reflected in Gene's own words in the emails exhibited to Bonny's affidavit. These problems are said to have typified Gene's behaviour since he was a teenager. Stan and Ron both recount an incident involving Gene's threatened use of a gun which led the Father to demand that Gene leave the farm.

(b) Dory Simon, the friend and caregiver of the Father, also describes several incidents when Gene erupted in irrational anger. One, for example, was when Ms. Simon went with the Father to buy a special needs chair so the Father could sleep safely but, in making the purchase, did not "shop around for a good deal." She also details unusual behaviour on Gene's part including the fact that he stopped payment on a $7,000 cheque the Father gave her for the round-the-clock care services she provided while on an unpaid leave from her job. Gene then went on to falsely tell Ron the cheque had been for $180,000.

(c) Knighton deposes that, leading up to the Father's death, Gene was "running down" every member of the family and saying they had taken money from the Father or had outright stolen money from the Father and Figley Farms Ltd.

(d) In 2007, Gene (claiming to be acting on the Father's instructions) spread soil sterilant on the lawn around Ron's house, killing grass and causing health problems for Ron.

(e) Jim says that, on at least five separate occasions in September of 2007, Gene told him that he was going "to screw Ron" and that the day before the Father died, Gene had said "I am going to fuck Ron over."

(f) Gene did not advise his siblings when the Father became gravely ill and they did not have a chance to be at the Father's bedside or to be with him when he died.

(g) When the Father died, Gene took complete control of the funeral arrangements, a step his siblings found very disturbing.

(h) Gene moved with curious speed to secure the sole directorship of Figley Farms Ltd. Ron states that Gene managed to accomplish this within a few hours of the time of the Father's death.

(i) Between the time of the Father's death and the funeral, Gene (it was discovered later) travelled to Calgary to make inquiries about liquidating Figley Farms Ltd.

(j) At the Father's funeral, Gene was drinking and said "his ship had come in." He refused to show the will to his siblings. They were later able to obtain a copy of it only when Ron approached the trust company which, for a time, had administered the estate.

(k) Shortly after the funeral, Knighton (who lives in Calgary) was telephoned by Gene who said he was in that city to arrange for a quick sale of the farm. Knighton indicates he was astonished to hear this given Ron and Stan's long-term relationship with the farm. Gene told Knighton that Ron and Stan had been "stealing the farm blind" and that he was going to "get them." When Knighton asked to see the Father's will, Gene said "If you know what's good for you, stay out of this. It's going to be an ugly fight."

(l) At the time of the same visit, Gene told Knighton that he was going through the Father's records, had already worn out one shredder and had "38 boxes of materials to go." (Such records, one might think, would contain material relevant to the farming relationship between Ron, Stan and the Father.) Gene told Knighton that if he found even one cheque from the Father to Knighton, he would be coming after Knighton to collect.

(m) On October 20, 2007, Gene visited Stan and his wife at their home. He told them that he expected trouble from Ron and Jim but that he would "look after the problem." Stan and his wife were not shown a copy of the will but, rather, were told that Stan was "well looked after in the will," would not be required to make any further land payments and would receive his share of the farm land. Gene took the extraordinary step of having them sign a document indicating (i) they were not involved in any kind of legal action against Gene or the Father's estate, (ii) they had not signed any agreements with any of their siblings to bring legal actions against Gene, and (iii) they were not involved with Ron or Jim or any of the other siblings in any conflicts with Gene. Stan says he was "shocked" when he saw the will some five months later.

(n) On November 13, 2007, Gene published a notice to creditors in respect of the Father's estate in the Saskatoon *StarPhoenix*. It indicated that creditors had to file claims against the estate by December 13, 2007. Gene provided no direct or personal notice of this development to Ron and Stan, both of whom he obviously knew would have had major claims to advance against the estate if they had known the terms of the will.

43 Gene does not deny or contest any of these accounts of his behaviour other than to depose he did not say that he was going to "screw Ron." He also says, in very general terms, that he did not attempt to isolate the Father and that he did not act rudely to caregivers.

44 The appellants suggest, and I agree, that there is also something to be learned from an examination of Gene's actions in relation to Merv's estate. With respect to the administration of that estate, they say Gene never showed the will to the family, never submitted it to probate and never paid anything out to the Mother who was the sole beneficiary. This took place in a context where, according to Jim, Merv received a lump sum payment of $21,000 from SGI a few months before his death. Jim also says Gene took $3,900 in cash from Merv's room at the time of Merv's death. Monty Goddard, a resident of the home where Merv lived, appears to indicate in his affidavit that there was an additional $4,900 in cash in Merv's room as well. When Merv died, Gene immediately attempted to empty the "Wheelies Gift Shop" bank account but Mr. Goddard says Merv never considered the Wheelies' bank account to be a personal account. Mr. Goddard also says Gene abused him verbally and threatened to charge him with fraud when he raised questions in this regard. In response to all of this, Gene does no more than generally deny "any mismanagement" of Merv's estate, say Merv died with little and add that "the money in the bank account was used for funeral expenses."

45 There is another factual consideration which also strikes me as being really quite significant. Gene was required, by orders of Dovell J. in March of 2008 and Mills J. in July of 2008, to provide an accounting in respect of his actions under the Father's power of attorney from the date of his appointment until the Father's death. No such accounting has been provided. This is a troubling failure on Gene's part because the accounting concerns the very assets which comprise the estate he is charged with administering.

46 The authorities indicate that a court should not act too readily to remove an executor. As Wimmer J. said in *Surminsky (Litigation Guardian of) v. Ulmer Estate*, 2000 SKQB 209 (Sask. Q.B.), "To override a testator's choice of an executor is a sensitive exercise not to be lightly undertaken." See also: *Mitchell v. Mitchell*, *supra* at para. 10. As well, the cases suggest the mere fact of conflict or bad personal relations between a beneficiary and a trustee is normally not enough to warrant the removal of a trustee. See, for example: *Welch v. Travis*, *supra* at para. 12.

47 However, this appeal involves a situation where the relationships between the executor and the beneficiaries go well beyond mere hard feelings. As indicated above, the affidavits reveal an active intention on Gene's part to "punish" his siblings, particularly Ron and Stan. It is difficult to understand how he will be able to fairly and even-handedly administer the estate when he starts from this highly partisan point of approach.

48 These concerns are especially acute with respect to the farm land and the relations between Figley Farms Ltd., on the one hand, and Ron and Stan on the other. Ron and Stan's combined operations are not small and, as of necessity, they must involve ongoing arrangements in relation to equipment, "rent" and so forth with Figley Farms Ltd. Yet, all of this must play out in a context where Gene says he is going to "get" Ron and Stan, where he has destroyed records and where he has pursued an agenda of dealing quickly and quietly with the land held by Figley Farms Ltd. before his siblings even knew what was in the Father's will.

49 In the end, and on the unusual facts revealed in the affidavits, the appellants have demonstrated, on Gene's part, "a want of proper capacity to execute the duties, or a want of reasonable fidelity" as per *Letterstedt v. Broers*, *supra*. As a result, he should be removed as the executor of the Father's estate and replaced, as requested, by the Public Trustee. (All of the appellants say they understand the cost to the estate of the Public Trustee acting as executor and are fully prepared to have the estate assume the cost.) On being appointed, the Public Trustee will obviously wish to vote the estate's shares in Figley Farms Ltd. and take such other actions as are necessary to assume management and control of the company. The Public Trustee will then, among other things, be in a position to direct Q.B. No. 1435/2009, the claim advanced by Figley Farms Ltd. against Jim.

50 Granting the rest of the order sought by the appellants is more problematic and, in my assessment, not appropriate or necessary at this time.

51 In this regard, let me deal first with the request that the Public Trustee be appointed to administer Merv's estate. My concern here is that, at this point, there does not appear to be much estate to administer. Further, the Public Trustee expresses concern about being appointed to administer an estate which is so small and asks that no appointment be made unless costs are payable out of the Father's estate. In the end, it seems to me that a better step at this late stage of the game might be to order an accounting, on Gene's part, with respect to how he handled the assets in Merv's estate. This was not any part of the relief sought by the appellants nor something to which Gene has had an opportunity to respond. Nonetheless, on the surface of things, it seems a sensible course of action - more sensible than drawing the Public Trustee into the administration of the small estate which, except for a disputed bank account, has in all probability been dissipated. Thus, without in any way attempting to pre-determine the result of an application by the appellants for an accounting, I decline to make the order they seek in relation to Merv's estate.

52 Second, turning to the Mother's estate, it is my understanding that an executor (not Gene) is in place. There is too little information in the record to warrant an order displacing that individual and appointing the Public Trustee to administer her estate.

53 The third and final issue to be resolved as to the relief sought by the appellants concerns the request that the Public Trustee be appointed to act as litigation guardian with respect to the interests of the estates in Q.B. No. 1435/2009, Q.B. No. 797/2007, Q.B. No. 90/2010 and Q.B. No. 621/2007. I am not inclined to make such orders at this time. As to Q.B. No. 1435/2009, the

appointment of the Public Trustee to administer the Father's estate will mean Gene is no longer in charge of the case on behalf of Figley Farms Ltd.

54 In Q.B. No. 797/2007, the claim is for only $6,100 and is being pursued by Gene in his capacity as executor of Merv's estate. In light of my decision declining to replace Gene as executor of the estate, there is no present reason to insert the Public Trustee into that litigation.

55 With respect to Q.B. No. 90/2010, the Father's estate is a party to the case and, by virtue of being appointed administrator of the estate, the Public Trustee is now necessarily involved. It seems to me the Public Trustee should be left to decide how best to proceed and to make such applications, if any, as might be needed to move ahead in a proper manner.

56 As for Q.B. No. 621/2007, Gene has been charged with proving the Father's will in solemn form. It is not apparent to me, on the basis of the materials and argument presented to this Court, why he cannot continue in this role. Nonetheless, I acknowledge that there might be considerations here which were not raised by counsel and I would not, by these reasons, wish to be taken as having decided that the Court of Queen's Bench cannot address this question afresh, or make supplementary or related orders, should that prove necessary or appropriate.

57 All of this said, the appellants and Gene need to either settle their differences or conclude the litigation they have initiated. The Father died well over four years ago and the clock is running. All members of the family must move forward if they are to escape the legal net which presently ensnares them. They would be well advised to do this with focus and as co-operatively as is possible in the circumstances.

D. Trial of an Issue

58 Counsel for the appellants also contends that the Chambers judge should have ordered the trial of an issue so as to put all of the facts relating to Gene's alleged inadequacies and misdeeds fully before the court. It is not clear whether such a request was made expressly to the Chambers judge but in view of my conclusions as outlined above, it is not necessary to give any consideration to this issue.

V. Conclusion

59 This appeal is allowed in part. There will be an order removing Gene as executor of the Father's estate and appointing the Public Trustee to act as administrator of the estate.

60 The difficulties giving rise to this appeal are directly linked to the Father's failure, inability or lack of capacity to foresee the problems which would arise if Gene was appointed as executor of his estate. As a result, and in view of what I understand to be the limited nature of Gene's financial resources, the appellants are entitled to have their reasonable solicitor and client costs relating to this appeal paid from the estate.

***Lane J.A.*:**

I concur

***Herauf J.A.*:**

I concur

Appeal allowed in part.

TAB 12

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to May 26, 2026

Last amended on March 26, 2026

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R.S.C., 1985, c. B-3

An Act respecting bankruptcy and insolvency

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act*.

R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Interpretation

Definitions

2 In this Act,

affidavit includes statutory declaration and solemn affirmation; (*affidavit*)

aircraft objects [Repealed, 2012, c. 31, s. 414]

application, with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; (*Version anglaise seulement*)

assignment means an assignment filed with the official receiver; (*cession*)

bank means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association; (*banque*)

L.R.C., 1985, ch. B-3

Loi concernant la faillite et l’insolvabilité

Titre abrégé

Titre abrégé

1 *Loi sur la faillite et l’insolvabilité*.

L.R. (1985), ch. B-3, art. 1; 1992, ch. 27, art. 2.

Définitions et interprétation

Définitions

2 Les définitions qui suivent s’appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une personne insolvable ou un failli transfère la propriété d’un bien en vue de garantir le paiement d’une somme ou l’exécution d’une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actif à court terme Sommes en espèces, équivalents de trésorerie — notamment les effets négociables et dépôts à vue —, inventaire, comptes à recevoir ou produit de toute opération relative à ces actifs. (*current assets*)

actionnaire S’agissant d’une personne morale ou d’une fiducie de revenu assujetties à la présente loi, est assimilée à l’actionnaire la personne ayant un intérêt dans cette personne morale ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S’agissant d’une personne morale autre qu’une fiducie de revenu, toute personne exerçant les fonctions d’administrateur, indépendamment de son titre, et, s’agissant d’une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

bankrupt means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; (*failli*)

bankruptcy means the state of being bankrupt or the fact of becoming bankrupt; (*faillite*)

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a person; (*agent négociateur*)

child [Repealed, 2000, c. 12, s. 8]

claim provable in bankruptcy, ***provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor; (*réclamation prouvable en matière de faillite* ou *réclamation prouvable*)

collective agreement, in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; (*convention collective*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

common-law partnership means the relationship between two persons who are common-law partners of each other; (*union de fait*)

corporation means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; (*personne morale*)

court, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; (*tribunal*)

creditor means a person having a claim provable as a claim under this Act; (*créancier*)

affidavit Sont assimilées à un affidavit une déclaration et une affirmation solennelles. (*affidavit*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une personne. (*bargaining agent*)

banque

a) Les banques et les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*;

b) les membres de l'Association canadienne des paiements créée par la *Loi canadienne sur les paiements*;

c) les sociétés coopératives de crédit locales définies au paragraphe 2(1) de la loi mentionnée à l'alinéa b) et affiliées à une centrale — au sens du même paragraphe — qui est elle-même membre de cette association. (*bank*)

bien Bien de toute nature, qu'il soit situé au Canada ou ailleurs. Sont compris parmi les biens les biens personnels et réels, en droit ou en equity, les sommes d'argent, marchandises, choses non possessoires et terres, ainsi que les obligations, servitudes et toute espèce de domaines, d'intérêts ou de profits, présents ou futurs, acquis ou éventuels, sur des biens, ou en provenant ou s'y rattachant. (*property*)

biens [Abrogée, 2004, ch. 25, art. 7]

biens aéronautiques [Abrogée, 2012, ch. 31, art. 414]

cession Cession déposée chez le séquestre officiel. (*assignment*)

conjoint de fait La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)

conseiller juridique Toute personne qualifiée, en vertu du droit de la province, pour donner des avis juridiques. (*legal counsel*)

contrat financier admissible Contrat d'une catégorie prescrite. (*eligible financial contract*)

convention collective S'agissant d'une personne insolvable, s'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre elle et l'agent négociateur. (*collective agreement*)

créancier Personne titulaire d'une réclamation prouvable à ce titre sous le régime de la présente loi. (*creditor*)

current assets means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; (*actif à court terme*)

date of the bankruptcy, in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed; (*date de la faillite*)

date of the initial bankruptcy event, in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d), or

(f) proceedings under the *Companies' Creditors Arrangement Act*; (*ouverture de la faillite*)

debtor includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; (*débiteur*)

director in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; (*administrateur*)

créancier garanti Personne titulaire d'une hypothèque, d'un gage, d'une charge ou d'un privilège sur ou contre les biens du débiteur ou une partie de ses biens, à titre de garantie d'une dette échue ou à échoir, ou personne dont la réclamation est fondée sur un effet de commerce ou garantie par ce dernier, lequel effet de commerce est détenu comme garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement. S'entend en outre :

a) de la personne titulaire, selon le *Code civil du Québec* ou les autres lois de la province de Québec, d'un droit de rétention ou d'une priorité constitutive de droit réel sur ou contre les biens du débiteur ou une partie de ses biens;

b) lorsque l'exercice de ses droits est assujetti aux règles prévues pour l'exercice des droits hypothécaires au livre sixième du *Code civil du Québec* intitulé *Des priorités et des hypothèques* :

(i) de la personne qui vend un bien au débiteur, sous condition ou à tempérament,

(ii) de la personne qui achète un bien du débiteur avec faculté de rachat en faveur de celui-ci,

(iii) du fiduciaire d'une fiducie constituée par le débiteur afin de garantir l'exécution d'une obligation. (*secured creditor*)

date de la faillite S'agissant d'une personne, la date :

a) soit de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*date of the bankruptcy*)

débiteur Sont assimilées à un débiteur toute personne insolvable et toute personne qui, à l'époque où elle a commis un acte de faillite, résidait au Canada ou y exerçait des activités. S'entend en outre, lorsque le contexte l'exige, d'un failli. (*debtor*)

disposition [Abrogée, 2005, ch. 47, art. 2]

enfant [Abrogée, 2000, ch. 12, art. 8]

entreprise de service public Vise notamment la personne ou l'organisme qui fournit du combustible, de l'eau ou de l'électricité, un service de télécommunications, d'enlèvement des ordures ou de lutte contre la pollution ou encore des services postaux. (*public utility*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

executing officer includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; (*huissier- exécutant*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account; (*garantie financière*)

General Rules means the General Rules referred to in section 209; (*Règles générales*)

failli Personne qui a fait une cession ou contre laquelle a été rendue une ordonnance de faillite. Peut aussi s'entendre de la situation juridique d'une telle personne. (*bankrupt*)

faillite L'état de faillite ou le fait de devenir en faillite. (*bankruptcy*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par les Règles générales à la date de l'ouverture de la faillite, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujetti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;

b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;

c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

huissier-exécutant Shérif, huissier ou autre personne chargée de l'exécution d'un bref ou autre procédure sous l'autorité de la présente loi ou de toute autre loi, ou de toute autre procédure relative aux biens du débiteur. (*sheriff*)

intérêt relatif à des capitaux propres

a) S'agissant d'une personne morale autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

localité En parlant d'un débiteur, le lieu principal où, selon le cas :

a) il a exercé ses activités au cours de l'année précédant l'ouverture de sa faillite;

income trust means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

legal counsel means any person qualified, in accordance with the laws of a province, to give legal advice; (*conseiller juridique*)

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

Minister means the Minister of Industry; (*ministre*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

official receiver means an officer appointed under subsection 12(2); (*séquestre officiel*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

a) soit du prononcé de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d'une cession de biens la visant;

b) le dépôt d'une proposition la visant;

c) le dépôt d'un avis d'intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

person includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; (*personne*)

prescribed

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules; (*prescrit*)

property means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; (*bien*)

proposal means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; (*proposition concordataire* ou *proposition*)

public utility includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; (*entreprise de service public*)

resolution or ***ordinary resolution*** means a resolution carried in the manner provided by section 115; (*résolution* ou *résolution ordinaire*)

secured creditor means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security

a) Sont assimilés aux personnes les sociétés de personnes, associations non constituées en personne morale, personnes morales, sociétés et organisations coopératives, ainsi que leurs successeurs;

b) sont par ailleurs assimilés aux personnes leurs héritiers, liquidateurs de succession, exécuteurs testamentaires, administrateurs et autres représentants légaux. (*person*)

personne insolvable Personne qui n’est pas en faillite et qui réside au Canada ou y exerce ses activités ou qui a des biens au Canada, dont les obligations, constituant à l’égard de ses créanciers des réclamations prouvables aux termes de la présente loi, s’élèvent à mille dollars et, selon le cas :

a) qui, pour une raison quelconque, est incapable de faire honneur à ses obligations au fur et à mesure de leur échéance;

b) qui a cessé d’acquitter ses obligations courantes dans le cours ordinaire des affaires au fur et à mesure de leur échéance;

c) dont la totalité des biens n’est pas suffisante, d’après une juste estimation, ou ne suffirait pas, s’il en était disposé lors d’une vente bien conduite par autorité de justice, pour permettre l’acquittement de toutes ses obligations échues ou à échoir. (*insolvent person*)

personne morale Personne morale qui est autorisée à exercer des activités au Canada ou qui y a un établissement ou y possède des biens, ainsi que toute fiducie de revenu. Sont toutefois exclues les banques, banques étrangères autorisées au sens de l’article 2 de la *Loi sur les banques*, compagnies d’assurance, sociétés de fiducie ou sociétés de prêt constituées en personnes morales. (*corporation*)

prescrit

a) Dans le cas de la forme de documents à prescrire au titre de la présente loi et des renseignements qui doivent y figurer, prescrit par le surintendant en application de l’alinéa 5(4) e);

b) dans les autres cas, prescrit par les Règles générales. (*prescribed*)

proposition concordataire ou ***proposition*** S’entend :

a) à la section I de la partie III, de la proposition faite au titre de cette section;

and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights; (*créancier garanti*)

settlement [Repealed, 2005, c. 47, s. 2]

shareholder includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

sheriff [Repealed, 2004, c. 25, s. 7]

special resolution means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; (*résolution spéciale*)

Superintendent means the Superintendent of Bankruptcy appointed under subsection 5(1); (*surintendant*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

time of the bankruptcy, in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

b) dans le reste de la présente loi, de la proposition faite au titre de la section I de la partie III ou d'une proposition de consommateur faite au titre de la section II de la partie III.

Est également visée la proposition ou proposition de consommateur faite en vue d'un concordat, d'un atermoiement ou d'un accommodement. (*proposal*)

réclamation prouvable en matière de faillite ou ***réclamation prouvable*** Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier. (*claim provable in bankruptcy*, *provable claim* or *claim provable*)

réclamation relative à des capitaux propres Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (*equity claim*)

Règles générales Les Règles générales établies en application de l'article 209. (*General Rules*)

résolution ou ***résolution ordinaire*** Résolution adoptée conformément à l'article 115. (*resolution* or *ordinary resolution*)

résolution spéciale Résolution décidée par une majorité en nombre et une majorité des trois quarts en valeur des créanciers titulaires de réclamations prouvées, présents personnellement ou représentés par fondés de pouvoir à une assemblée des créanciers et votant sur la résolution. (*special resolution*)

séquestre officiel Fonctionnaire nommé en vertu du paragraphe 12(2). (*official receiver*)

surintendant Le surintendant des faillites nommé aux termes du paragraphe 5(1). (*Superintendent*)

(g) generally, for carrying into effect the purposes and provisions of this Part.

R.S., 1985, c. B-3, s. 240; 1992, c. 27, s. 88.

f) changer ou prescrire, à l'égard de toute province, les catégories de dettes auxquelles la présente partie ne s'applique pas;

f.1) régir le renvoi des procédures dans une province autre que celle où l'ordonnance de fusion a été rendue;

g) prendre toute autre mesure d'application de la présente partie.

L.R. (1985), ch. B-3, art. 240; 1992, ch. 27, art. 88.

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- **(a)** the inventory,
- **(b)** the accounts receivable, or
- **(c)** the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 89; 1994, c. 26, s. 9(E).

Receiver to give notice

245 (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

(a) in the case of a bankrupt, to the trustee; or

(b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

Idem

(4) Le présent article ne s'applique pas dans les cas où une personne agit, à titre de séquestre, à l'égard de la personne insolvable.

1992, ch. 27, art. 89; 1994, ch. 26, art. 9(A).

Avis du séquestre

245 (1) Le séquestre doit, dans les meilleurs délais et au plus tard dans les dix jours suivant la date où il devient, par nomination ou autrement, séquestre à l'égard de tout ou partie des biens d'une personne insolvable ou d'un failli, en donner avis, en la forme et de la manière prescrites, au surintendant — l'avis devant, dans ce cas, être accompagné des droits prescrits — et :

a) s'agissant d'un failli, au syndic;

b) s'agissant d'une personne insolvable, à celle-ci, à tous ceux de ses créanciers dont il a pu, en y allant de ses meilleurs efforts, dresser la liste.

Idem

(2) Le séquestre de tout ou partie des biens d'une personne insolvable est tenu de donner immédiatement avis de son entrée en fonctions à tout créancier dont il prend connaissance des nom et adresse après l'envoi de l'avis visé au paragraphe (1).

Nom et adresse des créanciers

(3) La personne insolvable doit, dès qu'elle est avisée de l'entrée en fonctions d'un séquestre à l'égard de tout ou partie de ses biens, fournir à celui-ci la liste des noms et adresses de tous ses créanciers.

1992, ch. 27, art. 89.

Déclaration

246 (1) Le séquestre doit, dès sa prise de possession ou, si elle survient plus tôt, sa prise de contrôle de tout ou

TAB 13

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of April 1, 2023

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JUDICATURE ACT

Chapter J-2

Table of Contents

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

RSA 1980 cJ-1 s13

Interest

14(1) In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper.

(2) Subsection (1) does not apply in respect of a cause of action that arises after March 31, 1984.

RSA 1980 cJ-1 s15;1984 cJ-0.5 s10

Equity prevails

15 In all matters in which there is any conflict or variance between the rules of equity and common law with reference to the same matter, the rules of equity prevail.

RSA 1980 cJ-1 s16

Equitable relief

16(1) If a plaintiff claims to be entitled

(a) to an equitable estate or right,

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim whatsoever asserted by a defendant or respondent in the proceeding,

or

(c) to any relief founded on a legal right,

the Court shall give to the plaintiff the same relief that would be given by the High Court of Justice in England in a proceeding for the same or a like purpose.

(2) If a defendant claims to be entitled

(a) to an equitable estate or right, or

(b) to relief on an equitable ground

(i) against a deed, instrument or contract, or

(ii) against a right, title or claim asserted by a plaintiff in the proceeding,

the Court shall give to each equitable defence so alleged the same effect by way of defence against the claim of the plaintiff that the High Court of Justice in England would give if the same or like matters had been relied on by way of defence in a proceeding for the same or like purpose.

(3) The Court may grant to a defendant respecting an equitable estate or right or other matter of equity and also respecting a legal estate, right or title claimed or asserted by the defendant, all such relief against a plaintiff that the defendant has properly claimed by the defendant's pleading.

(4) The Court shall recognize and take notice

(a) of all equitable estates, titles and rights, and

(b) of equitable duties and liabilities,

appearing incidentally in the course of a proceeding, in the same manner in which the High Court of Justice in England would recognize and take notice of them in a proceeding instituted in that Court.

RSA 1980 cJ-1 s17;1991 c21 s15

Stay of proceedings

17(1) In a proceeding

(a) for the recovery of a debt or liquidated demand,

(b) for the enforcement of a security or charge on land,

(c) for the determination or specific performance of an agreement for the sale of land, or

(d) for the possession of land,

the Court in its discretion may at any stage of the proceeding grant a stay of proceedings on any terms that the Court may prescribe, and in like manner the Court in its discretion may with or without imposing terms, after final judgment in any proceeding whatsoever, grant a stay of execution of an order for sale or of other similar

(a) who would have been entitled formerly to apply to a court to restrain the prosecution of it, or

(b) who may be entitled to enforce by attachment or otherwise a judgment, decree, rule or order contrary to which all or part of the proceedings may be taken,

may apply to the Court for a stay of proceedings in the proceeding either generally or so far as might be necessary for the purposes of justice, and the Court shall on that application make any order that will be just.

RSA 2000 cJ-2 s18;2009 c53 s1

Damages instead of injunction, specific performance

19 In all cases in which the Court has jurisdiction to entertain an application

(a) for an injunction against

(i) a breach of a covenant, contract or agreement, or

(ii) the commission or continuance of a wrongful act,

or

(b) for the specific performance of a covenant, contract or agreement,

the Court if it thinks fit may award damages to the injured party either in addition to or in substitution for the injunction or specific performance, and the damages may be ascertained in any manner the Court may direct, or the Court may grant any other relief that it considers just.

RSA 1980 cJ-1 s20

Periodic payment of damages

19.1(1) In this section,

(a) "damages" means damages

(i) for personal injuries or for the death of a person, or

(ii) provided for under the *Fatal Accidents Act*;

(b) "judgment" means a judgment under which damages are to be paid in whole or in part by periodic payments;

(c) "judgment creditor" means a person who is entitled to receive periodic payments under a judgment;

TAB 14

Court of King's Bench of Alberta

Citation: Bank of Nova Scotia v Smiling Simba Learning Academy Inc, 2025 ABKB 11

Date: 20250110
Docket: 2401 04463
Registry: Calgary

Between:

Bank of Nova Scotia

Plaintiff/Applicant

- and -

Smiling Simba Learning Academy Inc.,
Uma Pujari and Prince Chahal

Defendants/Respondents

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] Bank of Nova Scotia (**BNS**) applies (**Application**) for a receivership order over the assets, undertakings and properties of Smiling Simba Learning Academy Inc. (**SSLA**). The application is opposed by SSLA and Uma Pujari (**Pujari**) and Prince Chahal (**Chahal**). Pujari and Chahal (**Guarantors**) are SSLA's directors, voting shareholders and guarantors.

[2] For the reasons set out below, the receivership order requested is granted.

II. Background

[3] BNS and SSLA entered into a Commitment Letter dated April 28, 2022 to re-finance a commercial property (**Property**) at 13209 Evanspark Blvd NW in Calgary which includes a three-storey commercial building completed in 2022. The Property is municipally zoned as

"Special Purpose – Community Service (S-CS)", which is for education and community uses, and accommodates a limited range of small scale public recreation facilities. S-CS zoned lands may only be used for specific permitted or discretionary purposes under the City of Calgary *Land Use Bylaw 1P2007*.

[4] BNS and SSLA also entered into an Acceptance Agreement dated May 24, 2022 and an interest rate swap transaction agreement dated May 31, 2022. BNS advanced monies pursuant to the Commitment Letter and these agreements. The Guarantors guaranteed the loan to a maximum of $8.2 million.

[5] From the outset of the relationship, BNS contemplated and understood that SSLA intended to rent or lease out the entirety of the Property to arms-length tenants and that all the tenants were to operate as childcare facilities. However, it turned out that for a significant time the Property was not being used to generate rental income and, in fact, the contemplated childcare facility was to be controlled by Chahal and had not yet obtained a required licence. BNS first learned about Chahal's involvement in the potential childcare operator in March 2023.

[6] SSLA defaulted. In May 2023, the interest rate swap transaction agreement was converted into a demand loan facility.

[7] The loans made pursuant to the 2022 Commitment Letter (and related documents) and the 2023 demand loan facility are referred to as the "**Loans**".

[8] By March 31, 2024, the amount outstanding on the Loans was over $9 million.

[9] The Loans are secured by a general security agreement (**GSA**), a collateral mortgage, a general assignment of rents and leases pertaining to the Property, and an assignment of insurance policies (collectively, the **Security**). BNS's security interests were perfected by registration of the collateral mortgage at Land Titles and a financing statement at the Personal Property Registry.

[10] SSLA committed events of default under the Loans, including but not limited to failing to pay amounts owing when due.

[11] On March 27, 2023, BNS demanded payment and served a notice of intention to enforce security under section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*).

[12] On May 5, 2023, 1967262 Alberta Ltd (**196 Alberta**) registered a collateral mortgage against the Property, which Chahal describes as being related to "collateralized debt" in the amount of approximately $900,000. SSLA did not obtain BNS' consent to this registration.

[13] On August 22, 2023, Mortgagequote Canada Corp. (**Mortgagequote**) registered a collateral mortgage against the Property for the principal amount of $200,000. SSLA did not obtain BNS' consent to this registration. As of May 6, 2024, the claimed amount outstanding to Mortgagequote was $164,487.56 (based on Mortgagequote's Statement of Claim against SSLA).

[14] In 2023, BNS provided extensions to SSLA to repay its indebtedness, which was ultimately extended to October 31, 2023. It appears that SSLA was trying to sell the Property in the fall of 2023, but nothing came to fruition.

[15] On January 4, 2024, BNS sent a further demand and notice of intention to enforce security pursuant to section 244 of the *BIA*.

[16] On or about January 12, 2024, SSLA appears to have entered into a 10-year lease (**Lease**) with respect to the Property, the term of which commenced in February 2024.[1] Chahal's evidence is that the tenant is currently paying monthly rent of $28,200[2]. SSLA never paid the rental proceeds to BNS and SSLA has not provided any evidence about what it did with the rent it received.

[17] On February 14 and 15, 2024, counsel for BNS and SSLA exchanged emails by which SSLA agreed to the general terms of a forbearance agreement, which included SSLA's consent to the terms of a receivership order. However, SSLA or its counsel failed to provide the signed forbearance agreement and SSLA sought new counsel.

[18] On April 2, 2024, BNS filed a receivership application in respect of SSLA.

[19] The parties continued to negotiate and entered into a Forbearance Agreement dated April 16, 2024 (**Forbearance Agreement**). The purpose of the forbearance was to provide SSLA and the Guarantors time to sell the Property and pay SSLA's indebtedness and other obligations. The forbearance period was the earlier of a "Forbearance Default" (as defined) or July 2, 2024 (**Termination Date**), and the full indebtedness was to be paid by the Termination Date. The Forbearance Agreement provided for payment of a forbearance fee and the execution of a specific form of consent receivership order (**Consent Receivership Order**).

[20] In the Forbearance Agreement, SSLA and the Guarantors acknowledged existing defaults under the Loans and SSLA's indebtedness (including indebtedness as of April 15, 2024 of $9,160,339.79). Further, their counsel executed his consent to the form of Consent Receivership Order appended to the Forbearance Agreement on their behalf.

[21] SSLA and the Guarantors then defaulted under the Forbearance Agreement. On July 2, 2024, SSLA's counsel sought an extension. On July 22, 2024, the parties entered into an Amending Agreement to amend the Forbearance Agreement which, among other things, extended the forbearance period to the earlier of a "Forbearance Default" (as defined) or September 20, 2024. SSLA continued to work toward a sale of the Property but then defaulted under the Amending Agreement by failing to repay the Loan and its obligations by September 20, 2024.

[22] SSLA appears to have continued to work toward the sale of the Property to potential third party purchasers. On September 24, 2024, BNS, SSLA and the Guarantors, through emails between counsel, reached agreement on the basic terms of a second amending agreement. A draft Second Amending Agreement was provided to SSLA's counsel on October 2, 2024, but SSLA and the Guarantors never signed it.

[23] On December 6, 2024, BNS advised SSLA it was applying for a receivership order. On January 2, 2025, BNS filed this application.

[1] The January 6, 2025 affidavit of Chahal (**Chahal Affidavit**) states that the Lease was entered into, but the version appended to the Chahal Affidavit is not signed by SSLA.

[2] The Chahal Affidavit does not explain the discrepancy between the amount of rent being paid versus the significantly higher amount of basic rent contemplated in the Lease. After argument on January 9, 2025, the Court was advised by Chahal's counsel of an error in the Chahal Affidavit related to the rent, but the error was not explained. I directed that any corrected affidavit must be provided to me by a certain time on January 10, 2025 for it to be considered. Nothing was provided by that deadline and, given the nature of the circumstances and (in my view) urgency of this matter, I have proceeded based on the evidence before me and knowing that there may be an error.

[24] As of December 30, 2024, the amount outstanding under the Loans was $10,170,652.26.

[25] The Application was heard on January 6, 2025. Mortgagequote's counsel was unable to attend; an articling student appeared and requested an adjournment so lead counsel could appear. Mortgagequote did not assert it intended to file evidence. I partially granted the adjournment: I heard the parties' submissions and scheduled a further attendance on January 9, 2025 for Mortgagequote's counsel to make submissions, and to give the Court and interested parties the opportunity to review the Chahal Affidavit which was filed during argument the on January 6, 2025. All interested parties were given the opportunity to make further submissions on January 9, 2025.

III. Issue

[26] The issue is whether to grant a receivership order as sought.

IV. Analysis

A. Should the Receivership Order be Granted as Sought?

1. Legal Framework

[27] The Court has jurisdiction to grant a receivership order under section 243(1) of the *BIA* and section 13(2) of the *Judicature Act*, RSA 2000 c J-2.

[28] The test is whether it is just and convenient to grant a receivership order in the circumstances: *Judicature Act*, section 13(2); ***Law Society of Alberta v Higgerty***, 2023 ABKB 499 at para 24.

[29] As noted in ***Higgerty***, at para 25, which I adopt:

> [25] A receivership order "should not be lightly granted": ***Kasten Energy Inc v Shamrock Oil & Gas Ltd***, 2013 ABQB 63 at para 20, citing ***BG International Limited v Canadian Superior Energy Inc***, 2009 ABCA 127 at paras 16-17. The court must carefully balance the rights of both the applicant and the respondent as justice and convenience can only be established by considering and balancing the position of both parties: ***BG International*** at para 17. When considering the issue of whether a receiver and manager should be appointed, the court should: (i) explore whether there are other remedies that could serve to protect the interests of the applicant; (ii) balance the rights of both the Applicants and the other stakeholders (including the secured and unsecured creditors); and, (iii) consider the effect of granting the Draft Receiver Order: ***Kasten Energy*** at para 20, citing ***BG International*** at paras 16.

[30] Alberta courts have frequently cited and considered a non-exhaustive list of factors described in Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130, when deciding whether it is just and convenient to appoint a receiver and manager: see, for example ***Higgerty***, at para 26; ***ATB Financial v Mayfield Investments Ltd***, 2024 ABKB 635 at para 65 [***Mayfield***]; ***Worth Ventures Ltd v MegaSys Enterprises Ltd***, 2024 ABKB 385 at para 32; ***2531005 Alberta Ltd v Katharine Enterprises Ltd***, 2023 ABKB 718 at para 19; ***CWB Maxium Financial Inc v 2026998 Alberta Ltd***, 2021 ABQB 137 at para 33; ***Schendel Management Ltd***, 2019 ABQB 545 at paras 44-45; ***Murphy v Cahill***, 2013 ABQB 335 at para

71; ***Kasten*** at para 13; ***Romspen Investment Corporation v Hargate Properties Inc***, 2011 ABQB 759 at para 20; ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27. Those factors include:

(a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) the risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) the nature of the property;

(d) the apprehended or actual waste of the debtor's assets;

(e) the preservation and protection of the property pending judicial resolution;

(f) the balance of convenience to the parties;

(g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

(i) the principle that the appointment of a receiver is extraordinary relief, which should be granted cautiously and sparingly;

(j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) the effect of the order upon the parties;

(l) the conduct of the parties;

(m) the length of time that a receiver may be in place;

(n) the cost to the parties;

(o) the likelihood of maximizing return to the parties;

(p) the goal of facilitating the duties of the receiver; and

(q) the secured creditor's good faith, commercial reasonableness of the proposed appointment and questions of equity.

[31] In circumstances where a debtor agrees to a consent receivership order as part of negotiating a forbearance of security enforcement, additional considerations are engaged, in part because of the importance of commercial certainty: ***Mayfield*** at para 40. The applicable principles were summarized by Justice Lema in ***Servus Credit Union Ltd v Proform Management Inc***, 2020 ABQB 316 at paras 60-63 (footnotes omitted):

> [60] On how to approach a consent order, the guiding principles are as follows:
>
> - the Court is not obliged, from the mere fact of consent, to grant a consent order; and

- the Court must be satisfied (at minimum) that:
  - it has the jurisdiction to grant the order;
  - if it has the jurisdiction, any preconditions (statutory or common law) to the exercise of its jurisdiction are met;
  - consent has actually been provided;
  - the consent is not the product of fraud, duress, or undue influence or otherwise tainted;
  - where the consent was provided on a conditional basis (e.g. order not to be entered unless certain conditions are satisfied), the condition(s) are satisfied;
  - the proposed relief does not exceed that consented to; and
  - consent aside, the ordered relief is warranted in the circumstances.

> [61] The level of scrutiny required depends on the circumstances. The onus to raise a concern rests with the consenting (or ostensibly consenting) party. If that party is present at the application for the order and raises no concerns, or if it is content to allow the other party (or parties) to appear at the application and relay the "we have consented" message, the Court can usually proceed on the basis that all of these elements are satisfied.
>
> [62] At minimum, the Court may have to consider whether it has the jurisdiction to grant the order i.e. to guard against parties (inadvertently or otherwise) pulling the Court outside its jurisdiction.
>
> [63] A safeguard here is the Court's power to set aside or vary its orders, including (in limited circumstances) consent orders. If it turns out that, despite apparent regularity, a consent order is fatally deficient on one or more of the bases above, the Court may decide to set it aside.

[32] In assessing the effect of a debtor's consent to a receivership order, Justice Lema went on to point out in ***Servus***, at para 66 (emphasis in original): "by giving that consent, the debtors conceded that, if and when the forbearance (and implicitly the stay) period ended, the consent order could be entered if they remained in default *and without any substantive-argument objection by them*". In my view, in the case of a consent receivership order the debtor has also conceded that receivership is an appropriate remedy (especially in the absence of any material change in circumstances since the provision of consent).

2. Application

[33] No party appears to dispute that judicial intervention is appropriate at this time. However, SSLA opposes a receivership because it is too expensive and, it argues, unnecessary for what

should be a relatively simple commercial real estate sale process. They argue that an order for judicial sale of the Property is appropriate. Initially, Mortgagequote also adopted this position.

[34] BNS asserts that the Property is complex given its zoning and is not a simple sale matter, and BNS has a right to choose its remedy. Further, BNS is concerned about SSLA's past conduct and lack of cooperativeness and also argues that Mortgagequote's position, as third mortgagee with a relatively small amount outstanding, should be given little (if any) weight. I note that the second mortgagee, 196 Alberta, which has a significantly larger financial stake in the outcome, and the tenant under the Lease, did not oppose BNS' application. Further, by the time of the second attendance, after reviewing the Chahal Affidavit, Mortgagequote changed its position and agreed that a straightforward receivership was appropriate.

[35] I have reviewed the evidence and considered the relevant factors noted earlier. For ease of reference, I specifically address the following key factors.

a. Irreparable Harm/Contractual Right to Appoint Receiver

[36] BNS has not proven, and does not assert, that it will suffer irreparable harm. However, as noted in ***Paragon***, at para 27, BNS is not required to show irreparable harm, particularly given that that BNS has the contractual right to appoint a receiver (or to seek a court-appointed receiver) in its collateral mortgage.

[37] Canadian courts have held that the extraordinary nature of the receivership remedy is significantly reduced where a secured creditor who has the right under its security documents to appoint a receiver applies to do so: see ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc***, 2020 ONSC 1953 at para 43; ***Murphy*** at para 72.

b. Risk to Security

[38] SSLA (initially supported by Mortgagequote) argues that BNS has not provided an affidavit of value to show that its Security is at risk of not being fully paid. It points to the third party transactions SSLA attempted to close which, had they closed, would likely have resulted in BNS being fully paid. However, a transaction that does not close, without more, is of minimal (if any), evidentiary weight on the question of value of a commercial real estate property.

[39] SSLA also asserts that the second mortgagee will likely be paid out of the judicial sale of other real property owned by Chahal, and it is likely that the alleged additional receivership costs (versus a judicial sale) will be borne by others, not BNS.

[40] I am not prepared to find that others would bear the costs of any incremental costs occasioned by a receivership versus a judicial sale order. While BNS may bear the overall onus to establish a receivership is just and convenient, the party that asserts a proposition has the onus to prove it: ***Braile v Calgary (Police Service)***, 2018 ABCA 109 at para 23; ***Freyberg v Fletcher Challenge Oil and Gas Inc***, 2005 ABCA 46 at para 75. Neither SSLA (nor Mortgagequote in support of its initial position) filed evidence of the value of the Property. SSLA did ultimately provide the Lease in the Chahal Affidavit, which references significant monthly rent but did not provide any reliable evidence as to how that may translate into value. There is evidence in the record before me that the Property's 2024 Calgary municipal tax assessment value was $6,790,000 (and the Property is in tax arrears of $359,106.11) which, if reliable evidence of value (a matter I need not and do not decide), would suggest that BNS' Security is at serious risk.

[41] While the actual risk to BNS' Security is undeterminable or not quantifiable, the presence of material risk can be inferred by the lack of payment by SSLA, lack of revenues generated by the Property being paid to BNS, the significant municipal tax arrears, and SSLA's to-date unsuccessful attempts to sell the Property at a price sufficient to pay its obligations to BNS.

[42] It is also important, in assessing security risk in this situation, to recognize that BNS has priority and significantly more at stake than any other interested party.

c. Nature of the Property

[43] BNS asserts that the Property's restrictive zoning, childcare licensing requirements, and the *Early Learning and Child Care Regulation*, Alta Reg 143/2008 make the marketing of the Property sufficiently complex such that a receiver would be of assistance. No admissible opinion evidence was provided about the complexity of the sale of the Property. While it is true that the Property is not one that can likely simply be placed on a publicly available listing service, I am not prepared to infer that a receiver is required, or necessarily preferred, simply due to the Property's zoning.

d. Consent Receivership Order

[44] SSLA and the Guarantors agreed to the Consent Receivership Order in April 2024 in the Forbearance Agreement. That agreement was not changed in the Amending Agreement or contemplated to be changed in the unsigned second Amending Agreement. In fact, on September 24, 2024 SSLA agreed by email through counsel to terms that re-confirmed "the ongoing effectiveness" of the Consent Receivership Order.

[45] Parties should expect that courts will hold them to their bargains in these circumstances, absent further agreement or circumstances that would make it appropriate to do so (including, for example, and without limitation, for matters such fraud or misrepresentation): ***Mayfield*** at para 40; ***Servus*** at paras 42-50; ***Royal Bank of Canada v Walker Hall Winery Ltd***, 2010 ONSC 4236 at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC).

[46] I find that the consent of SSLA and the Guarantor was real and obtained at time they were represented by counsel. It is not tainted (or alleged to be tainted). SSLA and the Guarantors acknowledged defaults and the indebtedness, and that a receivership order was the appropriate remedy if their obligations were not paid by the end of the forbearance period. The proposed form of Consent Receivership Order is virtually identical to the form of receivership order consented to by SSLA and the Guarantors. It is in alignment with, and substantially similar to, the Alberta template form of receivership order.

[47] This is a significant factor in favour of receivership.

e. SSLA Conduct/Facilitating Receiver Duties

[48] SSLA has not honoured its agreements, including under the Forbearance Agreement, the Amending Agreement, and its agreement to the terms of a second amending agreement. SSLA has been in default since March 2023, and then granted further mortgages against the Property without BNS' consent (the latter of which complicated BNS' receivership application). SSLA has not paid agreed-to forbearance fees. It has breached the terms of the assignment of rents, has received significant monthly rent from a tenant under the Lease, and has paid none of that rent to BNS. It has not explained where the rent has gone.

[49] SSLA's conduct suggests that it chooses when to cooperate with BNS, and it prefers its own interests and interests of third parties over its primary secured creditor, in disregard of its contractual obligations.

[50] A receivership order will provide court-supervision to better allow an orderly sale or refinancing of the property. The Court is concerned that a judicial sale order, without the assistance of a court-appointed receiver, would likely require an inordinate number of court applications to ensure SSLA/Guarantor compliance and/or active engagement in the process.

f. Effect/Impact of Receivership on SSLA

[51] SSLA provided no specific evidence of the effect on SSLA, beyond the usual impact of a receivership order. SSLA did not challenge that some court intervention is appropriate. Any negative effect or impact of a receivership, as opposed to a judicial sale order process, is offset by SSLA's own conduct and its agreement to the Consent Receivership Order. Further, a receivership would not preclude the third parties with which SSLA was previously dealing from contacting the receiver to negotiate the purchase of the Property.

g. Alternative Remedies

[52] BNS could have commenced foreclosure proceedings. It could have agreed to a judicial sale order. However, unless outweighed by other factors, a secured creditor, like BNS, is entitled to elect its security enforcement path: ***Bank of Montreal v Haro-Thurlow Street Project Limited Partnership***, 2024 BCSC 47 ***[Haro-Thurlow Street Project***]at para 95.

[53] In my view, the appointment of a receiver over SSLA's assets is more appropriate in this case than only a judicial sale order process. A receivership provides more flexibility: ***Haro-Thurlow Street Project*** at para 102. Further, a court-appointed receiver will have access to and control of SSLA's records to facilitate a realization process using its expertise in the best interests of all stakeholders. In this case, it may not simply be a matter of selling a single commercial building. BNS seeks to investigate what SSLA did with the rent it has received, among other things, and this is something that can most reasonably be facilitated through a receivership process. SSLA's offer at the application to, only now, honour its assignment of rents agreement by having rent from the Property paid directly to BNS, does not address past rent already received.

h. Maximizing Return

[54] SSLA has failed to sell the Property. A receiver can craft an appropriate sale process. I do not have sufficient evidence to determine whether a receiver or commercial real estate agent under a judicial sale order would result in greater net recovery from the sale of the Property. As noted above, a receiver can also determine whether other potential SSLA assets might be recovered.

i. Balance of Convenience

[55] SSLA has had months to achieve a refinancing or sale of the Property. BNS has been patient and reasonably attempted to facilitate and cooperate with SSLA's efforts. On the other hand, the Court has concerns about SSLA's conduct as noted earlier. There is no evidence of any imminent or reasonable refinancing or sale. The balance of convenience favours BNS.

3. Conclusion re: Receivership

[56] For those reasons, I find the appointment of a receiver is just and convenient.

[57] Mortgagequote and SSLA articulated that, if the Court decides to appoint a receiver, the Court should consider restricting the receiver's role to reduce costs. Mortgagequote submitted that the receiver's role should be limited to determining what has been and will be paid in rent, collecting rent, and expeditiously arranging for the sale of the Property. This may very well turn out to be true, but the full extent of the situation is unknown and, given the Court's concerns about SSLA's conduct, the Court is not prepared to restrict the usual receiver powers. The form of template order as amended and proposed by BNS is reasonable. The form of order includes reasonable safeguards to address any concerns about costs incurred by the receiver as an officer of the Court.

V. Conclusion

[58] I grant the receivership order as proposed by BNS.

Heard on the January 6th and 9th, 2025.
Dated at Calgary, Alberta this 10th day of January, 2025.

M.A. Marion
J.C.K.B.A.

Appearances:

Jeffrey Oliver and Natalie Thompson
for Bank of Nova Scotia

Randolph W. Mitchell
for Smiling Simba Learning Academy Inc., Uma Pujari and Prince Chahal

Cale W. Ellis Toddington (January 9, 2025 only) and Madona Markaj (student-at-law)
for Mortgagequote Canada Corp.

Anthony Merah
for 2499311 Alberta Ltd

Derek Pontin (January 9, 2025 only)
for the proposed receiver

TAB 15

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430

Date: 20020429
Action No. 0101 05444

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

INTRODUCTION

[1] On March 20, 2001, I granted an *ex parte* order appointing a receiver and manager of the property and assets of Merchants & Traders Assurance Company (“MTAC”) and 586335 British Columbia Ltd. (“586335"), including certain assets pledged by MTAC and 586335 to Paragon Capital Corporation Ltd. MTAC, 586335 and the other defendants in this action brought an application to set aside this *ex parte* order. I declined to set aside, vary or stay the *ex parte* order and these are my written reasons for that decision.

SUMMARY

[2] The *ex parte* order should not be set aside on any of the grounds submitted by the Defendants, including an alleged failure to establish emergent circumstances, a lack of candour or any kind of non-disclosure or misleading disclosure by Paragon. Hearing the motion to appoint a receiver and manager *de novo*, I am satisfied that the receivership should continue on the terms originally ordered, and that the Defendants have not established that a stay of that receivership should be granted.

FACTS

[3] On March 15, 2000, Paragon loaned MTAC $2.4 million. The loan was for a term of six months with an interest rate of 3% per month, and matured on September 15, 2000. MTAC was to make interest-only payments to Paragon in the amount of $72,000.00 per month.

[4] The purpose of the loan was to allow MTAC to acquire 76% of the shares of Georgia Pacific Securities Corporation (“Georgia Pacific”), a Vancouver-based brokerage business. That transaction was completed. As security for the loan, MTAC pledged the following:

a) an assignment of all of the property of MTAC and 586335, including the Georgia Pacific shares;

b) a general hypothecation of the shares of Georgia Pacific owned by MTAC;

c) a power of attorney granted by MTAC to Paragon appointing an agent of Paragon to be the attorney of MTAC with the right to sell and dispose of any shares held by MTAC;

d) an assignment of mortgage-backed debentures;

e) an assignment of a $200,000 US term deposit, which was stated to be held in the trust account of a lawyer by the name of Jamie Patterson;

f) $250,000 to be held in trust by Paragon’s counsel; and

g) $986,000 in an Investment Cash Account at Georgia Pacific.

Paragon filed a General Security Agreement executed by MTAC by way of a financing statement at the Personal Property Registry on March 15, 2000. In addition, Paragon obtained personal guarantees of the loan from Garry Tighe, Insurcom Financial Corporation, 586335 and 782640 Alberta Ltd.

[5] The loan was not repaid and, pursuant to the terms of the General Security Agreement, Paragon appointed a private receiver in January, 2001.

[6] Subsequently, the parties entered into discussions resulting in a written Extension Agreement. The Extension Agreement acknowledged the balance outstanding under the loan on January 9, 2001 of $2,629,129.99 with a then per diem rate of $2,528.28 and acknowledged delivery of numerous demands and a Notice of Intention to Enforce Security pursuant to Section 244 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c.B-3, as amended

[7] MTAC agreed pursuant to the Extension Agreement that all monies due and outstanding would be repaid by February 22, 2001. If the funds were not repaid, Paragon would be at liberty to enforce its security and take all steps it deemed necessary to collect the debt. MTAC agreed it would not oppose Paragon's realization of its security, including the appointment of a receiver over its assets, and that it would, if requested, work with Paragon and any person designated by Paragon to attempt to realize on the value of the Georgia Pacific shares in a commercially reasonable manner.

[8] Pursuant to the terms of the Extension Agreement, the shares of Georgia Pacific owned by MTAC were delivered to counsel for Paragon.

[9] It was also a term of the Extension Agreement that a discontinuance of the pending action would be filed and the appointment of the private receiver would be revoked. Both of these actions were undertaken by Paragon.

[10] The loan was not repaid by February 22, 2001. As of June 26, 2001, $2,850,192.62 was outstanding. Paragon issued a new Statement of Claim on March 2, 2001. On March 16, 2001 counsel for MTAC, Insurcom, 782640, 586335, and Tighe filed a Statement of Defence and served it upon Paragon's counsel.

[11] On March 20, 2001, Paragon applied for and was granted an *ex parte* order appointing Hudson & Company as receiver and manager of all of the assets and property of MTAC and 586335, including, specifically, the mortgage-backed debentures, $986,000 in a cash account, $200,000 in trust with a lawyer, the $250,000 paid to Paragon's counsel and the Georgia Pacific shares. The application was made in private chambers, and no court reporter was present. However, counsel for Paragon made his application based on affidavit evidence of Mr. Hudson and others and supported by a written "Bench Brief", all of which has been disclosed to the Defendants. All of the above-noted facts and additional information contained in the affidavits and Bench Brief were disclosed to me at the time of the *ex parte* application.

ANALYSIS

Should the *ex parte* receivership order have been granted?

[12] Rule 387 of the ***Alberta Rules of Court*** provides that the court may make an *ex parte* order if it is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. The applicant must act in good faith and make full, fair, and candid disclosure of the facts, including those that are adverse to his position: ***Metropolitan Life Insurance Company v. Hover***, 1999, 237 A.R. 30 at paragraph 23, referring to ***Royal Bank v. W. Got & Associates*** (1994), 150 AR. 93 at 102-3 (Alta. Q.B.); (1997) AR. 241 (Alta. C.A.); leave to appeal granted [1997] S.C.C.A. No. 342.

[13] The Defendants submit that there was no urgency requiring an *ex parte* application. There was, however, affidavit evidence that led me to believe that the assets of MTAC and 586335 that had been pledged as security for the loan to Paragon were at risk, and that mischief could occur if an *ex parte* order was not granted.

[14] There was, by way of example, evidence that the mortgage-backed debentures were not what they seemed.

[15] There was evidence that Mr. Hudson had been advised by Mr. Tighe that his intention was to pay out the Paragon loan by transactions involving Georgia Pacific. Without elaborating on the status of Georgia Pacific at the time, as it is not a party to this litigation, the evidence with respect to potential activities involving this company was troubling, and justified a concern that the shares that comprised this asset may be at risk.

[16] Further, Mr. Hudson deposed that Mr. Tighe was at first agreeable to Mr. Hudson and Paragon’s counsel speaking to various parties, including officers of Georgia Pacific and Deloitte & Touche, to gather information. However, he withdrew that consent when Mr. Hudson and Paragon’s counsel were actually in Vancouver, intending to speak to those parties.

[17] There were also concerns arising over whether or not there actually was $200,000 held in trust by Mr. Patterson, who had ceased practising law and left the country.

[18] There was evidence that the shares of Insurcom Financial Corporation, one of the guarantors of the Paragon loan, had been halted in trading and that the $986,000 that was supposed to be held in a Georgia Pacific cash account as security for the Paragon loan was missing.

[19] The Defendants also submit that Paragon and its counsel and the proposed receiver failed to be candid and make full disclosure of the facts in the application. However, it is clear from the affidavits filed and from the Bench Brief that the disclosure given at the time of the *ex*

parte order was extensive. It included reference to the fact that the proposed receiver, Mr. Hudson, had previously been appointed a private receiver for Paragon under the loan documentation, and that he and Paragon's counsel had been involved in negotiating and finalizing the Extension Agreement. In addition, counsel to Paragon disclosed that a defence to the Statement of Claim had been filed by counsel for the Defendants, and described the nature of the defences. I cannot find that there was any breach by the applicant for the *ex parte* order of its obligation of candour and frankness.

[20] In hindsight, it is regrettable that the application did not take place in open chambers so that a record would be available. However, on the basis of the strength of the evidence before me, including evidence of the loan documentation and events that had transpired since the loan was put in place, together with the extensive affidavits and Bench Brief, I was satisfied that there was a reasonable basis on which I could hear the application on an *ex parte* basis. I was satisfied that there was reasonable apprehension of serious mischief and risk of disappearance or dissipation of assets. These concerns included the concern of interference with the activities of a regulated firm in a sensitive industry, where third party rights may well be affected. I therefore chose to exercise my discretion to grant the order *ex parte*, as is "within the prerogative of a judge to do in Alberta under our rules": ***Canadian Urban Equities Ltd. v. Direct Action for Life et al***, [1990] A.J. No. 253 (Q.B.) at pages 7 and 8.

[21] The *ex parte* order contains the usual provision allowing any party to apply on two clear days notice for a further or other order. The Defendants' right to bring their position before the court on very short notice was therefore reasonably protected. The Notices of Motion seeking orders to set aside or stay the *ex parte* order were not filed until May 8, 2001, and the motions were heard on their merits at the earliest time available to counsel to the parties and the court.

Should the receiver and manager appointed under the *ex parte* order been precluded from acting in this case due to conflict?

[22] This issue is moot, given that on June 8, 2001 an order was granted replacing Hudson & Company as receiver and manager with Richter Allen and Taylor Inc. This was done with the consent of all parties other than the Defendants, who objected to the replacement, while continuing to maintain that Hudson & Company had a conflict. The Defendants make the same complaint about counsel to the former receiver and manager, who did not continue as counsel for the new receiver.

[23] Despite the complaint of conflict of interest, the Defendants have not raised any evidence that the former receiver and manager or its counsel preferred Paragon to other creditors, or failed in a receiver's duty as a fiduciary or its duty of care, other than to submit that the receiver should not have been granted the power in the *ex parte* order to sell the assets covered by the order. This power of sale was, of course, subject to court approval, and also subject to review at the time the application was heard on its merits. It was not exercised during the time the *ex parte* order was in place, and representations were heard on its propriety

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

[24] The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

[25] I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the *ex parte* order now be set aside?

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: ***Edmonton Northlands v. Edmonton Oilers Hockey Corp***., 1993, 15 Alta. L.R. (3rd) 179 (paragraphs 30 and 31).

[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

[28] In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry : ***Bank of Nova Scotia v. Freure Village on Clair Creek***, [1996] O.J. No. 5088, paragraph 12.

[29] It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a

court-appointed receiver. I also note the possibility that there will be a sizeable deficiency in relation to the loan, increasing the risk to Paragon as security holder.

[30] The conduct of Mr. Tighe, the primary representative of the Defendants, supports the appointment of a receiver. Although the Defendants submit that the assets that are the subject of the order are secure, there is troubling evidence that the mortgage-backed debentures appear to have questionable value, that the $200,000 that was supposed to be in Mr. Patterson's trust account does not exist, that the Georgia Pacific cash account that was supposed to contain $986,000 is not actually a cash account at all, but rather a trading account. Mr. Tighe's affidavits and cross-examination on affidavits do little to clear-up these matters, and instead add to the apprehension that these assets are of less value than represented to Paragon or that they in fact do not exist.

[31] The balance of convenience in these circumstances rests with Paragon, which is owed nearly $3 million. There is no plan to repay any of this indebtedness, and no persuasive evidence that the appointment would cause undue hardship to the Defendants. As stated by Ground, J. in ***Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*** [1995] O.J. No. 144 at paragraph 31, the appointment of a receiver always causes some hardship to a debtor who loses control of its assets and risks their sale. Undue hardship that would prevent the appointment of a receiver must be more than this usual unfortunate consequence. Here, any proposed sale of an asset by the receiver must be brought before the court for approval and its propriety and necessity will be fully canvassed on its merits.

[32] I am satisfied that the order appointing a receiver and manager should continue to stand on the same terms as the initial order.

Should the order be stayed?

[33] To be granted a stay of an order pending appeal, an applicant must establish:

a) that there is a serious issue to be tried on appeal;

b) that the applicant would suffer irreparable harm and no fair or reasonable redress would be available if the stay is not granted; and

c) that the balance of convenience is in favour of granting the stay after taking into consideration all of the relevant factors.

R.J.R. McDonald Inc. v. Canada (A.G.), [1994] S.C.J. No. 17 (S.C.C.); ***Schacter v. National Park Services***, [1999] A.J. No. 599 (Q.B.).

[34] On the issue of whether there is a serious issue to be tried, the Defendants have filed a defence to the claim raising several issues, the major one being that the effective rate of interest under the loan exceeds 60% and is therefore usurious. Affidavit evidence purporting to

indicate such an illegal rate of interest was filed and served on Paragon the day before this application was heard. Counsel for Paragon submitted that the evidence is defective on its face, but I was not able to make a determination of that question on the basis of the sworn evidence before me. Another factor affecting this issue is that Paragon has brought an application for summary judgment, which had not been heard at the time of this application. Given my decision on the second and third parts of the test, I have assumed that there is a triable issue relating to the loan and, therefore, to the appointment of a receiver, despite the uncertainty existing at the time of the application.

[35] With respect to irreparable harm, the Defendants submit that company assets are being tied up while the order is in force, and that therefore no payments are being made, allowing liabilities to inflate. The main assets that are the subject of this order are assets that were already pledged as security for the loan to Paragon and therefore no irreparable harm can be said to arise from this factor. The Defendants also submit that irreparable harm has been, and continues to be done to, Georgia Pacific's assets as a result of the order. The order affects only the Defendants' shares in George Pacific, and counsel for the Defendants does not represent Georgia Pacific. No objection to the order has been taken by Georgia Pacific itself, although management for Georgia Pacific is aware of the receivership. There is no evidence that the order is responsible for any harm to Georgia Pacific, aside from harm that may have arisen from the Defendants' precarious financial situation and the current status of this regulated business with the IDA.

[36] The balance of convenience in this case favours Paragon. The only asset that appears to have any real value at this stage in the proceedings is the shares in Georgia Pacific, an asset that is vulnerable by its nature, in a highly regulated business carried on in another jurisdiction. The order serves to maintain the status quo of that asset and prevent mischief caused by the possibility of illegal or imprudent manipulation or interference with the affairs of Georgia Pacific.

[37] Finally, the Defendants submit that, if a stay is not granted, the order be varied to maintain the status quo of the three major assets. By requiring court approval of a sale of any of the assets, the right of the Defendants to argue their position on a sale at an appropriate time is reasonably protected.

[38] I therefore decline to grant a stay, or to vary the order as granted.

[39] If the parties are unable to agree on the matter of costs, they may be spoken to.

DATED at Calgary, Alberta this 29th day of April, 2002.

J.C.Q.B.A.

TAB 16

CITATION: KingSett Mortgage Corporation v. 30 Roe Investments Corp., 2022 ONSC 2777
COURT FILE NO.: CV-22-00674810-00CL
DATE: 20220509

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: KINGSETT MORTGAGE CORPORATION, Applicant

AND:

30 ROE INVESTMENTS CORP., Respondent

BEFORE: Cavanagh J.

COUNSEL: *Richard Swan*, *Sean Zweig*, and *Joshua Foster*, for the Applicant

Symon Zucker, for the Respondent

Ben Frydenberg and *Darren Marr* for Canadian Imperial Bank of Commerce

Chris Armstrong for proposed Receiver, KSV Restructuring Inc.

HEARD: May 6, 2022

ENDORSEMENT

Introduction

[1] The Applicant, Kingsett Mortgage Corporation, brings this application for an order appointing KSV Restructuring Inc. ("KSV") as receiver and manager, without security, of real property owned by the Respondent, 30 Roe Investments Corp., (the "Real Property") and other property as described in the Notice of Application (collectively, the "Property").

[2] For the following reasons, I grant the Applicant's application.

Procedural background

[3] The Real Property consists of nine residential condominium units within a thirty-five story, 397 unit, condominium known as "Minto 30 Roe" located at 30 Roehampton Avenue in Toronto. The Applicant is a second mortgagee in respect of the Real Property.

[4] This application was commenced by a Notice of Application issued on January 7, 2022. The application first came before me on January 17, 2022. At that appearance, the Respondent was not represented by legal counsel. Mr. Raymond Zar, a director and principal of the Respondent, requested an adjournment of the application to allow the Respondent to retain counsel and respond to the application. The request for an adjournment was supported by the first mortgagee, Canadian Imperial Bank of Commerce

("CIBC"). I granted the request for an adjournment and the application was adjourned to be heard on February 22, 2022.

[5] On February 22, 2022, counsel who had just been retained appeared on behalf of the Respondent. There was evidence that the Respondent had made other attempts to retain counsel but had been unable to do so because of conflicts. Counsel for the Respondent requested an adjournment to prepare responding materials and respond to the application. This request was opposed by the Applicant. I granted the Respondent's request for an adjournment and the application was adjourned to March 28, 2022. I directed counsel to agree on a timetable for the application.

[6] A case conference was held before me on March 8, 2022. At that case conference, counsel for the Respondent advised that they were moving for an order removing them as lawyers of record for the Respondent. I was advised that the Respondent would be opposing this motion. A hearing date for this motion was set for April 11, 2022. As a result of the scheduling of this motion, I concluded that the hearing of the Applicant's application seeking the appointment of a receiver needed to be adjourned. The adjournment was opposed by the Applicant. A new hearing date for the application was set for May 6, 2022. In my endorsement, I wrote that "[t]he Respondent is responsible for retaining counsel, if necessary, and following a timetable to meet this hearing date".

[7] The motion by counsel for the Respondent to be removed as counsel of record was heard on April 11, 2022. On that day, Justice Penny released an endorsement and made an order removing counsel for the Respondent as counsel of record. The Respondent was served with the formal Order on April 20, 2022.

[8] A case management conference was held before me on April 20, 2022. This was arranged at the request of the Applicant to set a timetable for the hearing of the application on May 6. I approved a timetable and I directed the parties to comply with it.

[9] The Respondent retained new legal counsel on May 2, 2022. A supplemental affidavit of Mr. Zar was sworn on May 5, 2022. Some other documents relating to the Respondent's efforts to refinance were uploaded to CaseLines, including a letter of intent from Firm Capital Corporation dated May 4, 2022.

Analysis

[10] The issues raised at the hearing of the application were (i) whether the Respondent's request for an adjournment of the hearing should be granted, and, if not, (ii) whether the Applicant's application for the appointment of a receiver should be granted.

Request for adjournment

[11] The Respondent requested an adjournment of the hearing of the application for 30 days to allow time for the Respondent to complete the refinancing of the Real Property and pay out the second mortgage. The Applicant opposed this request. At the hearing, I denied the request for an adjournment. These are my reasons.

[12] The Firm Capital letter of intent is not a binding commitment and is simply an expression of interest in providing refinancing. The Respondent has had many months to arrange to refinance. There is no assurance that if a further adjournment were to be granted for 30 days, as requested, the Respondent would be successful in paying out the indebtedness secured by the applicant's second mortgage.

[13] I granted adjournments to allow the Respondent to retain counsel and to accommodate the motion by former counsel to move to be removed as counsel of record. These adjournments were opposed by the Applicant. I set the hearing date for this application on February 22, 2022 that would having regard to the motion by former counsel for the Respondent to be removed as counsel of record.

[14] In his May 5, 2022 affidavit, Mr. Zar gives evidence of his attempts to retain counsel for the Respondent. According to his affidavit, Mr. Zar did not contact any prospective counsel between February 22, 2022 and April 11, 2022. After April 11, 2022, Mr. Zar contacted several counsel who had conflicts or were not available. Mr. Zucker was retained on May 2, 2022.

[15] In my view, the Respondent has not acted reasonably and in accordance with my February 22 and March 8, 2022 endorsements by not seeking to identify counsel who could represent the Respondent after February 22, 2022 and waiting until April 11, 2022 to contact new counsel who would be available to replace former counsel for the Respondent, if the motion by former counsel to be removed were to succeed. I made it clear in my March 8, 2022 endorsement that May 6, 2022 was a firm date, and that the Respondent was expected to act diligently to ensure that counsel was retained and able to meet this hearing date. In my view, there was ample time for the Respondent to do so if efforts to contact counsel who could act on this matter were made between February 22 and April 11, 2022.

[16] The Applicant's mortgage loan has been past due for many months. The Applicant is entitled to seek remedies to enforce payment of this loan. In the circumstances, I concluded that it would not be just to the Applicant to grant a further adjournment to accommodate the Respondent's continuing efforts to refinance. The request for an adjournment was denied.

Has the Applicant shown that it would be just or convenient for a receiver to be appointed?

<u>Loan and security</u>

[17] The Applicant is a party to a commitment letter dated March 29, 2019 with the Respondent pursuant to which the Applicant agreed to provide, among other things, a non-revolving demand loan secured by a second mortgage against the Real Property. This loan was originally advanced on April 8, 2019.

[18] The parties entered into four amendments to the original commitment letter which, among other things, increased the loan facility from $1,500,000 to $1,875,000 and provided three extensions to the maturity date to December 1, 2021. The Applicant's evidence is that as

at December 13, 2021, the total indebtedness under the commitment letter, as amended, is $1,895,958.85.

[19] As general and continuing security for the payment and performance of its obligations under the commitment letter, as amended, the Respondent granted the Applicant various security including (a) a second charge/mortgage in respect of the Real Property securing the principal amount of $1,875,000, (b) a General Assignment of Rents and Leases dated April 8, 2019 pursuant to which, among other things, the Respondent assigned to the Applicant all of its rights in and to the Leases and Rents (as defined in the Assignment of Rents) in respect of the Real Property, (c) an Assignment of Material Agreements dated April 8, 2019, (d) a General Security Agreement dated April 8, 2019 pursuant to which, among other things, the Applicant was granted a security interest in all of the present and future undertakings and property of the Respondent which is located at or related to or used or required in connection with or arising from or out of the Charged Property (as defined in the second mortgage).

Default by Respondent

[20] The original maturity date of the loan facility was in April 2021. The Applicant granted extensions to the maturity date to and until December 1, 2021. In the amendment letter dated October 25, 2021 in respect of the fourth amendment, the Respondent acknowledged that "there shall be no further extensions of the Term beyond December 1, 2021".

[21] On December 1, 2021, the Respondent failed to make its monthly interest payment. By letter dated December 6, 2021, the Applicant advised the Respondent that (a) as result of the defaulted payment of interest, the loan facility was in default and an event of default had occurred under the loan documents; (b) the December 1, 2021 interest default was particularly concerning because it was not the first interest-related default under the loan facility; (c) the loan facility matured on December 1, 2021; and (d) unless the Respondent paid the December interest payment by 4 o'clock p.m. on December 8, 2021, the Applicant would demand the immediate repayment of the loan facility and enforce the security it held.

[22] On December 13, 2021, the Applicant issued a demand letter to the Respondent advising that the mortgage was in default and demanding repayment of the indebtedness. The demand letter was delivered to the Respondent contemporaneously with a Notice of Intention to Enforce Security in accordance with s. 244 of the *Bankruptcy and Insolvency Act*. The Applicant demanded payment of $1,895,958.85.

[23] Mr. Zar submits that there is evidence that the Applicant implicitly agreed to extend the loan until April 1, 2022 by debiting the extension fee from the Respondent's account on January 4, 2022, and again in February 2022, and leaving the interest rate at 9%. Mr. Zar's evidence is that the Applicant only returned the extension fee after he brought it to the Applicant's attention in settlement talks. He states that it was a shock and surprise to him when he heard about the application seeking the appointment of a receiver.

[24] In the affidavit of the Applicant's Senior Director with responsibility for this loan, Daniel Pollack, he explains that the Applicant's finance department made an error in debiting the extension fee. A draft fifth amendment to the commitment letter (that, if agreed upon, would have extended the maturity date to January 1, 2022) had had been under consideration and would have provided for an extension fee. The draft fifth extension was not executed and did not become effective. When the error was discovered, the Applicant's finance department was instructed to correct the error (which was done when the Applicant debited the Respondent's account for the December interest payment, less the extension fee).

[25] I accept the evidence from Mr. Pollack that the extension fee was debited in error and, when the error was discovered, it was corrected. I do not accept the Respondent's submission that by debiting the extension fee in error, the Applicant should be taken to have implicitly agreed to extend the maturity date for the mortgage until April 1, 2022. I note that, in any event, April 1, 2022 has passed, and the mortgage debt remains unpaid.

[26] Section 243 (1) of the *BIA* and s. 101 of the *Courts of Justice Act* provide that the Court may appoint a receiver where it is just or convenient to do so.

[27] In determining whether it is just or convenient to appoint a receiver, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No. 5088, at para. 11.

[28] In *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, Morawetz J., at para. 27, accepted the submission that while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. Morawetz J., at para. 28, accepted that in such circumstances, the "just or convenient" inquiry requires the court to determine whether it is in the interests of all concerned to have a receiver appointed.

[29] In *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, Koehnen J., at paras. 43-44, held that when the court is dealing with a default under a mortgage, the relief becomes even less extraordinary, citing *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511, at para. 20. Koehnen J., at para. 45, referenced four additional factors set out by Farley J. in *Confederation Life*, at paras. 19-24, that the court may consider in determining whether it is just or convenient to appoint a receiver:

a. the lenders' security is at risk of deteriorating;

b. there is a need to stabilize and preserve the debtors' business;

c. loss of confidence in the debtors' management; and

d. positions and interests of other creditors.

[30] In the third and fourth amendments to the commitment letter, the Respondent consented to the Applicant's appointment of a receiver, either privately or court appointed, in the event of a default by the Respondent beyond the applicable cure period. In the General Security Agreement, the Respondent agreed that after the occurrence of an event of default, the Applicant will have the right to appoint a receiver.

[31] On this application, there is no evidence that the second mortgage against the Real Property is at risk of deteriorating. The evidence is that the condominium units are rented and rents are being paid. The Respondent is continuing to pay interest on the mortgage debt. The first mortgagee, CIBC, is willing to continue to defer and forbear from taking any enforcement steps in connection with its mortgages for a period of thirty days commencing May 6, 2022, in order to allow the Respondent an opportunity to complete its refinancing with Firm Capital Corporation. CIBC does not take a position in opposition to the application.

[32] Mr. Pollack has stated in his affidavit that the Applicant has lost confidence in the Respondent's management to continue to satisfy the Respondent's obligations, obtain refinancing and manage the Real Property. I do not regard this to be a statement in the air and without objective evidentiary support, as the Respondent submits. The Applicant's mortgage loan matured on December 1, 2021 and the Respondent has had five months to refinance but has not done so. The Respondent submits that the appointment of a receiver is an extreme remedy that is not needed when "less aggressive" remedies are available, but the only alternative course of action the Respondent submits should have been taken was for the Applicant to have commenced private power of sale proceedings. The Applicant was under no obligation to do so, and has brought this application to seek a remedy to which the Respondent has contractually agreed.

[33] The Respondent submits that there is evidence that the Applicant is not acting in good faith by seeking to appoint a receiver. In support of this submission, the Respondent relies on the evidence of Mr. Zar in his May 5, 2022 affidavit that in discussions between his former lawyer and a lawyer for the Applicant, the Applicant's lawyer advised "in highly defamatory terms what his clients thought of me and wanted to do to me". Mr. Zar states that it was clear to him and his former counsel that the Applicant is using the application to appoint a receiver to cause him significant harm, such that this application is excessive and unnecessary, and is brought in bad faith.

[34] The Applicant's application was brought after extensions of the maturity date for the loan had been given, the mortgage debt had matured, and demands for payment had been made. This, objectively, provides a good faith basis for this application. The information given by Mr. Zar in his affidavit (that he obtained from the Respondent's former counsel) of what was said in the telephone conversation in question is vague and accompanied by Mr. Zar's characterization of what was said. Mr. Zar does not recite any particular statements that were made by the Applicant's counsel to the Respondent's former counsel. If Mr. Zar's hearsay evidence is admitted into evidence notwithstanding rule 39.01(5) of the *Rules of*

Civil Procedure, it is far from sufficient to allow me to draw the inference I am invited to make, that the Applicant lacks good faith in bringing this application. I do not draw this inference.

[35] The Applicant's loan has been overdue since December 1, 2021. The Applicant is entitled to take steps under its security to enforce payment of the indebtedness owing to it. The Applicant is not required to do so only through private power of sale proceedings. The appointment of a receiver will provide an effective and appropriate means to realize on the mortgage security by a court-appointed officer who owes duties to all stakeholders.

[36] I have considered the relevant circumstances and I am satisfied that the Applicant has shown that the appointment of receiver is just and convenient in the circumstances.

Disposition

[37] For these reasons, I grant the Applicant's application.

[38] Order to issue in form of Order signed by me today.

Cavanagh J.

Date: May 9, 2022