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Featuring Counsel Comments From:

**Sarah Miller, Chad Williamson and Scott Nicol,
Andrew Stead and Preet Saini,
Andy Hayher Q.C. and Emily Verbiski**

Featured Cases:

Mostafa Altalibi Professional Corporation v. Lorne S. Kamelchuk Professional Corporation, 2022 ABCA 239

Areas of Law: Civil Procedure, *Alberta Rules of Court*, Jurisdiction, Standard of Review, Costs

~Videoconferencing is a successful and effective way of conducting legal matters and advancing litigation, particularly during a pandemic when there are significant health and safety concerns to consider~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The appellants and the respondents, both dentists and their respective professional corporations, dispute a cost sharing agreement between their two orthodontic practices. A claim and counterclaim were commenced in 2017. In May 2020, the respondent sought to conduct questioning and, due to the Covid-19 pandemic, proposed questioning take place via videoconference. The appellant was not in agreement and the respondent sought an order. In November 2020, the matter came before a master who granted an order directing that both sides schedule questioning by videoconference within one month, to be completed within three months, noting that as a matter of general knowledge, Covid-19 cases were on the rise and restricted social interactions correlated with decreased case numbers (2020 ABQB 673). The appellant appealed the master's order as it applied to the appellant's questioning of the respondent's witness and costs. Prior

Mostafa Altalibi Professional Corporation v. Lorne S. Kamelchuk Professional Corporation, (cont.)

to determination of the appeal, the respondents questioned the appellant's witness in February, March, and April 2021, by videoconference.

The appeal was subsequently heard by the chambers judge and dismissed by way of an oral decision on December 2nd, 2021, with costs. The chambers judge adopted the reasoning of Justice Lema in *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2020 ABQB 359 and set out seven basic principles from the master's reasons: (1) the court has jurisdiction to order remote questioning; (2) as a matter of general knowledge, Covid cases were rising and restricting social interactions correlates with decreased case numbers; (3) videoconferencing has been successful and effective for the administration of justice during the pandemic; (4) in-person questioning "requires a sustained encounter between people in a small room for lengthy periods of time on multiple consecutive days"; (5) videoconferencing had been used prior to

Mostafa Altalibi Professional Corporation v. Lorne S. Kamelchuk Professional Corporation, (cont.)

the pandemic and increased use was justified by same; (6) the purpose of questioning is to generate a transcript, which can be achieved through remote questioning; and (7) it is not appropriate to simply pause the progress of the matter while waiting for the pandemic to resolve itself. The chambers judge dismissed the appeal, having determined that the master was correct on each point. The appellants appealed the chambers judge's decision, contending that the dismissal of their appeal was an "unreasonable exercise of the Court's discretion," the Rules of Court are silent on allowing videoconferencing for questioning, and that both the master and chambers judges failed to fully consider the importance of assessing credibility during questioning.

APPELLATE DECISION

The Court of Appeal dismissed the appeal, finding no error in the chambers judge's analysis. The Court agreed with the chambers judge that the combined effect of foundational rules 1.2(1) and (2), 1.4(1) and (2)(c), 1.7(2), and 6.10, which exist to ensure the fair, just and timely resolution of parties' claims, is that the Court has the authority to direct remote questioning. The Court further found that the chambers judge provided a thorough examination of the issue of credibility, that technology has improved such that related concerns have decreased to the point that the argument lacks substance and, moreover, that observations of physical demeanor are rarely determinative of credibility in any event. On the matter of costs, the Court determined that the issue was not novel, as was argued by the appellants, and that Rule 10.29(1) establishes that the successful party is presumptively entitled to costs.

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The Canada Trust Co (McDiarmaid Estate) v. Alberta (Infrastructure), 2022 ABCA 247

Areas of Law: Civil Procedure, Disclosure, Settlement Agreements

~A settlement agreement entered into between parties in a dispute may be relevant and material to a separate ongoing action depending on the information contained within the agreement~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The appellants, the executors of the estate of Helen McDiarmaid, commenced an action against the respondent, Alberta Infrastructure. The action was for breach of legal and equitable obligations stemming from a 1986 agreement under s. 30 of the *Expropriation Act*, RSA 1980, c e-16 whereby the respondent purchased land from Ms. McDiarmaid to construct a ring road. The respondent entered into a similar agreement with the owner of land to the north of Ms. McDiarmaid's land. The agreements allowed the sellers to have their land valued by the Land Compensation Board (the "LCB"). The other seller opted to have its land valued by the LCB and during the course of a series of hearings and appeals, the respondent settled with the seller.

In 1986, the respondent began expropriation proceedings to acquire the land to the west of Ms. McDiarmaid's land. The respondent eventually acquired possession of this land in 1988 and its owners commenced an action in the Court of Queen's Bench for compensation. The respondent settled this action in 1990 shortly before trial.

The appellants' action was commenced in 2001, and alleged the respondent had paid Ms. McDiarmaid below market value for her land. During the course of the action, the appellants requested that the respondent produce the settlement agreements that it entered into in relation to the land to the north and west of Ms. McDiarmaid's land. The respondent objected to the production of the agreements on the basis that they were not relevant and

The Canada Trust Co (McDiarmaid Estate) v. Alberta (Infrastructure), *(cont.)*

material to the ongoing dispute, and that they were protected by privilege and confidentiality.

The appellants applied to the case management judge for production of the agreements. The case management judge decided that the agreements were not relevant and material.

The Canada Trust Co (McDiarmaid Estate) v. Alberta (Infrastructure), *(cont.)*

APPELLATE DECISION

The majority allowed the appeal in relation to the settlement agreement entered into for the northern lands. They found that this agreement was relevant and material under Part 5 of the *Alberta Rules of Court*, Alta Reg 124/201. The majority referred the issue of whether the agreement was privileged and confidential back to the case management judge.

The majority held that the case management judge erred by not considering whether the agreement "could reasonably be expected to ascertain evidence that could reasonably be expected to significantly help resolve an issue in dispute." The majority found that the settlement agreement for the sale of the northern land, which was negotiated in the course of a dispute over only the fair market value of the property, could assist in determining the fair market value of Ms. McDiarmaid's land. The litigation over the land to the west, which was expropriated, however, was not only a claim for the fair market value of the land, but also for a substantial allowance under s. 44 of the *Expropriation Act*. The majority found that the settlement agreement in relation to the western land contained no reference to land value and no indication of how the various heads of damages that made up the settlement were factored into the agreement. Therefore, this settlement agreement was not relevant and material to the ongoing dispute.

Justice Wakeling dissented and would have upheld the case management judge's decision that neither agreement was relevant and material.

Alberta Health Services v. Pawlowski, 2022 ABCA 254

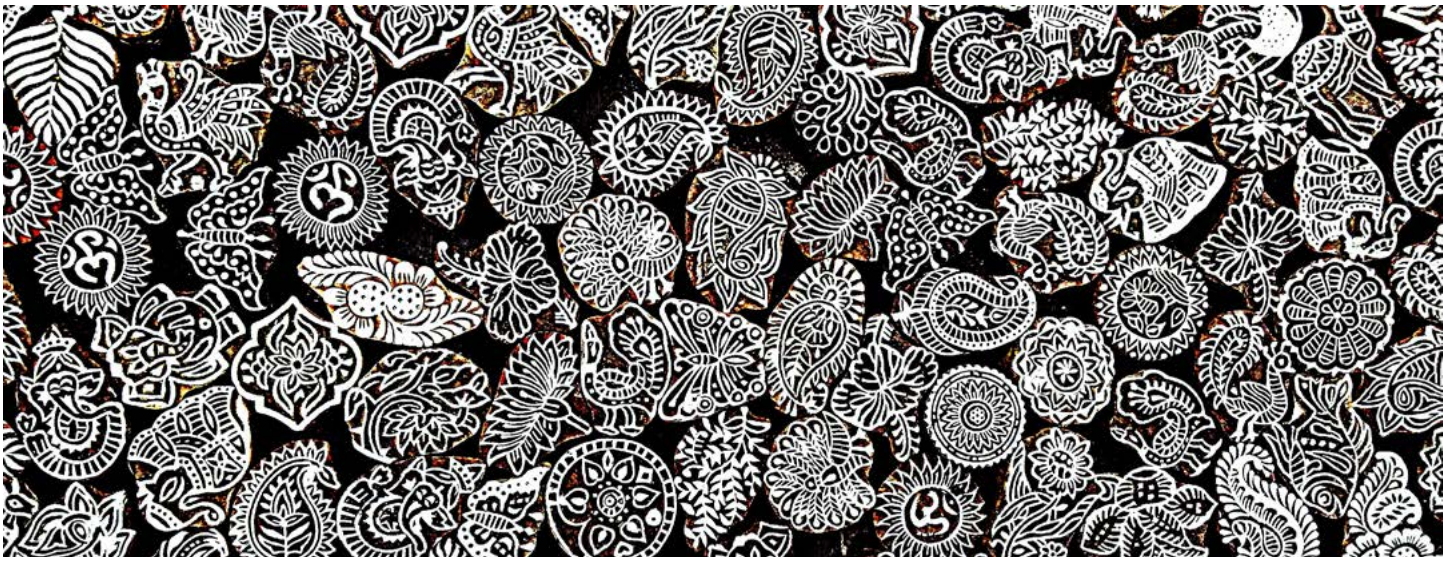
Areas of Law: *Ex parte* Injunctions, Civil Contempt, *Public Health Act*, Constitutional Law, *Canadian Charter of Rights and Freedoms*

~The language of an injunction must be sufficiently clear and unambiguous as to whom the order applies and the nature of the prohibited conduct in order to form the basis of a finding of civil contempt~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The World Health Organization declared Covid-19 a pandemic in March 2020. By May 2021, Alberta was in the third wave of the pandemic and, in response, Alberta's Chief Medical Officer of Health ("CMOH") implemented public health measures in the form of CMOH orders made pursuant to the *Public Health Act*, RSA 2000, c P-37 ("the *Act*"). CMOH Order 19-2021, issued May 6th, 2021, included requirements for mandatory masking and restrictions on indoor and outdoor gatherings, including capacity limits and physical distancing requirements. Alberta Health Services ("AHS") became aware that one of the appellants, Christopher Scott, and others were organizing and promoting public gatherings to protest and breach CMOH orders, including a specific gathering planned for May 8th, 2021. On May 6th, 2021, AHS applied for and obtained an *ex parte* injunction under the *Act* to enforce the CMOH orders ("the Injunction"). The appellants, Mr. Scott, Artur Pawlowski, and Dawid Pawlowski, were found in contempt of the Injunction and sanctions imposed accordingly.



Alberta Health Services v. Pawlowski, *(cont.)*

With respect to Mr. Scott, he did not dispute his contempt. The chambers judge determined his conduct was "extremely aggravating" as he engaged in direct and public defiance of a court order designed to save people's lives, and imposed a sentence of time served (three days in prison), a fine of $20,000.00, costs of $10,922.25, 18 months probation, 120 hours of community service, an order that Mr. Scott remain in Alberta, and that he include a disclaimer when speaking against government orders or recommendations in a public gathering or forum (*Alberta Health Services v Scott*, 2021 ABQB 812). With respect to the Pawlowskis, they denied they were in contempt, arguing they were not named in the Injunction, it did not apply to them, there was improper or no service, they were not made aware of the prohibitions set out in the Injunction, and that it was uncertain whether it applied to church services. The chambers judge disagreed, finding the appellants were served and had full knowledge of the Injunction. Further, the court held that it was not necessary for the Injunction to specifically identify religious services as a type of public gathering to which the Injunction was directed and that the use of nominal respondents (i.e. John Doe, Jane Doe) in the style of cause made it

clear the Injunction was intended to cover individuals not specifically named therein. The Pawlowskis' sanctions were similar to Mr. Scott's. Mr. Scott appealed the sanctions imposed for being "excessive and disproportionate" and a violation of his right to mobility and freedom of expression under the *Canadian Charter of Rights and Freedoms*. The Pawlowskis appealed their contempt findings as well as the sanctions imposed.

APPELLATE DECISION

The Court of Appeal allowed the appeals in part. With respect to Mr. Scott, the mobility and qualified speech provisions of the order were set aside by consent, AHS having acknowledged that the provisions of the order offended the *Charter*. The Court held that those provisions and the procedure followed were an error in principle. The Court noted that contempt proceedings have two purposes: (1) to ensure compliance with court orders; and (2) to punish the contemnor (*Ouellet v. BM*, 2010 ABCA 240 at para 60), and that the factors to be considered include proportionality, presence of aggravating and mitigating factors, deterrence, reasonableness of a fine, and appropriateness of incarceration (*Law Society of Alberta v Beaver*, 2021 ABCA 163 at para 78). While having found that Mr. Scott's conduct demonstrated a deliberate disregard for the authority of the court, the Court determined that in replacing the chambers judge's sanctions it was appropriate to take into account the fact that Mr. Scott had been subject to the now vacated mobility and qualified speech provisions for a period of six weeks. The Court substituted the chambers judge's sanction order with the lesser sentence of time served (three days' prison), a $10,000 fine, and 8 months' probation. With respect to the Pawlowskis, the Court held that in determining who is subject to an order, the words used must be clear and are presumed to have been included for a reason. The Court noted two aspects to paragraph 1 of the Injunction (1) identifying the persons to which the Injunction applies; and

Alberta Health Services v. Pawlowski, *(cont.)*

(2) identifying the nature of the prohibited conduct. The Court further noted that the chambers judge correctly outlined the three elements that must be established beyond a reasonable doubt for a finding of civil contempt: (1) the order alleged to have been breached must state clearly and unequivocally what should and should not be done; (2) the party alleged to have breached the order must have actual knowledge of it; and (3) the partly allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act the order compels (*Carey v Laiken*, 2015 SCC 17 at paras 32-35). However, the Court held the chambers judge erred in finding that the Injunction applied to the Pawlowskis such that they could be found in contempt of it, that the Injunction was not sufficiently clear and unambiguous when it referred to other parties "acting independently to like effect". In the result, the Court allowed the Pawlowskis' appeals and set aside the finding of contempt and sanction order.

COUNSEL COMMENTS

Alberta Health Services v. Pawlowski, 2022 ABCA 254

Counsel Comments provided by Sarah Miller,
for the Appellants, Artur Pawlowski and Dawid Pawlowski

Sarah Miller

"In May 2021, Alberta Health Services (**AHS**) obtained an *ex parte, quia timet* injunction (the **Injunction**) to prohibit Christopher Scott, Whistle Stop Café, and Glen Carritt (**Named Respondents**) from organizing, promoting, or attending a gathering that failed to comply with public health orders. The Injunction also named John and Jane Does in the style of cause and referred to such persons as acting under the instructions of the Named Respondents, in concert with the Named Respondents, or "independently to like effect" of the Named Respondents (the **Doe Clause**).

Law enforcement took the position that the Doe Clause should be interpreted to apply to all persons in the province of Alberta. When the Pawlowskis held church service in excess of the current gathering restrictions, law enforcement arrested and detained the Pawlowskis for three days, ostensibly under the arrest powers in the Injunction. The Chambers Justice agreed with this broad interpretation, finding that the Doe Clause:

> [Did] not restrict enforcement of it to those connected to the named target Christopher Scott and the Whistle Stop Café. Instead, it applies to all individuals willing to breach the operative terms of the Order after having received notice of it.

In other words, the Chambers Justice expanded the Doe Clause, reading it to mean all Albertans. This finding was overturned by the Court of Appeal.

The Alberta legislature, through our elected officials, has empowered our Chief

COUNSEL COMMENTS

Medical Officer of Health to make public health orders **and** has set out what penalty should follow if someone breaches a public health order in the *Public Health Act*, RSC 2000, c P-37 (the ***Act***). If the Injunction was to apply to all Albertans, then it essentially overruled the *Act* and exposed Albertans to excess legal liability that the legislature had not endorsed, contrary to the division of powers.

The *Act* applies to all Albertans. The Injunction does not. An injunction of this nature should apply *narrowly* to specific individuals and specific acts. A *quia timet* injunction requires the applicant to meet a high standard of proof. AHS did not plead or disclose any material facts regarding the Pawlowskis or weekly church services when they sought the Injunction. In applying for the Injunction, AHS told the Court it was "not trying to get a broad remedy to go out and arrest 4,000 Albertans" and not seeking relief in respect to Calgary events. Despite these assurances, AHS subsequently sought to enforce the Injunction against the Pawlowskis in Calgary and find them in contempt.

The appropriate legal response to the Pawlowskis' church gathering would have been to issue a ticket or summons under the *Act*. Alternatively, AHS could have sought an order which had the requisite specificity to apply to the Pawlowskis and their conduct. Instead, AHS and law enforcement took a covert approach by obtaining the order *ex parte*, giving no notice of the Injunction to them or legal counsel once it was obtained, refusing to explain the order, serving it on only one of the Appellants well after the gathering had already commenced (despite having ample time to serve it on both Appellants well in advance of the gathering), arresting them after the gathering had concluded, and detaining the Pawlowskis for more than 50 hours despite no ongoing threat to public safety.

A covert approach does not protect public health. No matter how unfounded the Pawlowskis' perspectives may have been, there was simply no basis for the contempt proceedings. There were many issues with the contempt proceedings - the Pawlowskis were not named, they clearly had no association to the Named Respondents, the Injunction incorporated overly broad and vague language, it was unclear who was prohibited, one of the Appellants was not served with the Injunction, and the notice provision in the Injunction was not complied with at all. The proceedings in Queen's Bench were not informed by rule of law and

COUNSEL COMMENTS

established legal tests, but motivated and decided by human emotion and a distaste for the Pawlowskis' rhetoric and beliefs. The Pawlowskis may have been on the "wrong side of science", but this is not the legal test for contempt. We do not punish people in Canada for having the "wrong" opinion, and the Chambers Justice misdirected himself out of fear or anger related to the pandemic rather than a reasonable consideration of law, facts, and the burdens of proof.

Counsel seeking and enforcing injunctions are encouraged to meet established legal tests and afford respondents procedural fairness, regardless of how detestable the respondents may seem."

COUNSEL COMMENTS

Alberta Health Services v. Pawlowski, 2022 ABCA 254

Counsel Comments provided by Chad Williamson and Scott Nicol, Counsel for the Appellant, C. Scott

Chad Williamson

Scott Nicol

"The Court of Appeal's decision on appeal of an unconstitutional sanction given to Christopher Scott following a finding of contempt of court demonstrates the importance of *Charter* protected rights at all stages of the application and administration of justice — even in sentencing.

The Court of Appeal recognized that a penalty for contempt must be consistent with *Charter* protected rights and freedoms. Furthermore, if a judge is considering laying a sanction that exceeds or is significantly different than that requested by the prosecuting party — as in this case — the judge must alert the responding party and give Counsel the opportunity to address the proposed sanction. These requirements were not met when the lower Court judge imposed sanctions which violated Mr. Scott's *Charter* protected mobility rights and rights to freedom of speech and expression. In this case, the Court of Appeal reduced the amount of the fines given, and effectively committed the balance of Mr. Scott's sentence to what had been served.

This ruling was a sensible response. Contempt proceedings are supposed to uphold respect for the Courts and the judiciary. But respect is a two-way street. While the COVID pandemic has been polarizing, excessively and unconstitutional sanction imposed upon those who hold opposing views, even where they were found to breach rules, is only likely to sow further division and could bring the administration of justice into disrepute.

COUNSEL COMMENTS

What was especially alarming in this case, was the sanction imposed on Mr. Scott by the lower Court which compelled Mr. Scott to make public statements containing views on science which would undoubtedly change over the course of the 18-month period during which his speech would have been compelled whenever he would speak out in a public forum against government COVID mandates. We are already seeing the consensus on those views changing. The Court of Appeal's decision not only speaks to the protection of *Charter* interests, but is also sensible in the context that mandated speech, which is likely to become at least somewhat inaccurate over the period in which it is mandate, is likely to erode a sense of trust in the Courts and the Rule of Law, rather than build blind trust in society and its institutions.

The decision is also significant in demonstrating the serious costs consequences which can befall a party waiting until the eleventh hour to concede significant parts of the case. The appeal was heard, and won, by Mr. Scott notwithstanding that shortly before the hearing Alberta Health Services purported to "consent" to the removal of the most offending provisions of the sanction, being the compelled speech and mobility restriction provisions. While the Court recognized AHS' consent to set these provisions aside, it recognized that it was provided only shortly before the hearing and granted costs against AHS on the scale it had been granted costs in the proceedings below — effectively reversing the foothold on victory AHS had established prior to the appeal proceedings.

While we eat bananas in this republic, this correction of a bad decision by the Court of Appeal shows that we do not yet grow them. And that is good for the Rule of Law and the prevailing spirit of justice in the Province of Alberta."

Manitok Energy Inc (Re), 2022 ABCA 260

Areas of Law: Bankruptcy, Vesting Orders, Oil and Gas

~The effect of a Sale Approval and Vesting Order is to convey title to the purchased assets on a free and clear basis and extinguish encumbrances on title. In this case, the proceeds for the gas produced from natural gas assets that were purchased from a bankrupt entity were covered by the order and vested absolutely in the purchaser~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The appellant, Yangarra Resources Limited, purchased natural gas assets from a company that had filed a notice of intention to make a proposal in bankruptcy. The sale was approved by a Sale Approval and Vesting Order ("SAVO"), but a dispute later arose regarding the status of proceeds from natural gas produced from the assets between the effective date and the closing date of the agreement.

The respondent, the receiver, took the position that the proceeds were a contingent unsecured pre-receivership obligation, subordinate to the secured claims in the receivership. The chambers judge agreed with the respondent and struck the appellant's claim to the proceeds. The chambers judge found that the proceeds were intended to be distributed through a final adjustment of the purchase price under the agreement, but that the adjustment was never completed. She further found that the proceeds were not captured by the SAVO and were solely an unsecured claim in the receivership. The chambers judge concluded that the SAVO did not create any rights in the appellant or obligations on the respondent with respect to the purchase and sale that were not contemplated by the agreement.

Manitok Energy Inc (Re), *(cont.)*

APPELLATE DECISION

The Court of Appeal allowed the appeal and found that the SAVO changed the status of the appellant's claim such that the assets covered by the asset purchase agreement vested the assets absolutely in the appellant. By order of the SAVO, the appellant became the owner of the proceeds, and was not simply an unsecured creditor of the vendor.

The Court reiterated that the purpose of a vesting order is to effect the transfer of purchased assets to a purchaser on a free and clear basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the asset purchase. The order conveys title in the purchased assets and extinguishes encumbrances on title. The Court found that the approach taken by the chambers judge failed to consider whether the proceeds had already vested absolutely in the purchaser by way of the SAVO, and therefore were not part of the remaining estate to be distributed. The Court considered the specific language used in both the SAVO and the purchase agreement, and concluded that the SAVO did in fact include the proceeds as assets, and were not part of the remaining assets to be distributed through the bankruptcy process.

The Court also considered whether the appellant had an appeal as of right under s. 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 and found that it did under s. 193(c). The Court held that the value of the property at issue exceeded $10,000, the order under appeal was not procedural, and the order determined the status and entitlement to the monies being claimed under the SAVO, as required by s. 193(c).

COUNSEL COMMENTS

Manitok Energy Inc (Re), 2022 ABCA 260

Counsel Comments provided by
Andrew Stead and Preet Saini, Counsel for the Appellant

Andrew Stead

Preet Saini

"The Court of Appeal's decision affirms the enforceability and supremacy of a sale approval and vesting order ("SAVO") generally, and across multiple insolvency proceedings involving the same debtor. The issue before the Court was novel. We found no directly analogous case law. We argued that fundamental objectives of insolvency proceedings would be undermined if the SAVO become unenforceable due to a subsequent receivership. A purchaser in an insolvency proceeding requires certainty that assets will be purchased on a free and clear basis, without being subject to claims derived through the prior owner. As noted in *Third Eye Capital*, the SAVO is the cornerstone of the modern age of corporate asset sales. The market value for a debtor's assets would be significantly diminished if those assets were subject to outstanding claims, known or unknown at the time of sale.

Our client was aware of the insolvency of the debtor. A proposal proceeding was initiated by the debtor pursuant to the *Bankruptcy and Insolvency Act*. Our client sought and obtained a SAVO in that proposal proceeding to approve a sale agreement with the debtor and to receive the purchased assets on a free and clear basis. The sale agreement required certain post-closing adjustments to be made and the resulting proceeds to be paid to our client. The subsequent receivership of the debtor created a dispute regarding whether the SAVO was enforceable and

COUNSEL COMMENTS

binding on the receiver, and whether the adjustments were unsecured obligations in the receivership. We argued that finding the SAVO to be unenforceable in the receivership created absurd results, inconsistent with the purpose of SAVOs and with realization in insolvency proceedings. For example, the debtor's primary secured creditor would be paid twice if the SAVO was unenforceable: first by being paid from the purchase price for the debtor's assets, and then again, by receiving the adjustments which ought to have been delivered to our client under the sale agreement. The Court of Appeal agreed with us and held that, as with any court order, the interpretation and effect of a SAVO will depend upon its language. The Court of Appeal determined that the language of the SAVO was clear that the assets covered by the sale agreement vested absolutely in our client. Parties ought to consider whether the template SAVO language is sufficient or express when dealing with unique circumstances."

VW v. AT, 2022 ABCA 261

Areas of Law: Family Law, Grandparent Contact, "Best Interests of the Child", *Family Law Act*

~The branch of the test for a Contact Order under section 35(5)(a) of the Family Law Act *places the onus on an applicant seeking contact with the child to establish that the child's physical, psychological, or emotional health may be jeopardized if contact between the child and the applicant is denied~*

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The appellant mother and father were married in 2012 and separated in 2020. There were two children of the marriage ("the Children"), and the appellants continued to co-parent the Children together, despite their separation. The respondent maternal grandparents were very involved in the Children's lives, up until the relationship between the appellants and respondents deteriorated in October 2018. Thereafter, the Children had no further in-person contact with the respondents. While the appellants acknowledged the Children would like to have a relationship with the respondents, the appellants were uncomfortable with what they describe as the respondents' racist, sexist, classist, anti-Semitic, and homophobic beliefs. In April 2021, the respondents applied for a contact order pursuant to s. 35 of the *Family Law Act*, SA 2003, c F-4.5 ("the *Act*"). On May 21, 2021, the chambers judge granted the respondents supervised contact, provided the children desired contact. As part of her order, the chambers judge imposed conditions that no derogatory comments about the parents or their lifestyles be made, that there be no corporal punishment and no discussion of controversial topics, and further required all parties to attend at least three sessions with a counselor. In determining whether a contact order was in the best interests of the Children, pursuant to section 35(5) of the *Act*, the chambers judge determined the intergenerational conflict and divide on ideology did not have to be resolved in order to allow contact. That is, that the divide could be safely bridged and the Children's physical, psychological and emotional health would not be compromised with third-party independent

supervision. The chambers judge further found that not permitting access with supervision would be unreasonable. On June 18, 2021, the appellants filed a notice of appeal, asserting the chambers judge erred by misstating and misapplying the test in s. 35(5) of the *Act*, failing to give deference to the appellants decision as to contact between the respondents and the Children and in finding that contact was in the best interests of the Children.

VW v. AT *(cont.)*

APPELLATE DECISION

The Court of Appeal noted that a deferential standard of review applies in family law cases, but allowed the appeal setting aside the contact order on the basis that the chambers judge applied the wrong test and reversed the onus, failing to make the necessary findings required by s. 35(5)(a). The Court held that the proper test as per s. 35(5)(a) is whether contact is in the best interests of the Children, specifically: (1) whether the Child[ren]'s physical, psychological, or emotional health may be jeopardized if contact between the Child[ren] and the person … proposed *is denied;* and (2) whether the guardian's denial … is unreasonable. In her oral reasons, the chambers judge mischaracterized the test as being a question of whether best interests may be jeopardized if contact *is permitted*. The Court would have dismissed the appellant's "parental autonomy" ground of appeal had it been necessary to consider it, noting that the best interests of the child are always paramount, and the chambers judge did not err in not deferring to the parents' decision regarding grandparent contact. The Court held that while s. 18 of the *Act*, which enumerates the factors a court must consider in determining the best interests of the child, does include consideration of the parents' wishes (s. 18(2)(ix)), there is no basis for the court to interpret parental wishes as having priority and, as Justice Martin for the Supreme Court recently commented in *BJT v JD*, 2022 SCC 24 "parental preferences should not usurp the focus on the child's best interests" (at para 102).

COUNSEL COMMENTS

VW v. AT, 2022 ABCA 261

Counsel Comments provided by
Andy Hayher Q.C. & Emily Verbiski, Counsel for the Appellants


Andy Hayher Q.C.


Emily Verbiski

"This appeal was interesting because it is unusual in family law that counsel is arguing in support of two parents that are aligned. In this case, the parents agreed that it was best for their children to deny contact with the grandparents. The lower court then decided that the contact was in the children's best interests, notwithstanding both parent's agreement to the contrary.

In determining whether contact is appropriate, the court is guided by s. 35 of the *Family Law Act* ("*FLA*"), which sets out authority to grant contact between a child and a person who is not a guardian. The court must also consider the best interests of the child, the factors of which are enumerated at s. 18 of the *FLA*.

In this appeal, the grandparents had to (a) obtain permission to make an application; and (b) satisfy the Court that the children's physical, psychological or emotional health may be jeopardized if contact between the children and the grandparents is denied. In granting the application, the Court of Appeal found that the lower court misapplied the test under s. 35 of the *FLA* by effectively reversing the onus. The chambers Justice considered whether the children's physical, psychological or emotional health may be jeopardized if contact is permitted. In effect, this moved the goalposts. The Court of Appeal ultimately allowed the appeal on this basis.

However, when preparing for this appeal, we were most intrigued by the

COUNSEL COMMENTS

concept of parental autonomy and the role of the court. In this case, the parents were aligned in deciding to deny contact with grandparents that displayed egregious behaviour/ beliefs, including racism, sexism, and homophobia. There was also a lack of understanding or compassion for the children's diagnoses of ADHD and autism. It was argued that in the absence of a finding of parental unfitness, or harm flowing from a lack of contact, the court should not interfere with the parents' decision-making authority.

The Court of Appeal disagreed. The Court provided commentary on the principle of "parental autonomy" in Alberta. It was found that parents aligned in decision-making does not override the best interests analysis, nor is it determinative of what is in the children's best interests. This case may open the door to more grandparents pursuing court intervention in the face of both parents denying any contact with their children."

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