

Practitioners' Update: Trust and Estate Law

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Common Law

Cowper-Smith v. Morgan, 2017 SCC 61

- Update from last year's BCCA decision.
- Appeal on issue of proprietary estoppel.
- Findings on undue influence and independent legal advice not appealed.

Cowper-Smith v. Morgan, 2017 SCC 61

- Proprietary estoppel requires:
 1. Representation or assurance to claimant of a right or benefit over property.
 2. Claimant reasonably relies on expectation to do or refrain from doing something.
 3. Claimant suffers a detriment as a result of reliance leading to unfair or unjust result for responsible party.
- Estoppel operates to attach to the property interest of the representor in favour of the claimant.
- BCCA majority held assurance so uncertain that could not be the basis for estoppel.
 - Property owned by another person when representation made.
 - Representor merely a potential beneficiary at time representation made.

Cowper-Smith v. Morgan, 2017 SCC 61

SCC, per McLachlin, CJ, granted appeal.

- **Representation:** Not necessary for representing party to own an interest in the property at time of the claimant's reliance provided reliance is reasonable.
- **Reasonable Reliance:** Fact that daughter and son knew for over a decade that daughter would inherit a 1/3rd interest in the property created reasonable reliance by the brother.

Cowper-Smith v. Morgan, 2017 SCC 61

- **Equity:** Arose in brother's favour when he reasonably relied on that expectation in respect of the 1/3rd interest.
- **Note:** Estoppel did not arise at time made, but attached to representor's interest at moment she obtained it from estate.
- **Remedy:** Claimant entitled to minimum relief necessary to satisfy the equity in their favour.
 - In this case - enforce estoppel and allow brother to purchase sister's interest at fair market value as of the approximate date on which he would reasonably have expected to be able to do so.

What Did We Learn?

- Reasonably expected future property interests can create rights by proprietary estoppel if representation is made and reasonably relied upon and then interest in the property acquired subsequently.
- Be careful what you say to your siblings!

Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8

- Non-traditional trust case (labour and material payment bond).
- Issue was trustee's duty to advise potential beneficiary of existence of trust.
- Valard was unaware of existence of trust and did not file claim in time under the bond.

Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8

1. Is there a duty to disclose the existence of an express trust?
 - SCC reviewed duties of trustee, including to account to beneficiaries.
 - Analysis of disclosure of trust existence focused on whether beneficiary would be unreasonably disadvantaged by lack of disclosure.
 - Distinguished cases where interest of the beneficiary is remote (i.e. vesting unlikely) or discretion unlikely to be exercised in favour of that beneficiary.
 - Court rejected trustee's suggestion it was merely a "bare trustee" with no express obligation to disclose (more later on bare trusts ...).

Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8

2. How is the duty to be exercised?

- “...the standard to be met in respect of this particular duty is not perfection, but rather that of honesty, and reasonable skill and prudence” (at para 26).
- Not a question to be looked at in hindsight but in the circumstances of the particular case.
- **Factors include:**
 - Trust terms;
 - Identity of trustee and beneficiaries;
 - Size of class of potential beneficiaries; and
 - Pertinent industry practices.
- **Note:** Few or no steps may be required if reasonable to assume beneficiaries knew of the trust’s existence or were practically difficult to advise

Valard Construction Ltd. v. Bird Construction Co., 2018 SCC 8

3. What was the remedy?

- Court recognized here no loss suffered by trust itself leading to payment into trust by trustee (normal remedy for trustee breach of duty).
- Allowed the individual beneficiary to obtain damages from trustee itself for breach of trust.

What Did We Learn?

- Non-traditional fact situation, but implications for other express trusts.
- What about private trusts where confidentiality is desired by the settlor/trustee?
- Can express clauses in the trust agreement absolve the trustee from any duty to inform potential beneficiaries?
- Can the trustee be exculpated for a breach of trust arising therefrom?

S.A. v. Metro Vancouver Housing Corporation, **2017 BCCA 2**

- Opposite of *Valard* – beneficiary knows of trust and resists disclosure to a third party.
- Arose in context of subsidized housing provided to S.A. by MVHC.
- S.A. was beneficiary of a trust which had been created by court order following a *Wills Variation Act* application in 2012.

S.A. v. Metro Vancouver Housing Corporation, **2017 BCCA 2**

- Trust terms were discretionary, but was not a true Henson trust.
- Operative clause was “pay so much of the Trust’s income and capital as the trustees decide is necessary or advisable for the care, maintenance, education, or benefit of S.A.” (at para 12).
- S.A. was provided a power of appointment by will on her death, with a further gift over to her intestate heirs if not exercised.

S.A. v. Metro Vancouver Housing Corporation, **2017 BCCA 2**

1. Was S.A.'s interest in the trust an “asset” requiring disclosure?
 - Court concluded:

“While S.A. may not have a vested interest in the Trust, she clearly has a beneficial interest. If she wishes to apply for a rental subsidy she must disclose the amount in the Trust”. (at para 54)
 - Court held trust was an asset of S.A.
 - MVHC entitled to request information to assist in determining eligibility for rental subsidy.
 - Includes statement showing the current balance of the trust and details of all disbursements made since its establishment.

S.A. v. Metro Vancouver Housing Corporation, **2017 BCCA 2**

2. Disability Alliance BC Society intervened:

- Focused on the nature of discretionary trusts in that a beneficiary's interest in it cannot be valued.
- Raised concerns about other forms of social assistance that rely on eligibility tests based on asset values
- Court did not accept the broad contentions asserted, in part because assistance by MVHC was discretionary.

What Did We Learn?

- Notwithstanding court's assertion, may in fact affect support eligibility for beneficiaries of discretionary trusts.
- Can true Henson trusts be distinguished?
- What if the trust arose through father's will originally and not by a later court variation?
- What if the trust had other potential beneficiaries who could have received income or capital on a discretionary basis in addition to S.A.?

Teixeira v. Markgraf Estate, 2017 ONCA 819

- Issue was a failed *inter vivos* gift by cheque prior to maker's death.
- Three elements of valid gift:
 1. Intention to gift (no consideration or remuneration);
 2. Acceptance by donee;
 3. Delivery or transfer of the property sufficient to complete the gift.
- Issue here was delivery.
- Significant difference in enforcement between contracts and gifts if no delivery.

Teixeira v. Markgraf Estate, 2017 ONCA 819

- Delivery
 - Actual physical transfer of subject matter of gift to donee typically required.
 - Constructive delivery may be satisfactory.
 - “...the critical questions have been whether or not the donor retained the means of control and whether all that could be done had been done to divest title in favour of the donee” (at para 43)

Teixeira v. Markgraf Estate, 2017 ONCA 819

- In this case, gift was **by cheque**.
 - Gift by cheque is only complete when it is cashed or has been cleared.
 - Was presented to bank but uncashable at time as insufficient funds in chequing account of donor.
 - Other funds on deposit at same bank but not in chequing account.
- Donee argued equitable principles
 - Estoppel by convention and “Equity will not strive officiously to defeat a gift”
 - None successful.

What Did We Learn?

- Execution, execution, execution!
- Consider implications for delivery of other types of gifts:
 - Items with registered title (land, vehicles, etc.).
 - Transfers to express trusts.
- But consider cases where transfer of shares may be effective in favour of donee if donor has done everything necessary to create valid trust but something further remains to be done at law (see para 61 of decision).
- Get to the bank quickly!

Scoretz v. Kensam Enterprises Inc., 2018 BCCA 66

- Involved a bare trust for commercial arrangement for the ownership of certain corporate shares, and then the inevitable falling out of the parties!
- Defendants admitted shares in question were held for plaintiff under a bare trust arrangement, but disagreed on their duties as bare trustee.
- A principal issue was under what terms must the trustee transfer the shares to the beneficiary after demand.

Scoretz v. Kensam Enterprises Inc., 2018 BCCA 66

- Trial judge found Kensam was bare trustee, was not an agent of plaintiff, had breached its duties as trustee, was not entitled to indemnification before transferring the property and had unreasonably delayed in transferring the property.
- Awarded damages to plaintiff against Kensam and against individual defendant for knowing participation and assistance in the breach of trust.

Scoretz v. Kensam Enterprises Inc., 2018 BCCA 66

1. Is a bare trustee a fiduciary?

- Bare trustee owes a fiduciary duty to beneficiary of trust.
- Primary duty is to carry out terms of the trust.
- “A bare trustee has no further duty to perform except to convey the property to the beneficiary on demand, and to exercise reasonable care over the property” (at para 23).
- Fiduciary duties of bare trustee are “clearly limited” (at para 23).

Scoretz v. Kensam Enterprises Inc., 2018 BCCA 66

2. Is a bare trustee always an agent?

- Defendants alleged agency relationship which predominated.
- Court held agency can arise alongside bare trusteeship.
- Question is whether trustee has independent powers, discretions or responsibilities.
- On facts of this case, no control of Kensam by beneficiary and no agency relationship.

Scoretz v. Kensam Enterprises Inc., 2018 BCCA 66

3. Is there a right to indemnification by bare trustee?

- Defendant's alleged right as bare trustee to demand security and indemnity for tax consequences for the share transfer.
- Court held a right to security or indemnification does not arise in a bare trusteeship.
- Only duty was to transfer title of shares upon demand.
- There were no actual expenses incurred in administering trust by the bare trustee which could have been reimbursed under *Trustee Act*.

What Did We Learn?

- Common planning tool for both probate avoidance by individuals and in commercial arrangements.
- Use of corporation as bare trustee no different than individual unless beneficiary exercises control over the trustee.
- Must act in accordance with beneficiary's instructions or face liability.

Re Evans Estate, 2018 NSSC 68

- Involved an insolvent estate for which the Public Trustee was appointed as personal representative
- 13 unsecured debts remained, including a CRA debt of around \$8,000
- Certificate sought from CRA under s.159 of the *Income Tax Act*
- Registrar ordered the funeral expenses be paid in priority to the CRA debt per s.83(3) of the NS *Probate Act*

Re Evans Estate, 2018 NSSC 68

Section 83(3) of NS *Probate Act*:

(3) On the settlement of an insolvent estate the assets of the estate shall be distributed in the following order of priorities to those persons who have rendered their accounts, duly attested, in the following priority:

- a) **first - in payment of funeral expenses, including a headstone, to the extent such expenses appear reasonable;**
- b) second - in payment of probate taxes and court fees;
- c) third - in payment of the personal representative's commission and legal fees, on an equal footing;
- d) fourth - in payment of reasonable medical expenses incurred during the last thirty days of the deceased's life, on an equal footing;
- e) **fifth - in payment of all other debts.**

Re Evans Estate, 2018 NSSC 68

Section 159 of the *Income Tax Act*:

159 (1) For the purposes of this Act, where a person is a legal representative of a taxpayer at any time,

(a) the legal representative is jointly and severally, or solidarily, liable with the taxpayer [...]

(3) If a legal representative (other than a trustee in bankruptcy) of a taxpayer distributes to one or more persons property in the possession or control of the legal representative, acting in that capacity, without obtaining a certificate under subsection (2) in respect of the amounts referred to in that subsection,

(a) the legal representative is personally liable for the payment of those amounts to the extent of the value of the property distributed;

Re Evans Estate, 2018 NSSC 68

NSSC Held: “CRA has “first priority” against the monies remaining in the Estate, as evidenced by the clearance certificate” (at para 14).

Two reasons:

1. Crown Prerogative & Statutory Interpretation
2. Principle of Paramountcy

Re Evans Estate, 2018 NSSC 68

Potential Impact on Other Jurisdictions

- BC & PEI's *Interpretation Acts* expressly bind federal crown to provincial statutes.
- AB – *Chernichan v Chernichan (Estate)*, 2001 ABQB 913
 - Opposite ruling, but entirely based on the common law of funeral expenses and limited focus on the priorities aspect.
- ON – *Denuzzo v McLachlin*, 2005 CanLII 34823 (ONSC)
 - States the same principle as *Evans*, but without any extensive analysis; rather as a matter of fact.

What Did We Learn?

- Payment of tax debt takes priority to payment on funeral expenses in Nova Scotia
 - Might extend to other provinces with similar legislative structure.
 - Exceptions - BC and PEI
- Does it matter when the tax debt arose (pre-existing or on terminal filing)?
- Any different if the Estate begins as insolvent, or becomes insolvent during the administration and some expenses already paid?

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Civil Law

Droit de la famille 172259, 2017 QCCA 1495

Lifting the Trust Veil #1

To determine amount of alimony payable to mother, should father's corporate assets, held in a Family Trust, be included in calculating his means to pay?

- Family Trust created during the marriage and corporate assets transferred to trust.
- Family Trust structure:
 - **Beneficiaries:** Father, mother and their children.
 - **Control:** Father has discretionary power to designate beneficiaries and determine the use of the trust property.
 - **Trustees:** Father, his brother, and his best friend.

Droit de la famille 172259, 2017 QCCA 1495

- Superior Court: did not consider the Family Trust assets in evaluation of father's means and resources
- Court of Appeal increased amount payable to mother:
 - Although the Family Trust is a patrimony by appropriation, autonomous and distinct from the father's patrimony, the father nonetheless has complete control of the trust property
 - The father chose to transfer the entirety of his share of the corporate profits in the Family Trust, therefore the trust property is included in his "means" and "resources" (per art. 587 CCQ & art. 15(2) of the *Divorce Act*)

Karam c. Succession de Yared, 2018 QCCA 320

Lifting the Trust Veil #2

Should the value of the family residence acquired by a trust created during the marriage be included in calculating the value of the family patrimony (art. 415 CCQ)?

- **Family Trust structure:**
 - **Beneficiaries:** Mother and the children.
 - **Control:** Father has discretionary power to designate and remove beneficiaries, he later renounces to that power by notarial deed. He also has the power to determine the shares of each beneficiary.
 - **Trustees:** The father

Karam c. Succession de Yared, 2018 QCCA 320

Superior Court:

- The distinct patrimony of a trust cannot be set up to avoid the application of rules of public order.
- The father had near total control of the trust, therefore *de facto* control of the family residence.
- The entire value of the residence is included in the father's property for the purpose of calculating the family patrimony.

Karam c. Succession de Yared, 2018 QCCA 320

Court of Appeal:

- Rejected the concept of “lifting a trust veil” entirely.
- Concluded that no portion of the value of the family residence should be included in the family patrimony.

Boettger c. Agence du revenu du Québec, 2017 QCCA 1670

Residence of a trust for tax purposes

- Trust created in Montreal for the benefit of the settlor's wife, as part of exchange of corporate shares.
- The Trust was meant to be an Alberta trust in order to benefit from lower tax rate.
- The sole trustee was domiciled in Alberta, paid Alberta and federal taxes in 2003.
- The Trust assets consisted mainly of corporate shares, the trustee did not actively invest trust property to generate income.
- In 2007, MRQ assessed the trust as a resident of Québec, resulting in \$1.8M tax bill, late filing penalties and statutory interest.

Boettger c. Agence du revenu du Québec, 2017 QCCA 1670

Where did effective control and administration take place? In Québec.

Findings of fact by the Court:

- Trustee did not know the settlor or the beneficiary prior to being hired (by the settor's Montrea lawyers)
- The trustee simply executed the plan elaborated by the Montreal lawyers and accountants for the settlor, beneficiary and corporation (as set out in written memos)
- The trustee fees and trust expenses were paid by the corporation, the settlor and from the proceeds of the corporate share redemption
- The trust did not create any economic activity in Alberta
- The Montreal accountants did not keep separate files for their work performed for the corporation and for the trust

Ostiguy c. Allie, 2017 SCC 22

Acquisitive prescription vs. Publication

Without a court order, can acquisitive prescription be set up against a new owner whose title is registered?

- Publication does not “create” a right
- Acquisitive prescription can be set up against third parties without publication
- Article 2918 CCQ: *A person who has for 10 years possessed an immovable as its owner may acquire the ownership of it only upon a judicial application.*

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Thank you!!!