SUPREME COURT OF NOVA SCOTIA

Citation: *Lawen Estate v. Nova Scotia (Attorney General)*, 2018 NSSC 188

Date: 20180810
Docket: HFX470647
Registry: Halifax

Between:

Dr. Joseph Lawen in his capacity as
Executor of the Estate of Jack Lawen

First Applicant

and

Michael Lawen

Second Applicant

and

Attorney General of Nova Scotia representing Her Majesty the
Queen in right of the Province of Nova Scotia

Respondent

Decision

Judge: The Honourable Justice Michael J. Wood

Heard: August 8, 2018, in Halifax, Nova Scotia

Counsel: A Lawrence Graham QC, for the First Applicant

Victor J. Goldberg QC, Richard W. Norman and Kilian Schlemmer, for the Second Applicant

Jeremy Smith, for the Respondent

By the Court:

[1] The applicants are the executor of the Estate of Jack Lawen and the residual beneficiary under his will. They have brought this Application in Court alleging that sections of the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c 465 (the "Act") violate the *Canadian Charter of Rights and Freedoms*. The provisions being challenged are those that permit adult non-dependant children of a testator to claim against an estate for benefits beyond those provided to them under the terms of the will.

[2] The primary relief being sought is a declaration under s. 52 of the *Constitution Act, 1982*, that the impugned provisions of the Act are of no force and effect, and should be read down or interpreted to exclude non-dependant adult children. In addition, the applicants seek remedies pursuant to s. 24 of the *Charter*, including damages. The *Charter* provisions alleged to be infringed by the Act are s. 2(a) and s. 7.

[3] The respondent, Attorney General of Nova Scotia, has brought a motion for summary judgment on pleadings under *Civil Procedure Rule 13.03* seeking dismissal of the proceeding on the basis that the applicants lack standing. The applicants oppose the motion and argue that they have both private and public interest standing to advance the claims set out in the amended Notice of Application which has been filed.

[4] For the reasons which follow, I am satisfied that the applicants have public interest standing to pursue their claims. As a result of this conclusion it is unnecessary to decide whether they also have private interest standing.

Principles of Public Interest Standing

[5] The Supreme Court of Canada in *Canada v. Downtown Eastside Sex Workers*, 2012 SCC 45, considered the nature of public interest standing and the proper approach to be undertaken in determining whether it should be granted.

[6] The Court noted that such standing is discretionary in nature and this discretion must be exercised in a purposive and flexible manner taking into account the underlying principles which govern questions of standing. The principles identified by the Supreme Court include the following:

- Scarce judicial resources need to be carefully allocated and a multiplicity of marginal or redundant lawsuits by "busybodies" is undesirable.
- Courts require the benefit of contending points of view advanced by people affected by the issue. A personal stake or interest ensures that the arguments are presented thoroughly and diligently.
- The constitutional role of Canadian courts is to review the legality of actions of the other branches of government. It is important for the public to have access to these courts in order to assess the constitutionality of the exercise of legislative power.

[7] The Supreme Court indicated that in exercising judicial discretion on the question of standing, a judge must consider the following three factors:

1. Whether there is a serious justiciable issue raised.
2. Whether the plaintiff has a real stake or genuine interest in the litigation.
3. Whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the court.

[8] These factors must be applied purposively, flexibly and in combination. They are not to be treated as discrete items on a checklist.

[9] The serious justiciable issue relates to two of the concerns which underlie the concept of standing. The first is the role of courts in assessing the legality of legislation. The other relates to burdening courts with an unnecessary proliferation of marginal or redundant lawsuits. The Supreme Court described the serious issue factor as follows:

> 42 To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that

> "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

[10] The factor involving the nature of the plaintiff's interest relates to whether they have a real stake in the proceeding or are engaged with the issues raised. This ensures that the plaintiff will be capable and motivated to present a thorough and complete argument in support of their position.

[11] The third factor, whether the proposed lawsuit is a reasonable and effective means to bring the challenge to court, is also related to ensuring a proper adversarial presentation and conserving judicial resources. The Supreme Court described the approach to this factor as follows:

> 50 The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

Application of Principles

[12] As noted by the Supreme Court in *Downtown Eastside Sex Workers*, the three factors relevant to public interest standing must be weighed cumulatively and not individually. They must be considered in a purposive, flexible and generous manner. This requires consideration of all of the circumstances related to the proceeding and the issues raised.

Serious Justiciable Issue

[13] Most of the Attorney General's submissions related to this issue and whether the applicant's claims were likely to succeed. They argue that the *Charter* sections relied on do not extend to encompass testamentary dispositions. Although the merits of a claim should be considered as part of the discretionary application of the public standing principles it will rarely be determinative, particularly where

the claim being advanced is novel in the sense that it has not been previously adjudicated.

[14] It is also important to remember that a hearing in relation to standing is not the forum in which a detailed assessment of each individual aspect of the claim should be undertaken. This is reflected in the comments of the Supreme Court of Canada at para. 42 of *Downtown Eastside Sex Workers* noted above, as well as in para. 56 of that same decision which states in part:

> 56 … Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles.

[15] The constitutional arguments framed by the applicants are clearly "justiciable" as that term is used by the Supreme Court. They fall within the proper scope of the judiciary's role in the Canadian constitutional structure. Whether the issue is "serious" requires some consideration of the merits, although not necessarily a review of every specific allegation.

[16] I believe that the applicant's Notice of Application raises a number of serious and justiciable issues. By way of illustration I would note two in particular. The first is whether s. 7 of the *Charter*, which states that everyone has the right to life, liberty and security of the person, can be extended to testamentary decision making. Section 7 has been interpreted to include a wide range of activities and there is no judicial indication that new areas of protection might not arise. For example, in the recent decision in *Association of Justice Counsel v. Canada*, 2017 SCC 55, the majority of Supreme Court made the following observation:

> 49 The extent to which s. 7 of the *Charter* applies outside the context of the administration of justice has yet to be settled in this Court; see e.g. *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at paras. 77-79; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at paras. 196-99. But even assuming s. 7 applies to the relationship at issue here, I would agree with the Federal Court of Appeal that the adjudicator clearly overstated the breadth of the right to liberty protected under s. 7. **Section 7 protects a sphere of personal autonomy involving "inherently private choices"** (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 85, quoting *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66). **However, such choices are only protected if "they implicate basic choices going to the core of what it means to enjoy individual dignity and independence"** (*ibid.*). [Emphasis added]

[17] The question for determination in this litigation is whether testamentary decisions fall within the sphere of personal autonomy involving choices going to the core of what is meant by individual dignity and independence. If so, they may be protected by s. 7 of the *Charter*. In my view, this is a serious justiciable issue.

[18] Another example from this litigation is whether the testator's s. 2(a) and s. 7 rights can be relied upon by his estate to found a claim for damages under s. 24 of the *Charter* or a declaration under s. 52 of the *Constitution Act, 1982*. The Attorney General relies on a number of cases that indicate that claims under the *Charter* may not survive death (see for example *Canada (Attorney General) v. Hislop*, 2007 SCC 10, and *Giacomelli Estate v. Canada*, 2008 ONCA 346). These cases consider whether remedies under s. 24 and s. 15 of the *Charter* are available to the estate, but not whether the alleged breaches can support a declaration under s. 52 of the *Constitution Act, 1982*.

[19] In response to the Attorney General, the applicants rely on two cases where Courts refused to strike out pleadings where conduct prior to death is relied upon as the basis for claiming *Charter* remedies, including for alleged breaches of s. 7. These are *Dudley v. British Columbia*, 2013 BCSC 1005, and *Grant v. Winnipeg Regional Health Authority*, 2015 MBCA 44. In both cases a significant factor in the Court's decision that *Hislop* and *Giacomelli* might not preclude the claims was the assertion that the *Charter* infringing conduct contributed to the death of the individual in question.

[20] The fact that the will was created during the testator's lifetime, but the claim under the Act did not arise until after death, is a different circumstance than any of the cases provided by either party to this motion. Whether this supports the applicants' claim that the Court should award constitutional remedies for alleged *Charter* breaches is a sufficiently serious question to justify granting the applicants standing.

The Nature of the Applicants' Interest

[21] The Estate of Jack Lawen is subject to a claim by some of his adult children under the Act. If successful, there will be a change in the distribution of assets from what is specified in Mr. Lawen's will. This would obviously impact the estate, as well as the other applicant, Michael Lawen, who is the residual beneficiary.

[22] The potential impact of the *Testators' Family Maintenance Act* litigation on both litigants, takes them out of the category of mere "busybodies" and gives them

an interest in ensuring that the arguments set out in their Notice of Application will be advanced appropriately.

Reasonable and Effective Means of Bringing the Issue Before the Court

[23] This factor does not require the court to decide who would be the ideal person to bring the issue forward. There may be a number of parties and proceedings whereby this could occur. The question is whether the one under consideration is a reasonable and effective mechanism for doing so.

[24] I am satisfied that an estate which is subject to a claim under the Act is well positioned to bring forward a constitutional challenge to that legislation either in advance or as part of the claim itself. The applicants argue that by bringing this as a stand alone application the issue can be dealt with in a short chambers hearing and, if successful, avoid the necessity of a highly contested proceeding under the Act. I agree with that proposition as an illustration of an appropriate procedure to manage judicial resources.

[25] The Attorney General argued that the constitutional issue could equally be raised by a testator who is in the process of preparing a will. While this is theoretically possible, I agree with the concerns expressed by the applicants that such a person might be reluctant to disclose their person testamentary views to family members in circumstances that might create some internal controversy. In addition, at that point in time, there is no certainty that a claim under the Act will be advanced and there is also the possibility that the testator may revise their will at some future date. Either circumstance suggests the possibility of a diminished "interest" in the constitutional issue.

[26] On balance, I am satisfied that this proceeding and these applicants do represent a reasonable and effective means of bringing the issue before the court.

Conclusion

[27] When I follow the guidance of the Supreme Court in *Downtown Eastside Sex Workers* and consider the three factors applicable to public interest standing in a cumulative fashion, I am satisfied that both of the applicants ought to be given that status. In light of this conclusion it is not necessary for me to deal with the question of whether they should also have private standing. The Attorney General's motion for summary judgment is dismissed.

[28] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this decision.

Wood, J.