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Take Five

ONPOINT LAW CORPORATION

ALBERTA EDITION

June 2018

Featured Cases:

Ripulone v. Smith, 2018 ABCA 167

Areas of Law: Family Law; Child Support; Imputed Income; Failure to Disclose

~The court must be careful, when imputing income to a parent who has not made disclosure, not to accept oral submissions as though they were evidence of income~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The Appellant, Lissa Ripulone, received child support from the Respondent, Jeremy Smith. In December 2016, the Respondent unilaterally reduced his child support from $875 per month, based on a consent order imputing his income at $96,000, to $500 per month. In March 2017, he brought an application to vary child support. The Appellant responded seeking an increase in support as well as arrears. The Respondent did not provide necessary disclosure despite repeated requests and a formal notice to disclose. On May 2, 2017, the parties attended a case management meeting during which the judge imputed income to the Respondent at $55,000 on an interim basis, and directed him to provide his full financial disclosure on or before July 1, 2017. He provided some but not all of the required disclosure three weeks after the due date. On September 22, 2017, the Appellant filed an application to impute income to the Respondent in the amount of $253,792. She also requested arrears, ongoing support, and an order that the Respondent not bring further applications to vary

Ripulone v. Smith, *(cont.)*

child support until there had been a material change in circumstances and he had provided full financial disclosure. The Respondent did not file any material in response. On October 30, 2017, a chambers judge imputed the Respondent's income at $80,000, based largely on the Respondent's oral submissions and a financial statement dated March 31, 2017, which the Respondent provided to the court and to the Appellant on the day of the hearing. The Appellant brought this appeal on the basis that the chambers judge erred in imputing income in the manner that he did, in the absence of any evidence to support the Respondent's position. She also submitted that the chambers judge ought to have imputed a larger income, given the Respondent's persistent refusal to disclose. She requested child support based on the new imputed income retroactive to May 2, 2017.

Ripulone v. Smith, (cont.)

APPELLATE DECISION

The appeal was allowed. The Court of Appeal noted that an appellate court will only interfere with child support if there has been an error in principle, a misapprehension of the evidence, or the award is clearly wrong. A refusal to exercise a discretion to impute income is subject to the same standard. Disclosure obligations are legal obligations to the children and to the court, and must be enforced accordingly. A court cannot make an informed decision unless and until full and complete disclosure is made. It is improper to rely on submissions masquerading as evidence when imputing income to a parent who has failed to disclose. The Court of Appeal reviewed the record and found that the evidence supported imputing $120,000 in income to the Respondent. Child support calculated on this imputed amount retroactive to May 2, 2017 was ordered on an interim basis, and the matter was remanded to the Court of Queen's Bench to be heard on a proper evidentiary basis with full disclosure.

Arndt v. Banerji, 2018 ABCA 176

Areas of Law: Administrative Law; Tribunals; Collateral Attack; *Workers' Compensation Act*

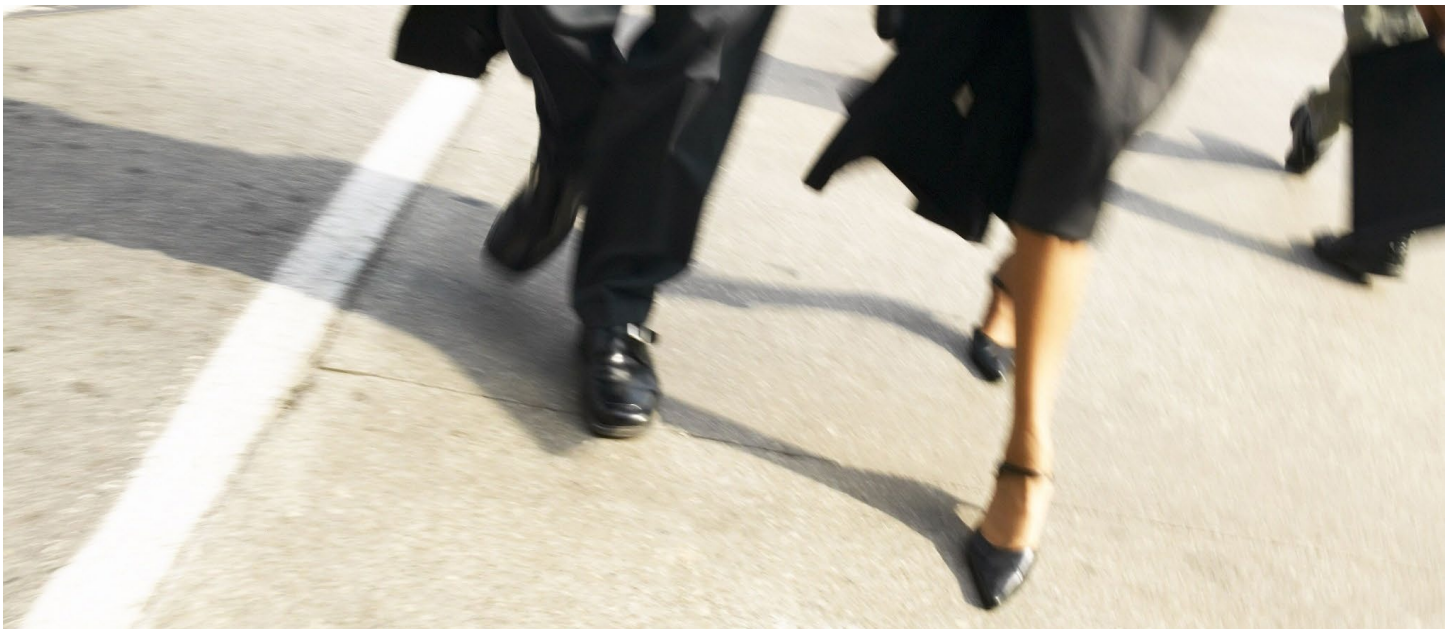
~The workers' compensation system in Alberta encompasses all issues about coverage and entitlement. Bringing an action in the ordinary courts for benefits under this system may be considered a collateral attack~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The Appellant, Jordan Arndt, was employed by the Scandinavian Cultural Society of Calgary. His contract was not extended beyond February 7, 2007. Shortly thereafter he reported work-related injuries to the Respondent Workers' Compensation Board, ("WCB") including stiffness, pain, and numbness in his hands, wrists, elbows, and shoulders that he attributed to repetitive lifting of furniture. He also reported lung problems from inhaling dust, fumes, and other irritants.

WCB retained the Respondent Dr. Banerji as a medical consultant to review medical documentation and provide an opinion on the claim. Dr. Banerji reviewed the medical documentation and spoke with Dr. Beeharry, the Appellant's family doctor, but did not examine the Appellant. Initially Dr. Banerji could not connect the symptoms to work-related injuries, but ultimately WCB acknowledged a work-related claim arising from bilateral shoulder strain, and for bilateral medial and



Arndt v. Banerji, *(cont.)*

lateral epicondylitis. WCB denied coverage for bilateral carpal tunnel syndrome, and determined that the compensable injuries should resolve within six weeks. The Appellant sought reconsideration and appeal of his claim for carpal tunnel syndrome, but at the time this appeal was heard all his opportunities for review and appeal had been exhausted. The Appellant sued his former employer, and in the underlying litigation he sued WCB and a number of its employees as well as Dr. Banerji. He claimed that Dr. Banerji failed to perform within his professional mandate, failed to provide a medical assessment, took steps to conceal his own errors, neglected and ignored his responsibilities as a physician, and pressured and harassed Dr. Beeharry in an effort to conceal his own errors and to promote and foster Dr. Beeharry's distrust of the Appellant. Dr. Banerji brought an application for summary dismissal of the part of the claim that was made specifically against him. The case management judge granted partial summary judgment and dismissed the action against Dr. Banerji except regarding the issues

Arndt v. Banerji, *(cont.)*

of whether Dr. Banerji owed the Appellant a duty of care to ensure that his claim was reviewed with the level of knowledge, competence and skill expected of a similarly qualified practitioner, whether Dr. Banerji failed to meet the standard of care, whether the Appellant suffered an injury or loss not recognized by WCB, whether Dr. Banerji's failure to comply with the applicable standard of care was the actual and legal cause of that loss or injury, and whether some or all of the actions fell outside the scope of s. 34(4) of the *Workers' Compensation Act*. The Appellant and Dr. Banerji both appealed the decision.

APPELLATE DECISION

The Appellant's appeal was dismissed, and Dr. Banerji's was allowed.

The majority held that the Appellant's claim was premised on certain assumptions that were wrong in law. His claim and his affidavit in support of it contained many sweeping allegations of misconduct that were unsupported by any particulars or confirming documentation. The WCB system in Alberta is designed as a "closed system", within which all issues about coverage and entitlement are to be handled. Bringing an action in the ordinary courts for benefits under this system is not an option. WCB found that certain of the Appellant's medical issues arose in the workplace, but that his carpal tunnel syndrome did not. He was not entitled to challenge those findings in a separate civil suit in court, and it was an error of law for the case management judge to assume that he might be able to prove, in this action, that his carpal tunnel syndrome was work-related. Many components of his claim were an impermissible collateral attack on the WCB's decisions and on the entire workers' compensation scheme. The supplemental reasons for judgment in the court below clarified that there was a finding that "someone owed a duty" to the Appellant, be it WCB or Dr. Banerji, and the trial of the issues was to be held based on that assumption. However, while it is reasonable to assume that the Appellant had a

Arndt v. Banerji, *(cont.)*

legitimate expectation that his claim would be processed fairly and properly, any such duty is not a "duty in tort". It is a statutory public duty. If WCB fails to discharge that duty, the remedy lies in the appeal and review procedures set out in the legislation.

O'Ferrall JA dissented. He noted that an appellate court does not ordinarily assess the merits of claims until the trial court has completed its assessment. He said that much of the analysis in the majority reasons was devoted to assessing the merits of the Appellant's claims which were permitted to go to trial. In his view, the appellate reasons should be limited to assessing whether the case management judge was unreasonable in concluding that the court required more evidence and more fulsome legal argument in order for it to properly assess the claim. He would have dismissed Dr. Banerji's appeal.

Dhillon v. Sikh Society Calgary, 2018 ABCA 193

Areas of Law: Society Bylaws; Charge on Land; Easements; Mootness

~In its bylaws, a society can set its own legal definition of a term, reflective of the consensus view of the members of the society, in the same way that parties to a contract set contractual terms~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The Appellant, Kulwant Dhillon, alleged that the Respondent, Sikh Society Calgary, subjected its own land to a "charge" in a manner contrary to its bylaws. The Respondent granted a mutual easement on its property together with a neighbouring landowner on its own property, to allow an access road to both properties. The Appellant took issue with this, as the Respondent's bylaws provide that its executive committee shall have no power to convey mortgages or in any way charge its property except upon an extraordinary resolution of the Respondent at a general meeting. The Master hearing the Appellant's originating notice of motion found that the matter involved a legal dispute over the Respondent's property within the jurisdiction of the court. She held that the grant did not constitute a "charge" on the property such as to require compliance with the extraordinary resolution requirement. The Master dismissed the Appellant's motion. A chambers judge heard the Appellant's appeal of this decision. The judge noted that the road work had been completed by the time the appeal was heard. He found that the matter was moot because any decision in favour of the Appellant would have no practical effect. He also noted that in a stay application dated May 9, 2014, the Appellant explicitly acknowledged this reality, unless the stay was granted, which it was not. The chambers judge noted that the Appellant attended the Respondent's Emergency General Body Meeting and its AGM, but at neither meeting did he raise an objection to the shared access road resolution. He should have voiced a concern at one or both of those meetings. Further, the judge found that the Appellant's complaints about the process being unfair were unfounded.

Dhillon v. Sikh Society Calgary, (cont.)

APPELLATE DECISION

The appeal was dismissed. The Court of Appeal found that, whatever the word might mean in other contexts, it was plain that the Respondent in its bylaws intended "charge" to refer to an encumbrance in the nature of a debt. The bylaw was drafted in such a way as to protect the Respondent's landholding from being subjected to such a charge without its members' consensus. A society has the power to set its own rules regarding dispositions of its property, and the members of the society may reasonably expect the governors of the society to comply with those rules. They are similar in this respect to contractual terms. The Court did not accept the Appellant's contention that the access road easement was akin to a debt. The decision to grant the easements and related agreements fell comfortably within the jurisdiction and discretion of the society. The chambers judge properly rejected the Appellant's objection as untimely and moot, and it would also have been correct to reject his objection on the correct interpretation of the concept of "charge" for the purposes of the Respondent's bylaws.

COUNSEL COMMENTS

Dhillon v. Sikh Society Calgary, 2018 ABCA 193

Counsel Comments provided by
Ugochukwu (Ugo) Ukpabi, Counsel for the Appellant

"Introduction

The note highlights the following issues: First, it briefly re-engages the notion of mootness, particularly in the context in which it was raised in the appeal, namely, whether the Court ought to have decided the issues argued by the Appellant even though a subject matter complained of had already occurred. Second, it references the Court's approach where an issue untethered to the grounds of appeal is raised before it. Finally, it re-visits the meaning of the word "charge" deployed in the context of the Respondent's bylaws.

Ugochukwu (Ugo) Ukpabi

Blurred Lines

The Court lumped together its discussion of the applicable principles concerning mootness with that as to factors to consider where a judge wishes to raise a new issue on appeal distinct from those contained in the grounds framed for him. The principles applicable to those two issues differ and should have been discussed separately.

Two distinct grounds of appeal were framed for the Court's consideration in respect of those lumped issues to wit: whether the QB judge followed the proper procedure in raising a new issue not originally embodied in the grounds of the appeal. And second, whether the QB judge had reached the right conclusion in deciding that the issues raised in the grounds of appeal were nonetheless moot, and as such, it would serve no practical purpose for the court to address them.

COUNSEL COMMENTS

Dhillon v. Sikh Society Calgary, (cont.)

On mootness, the Court appeared to implicitly prioritize that an access road, partially subject matter of the action, had already been built. In doing so, the Court relegated the co-equally important concept advanced by the Appellant, namely, upholding a members' right in ensuring that the Respondents' by-law is scrupulously adhered to.

Appellant commenced the action before the access road was built. As such, the Appellant's complaint pre-dated the building of the road and engaged a more fundamental question as to the appropriate procedure that would ground the Respondents' decision-making process. The Court's prioritization central to its concept of mootness diminished that of the sanctity of the Respondents' by-laws typically articulated as a constitutional contract between and among members of a society.

As to the applicable principles where a QB judge wished to raise a new issue not already embodied in the grounds before him, the Court was no less dismissive. It concluded that although the issue of mootness was not embodied in the grounds before the QB judge, the Appellant should have been alert to that issue since it came up in the related Application for stay. "It was not unfair to the appellant that he was unable to overcome a discretionary due to mootness". [sic]

Neither the Respondent nor the Appellant raised the issue of mootness before the QB judge. The issue of mootness was raised by the QB judge himself on the date of the Special. Having so raised it, he invited the parties to address him on it at that same proceeding. Appellant took the position that the surprise sprung on by the QB judge amounted to a fundamental breach of procedural fairness in that, at the least, he should have been granted an adjournment to offer a more robust response to that issue.

An Unattended Charge

The Court declared in connection with the meaning of a charge:

COUNSEL COMMENTS

Dhillon v. Sikh Society Calgary, (cont.)

> Whatever a "charge" might mean in other contexts, it is plain that the Society here sought by the language it chose to protect its landholding from being subjected to an encumbrance in the nature of a debt charge [para 26]

First, after an excursion as to the meaning that might be attributed to the word "charge" used in the Respondents' by-law, the Court nevertheless declined to settle on a particular meaning.

Second, the Court held: "it is plain that the Society here sought by the language it chose to protect its landholding from being subjected to encumbrance in the nature of a debt charge". *Au contraire-* there is nothing "plain" about the Respondents' use of the word "charge" in its by-laws. That word is not defined in those by-laws. It was the ambiguity over the meaning of the word "charge" that originally animated the dispute between the parties to the Appeal.

Third, the Court restricted the meaning of that word as an obligation for securing a debt. Viewed as such, the Court found that the encumbrance created over the Respondents' land could not be regarded as a charge as no debt was secured.

Appellant however noted that a charge could mean either one of two things: an instrument to secure a debt *or the performance of an obligation*. The Court failed to deal with the latter possibility. Had the Court broadened the universe of what a charge could entail to encompass the latter possibility, it may have reached a different result. In other words, the encumbrance rights accorded to the third party by the Respondent amounted to a charge requiring a special resolution to pass.

Conclusion

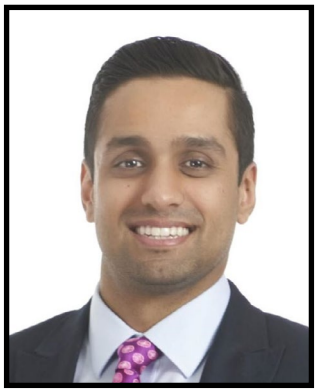
Through its approach, two central issues remain outstanding: on what basis did the Court relegate the right of a member to ensure that a Respondents' by-law is followed; and finally, what is the applicable procedure to follow where the Respondent wishes to create an interest over its property."

COUNSEL COMMENTS

Dhillon v. Sikh Society Calgary, 2018 ABCA 193

Counsel Comments provided by
Harman Toor, Counsel for the Respondent

"This matter reached the Court of Appeal after 10 specific appearances at the Court of Queen's Bench including an appeal of a Master's decision.



Harman Toor

The appellant was a member of the respondent Sikh Society of Calgary (the "Sikh Society"), a religious Society. The appellant asserted that a Mutual Access Easement Agreement (the "Easement Agreement") for a mutual/shared access road between the Sikh Society and an adjoining landowner was registered onto title of the Sikh Society lands contrary to the bylaws of the Society.

The Court of Appeal noted that the Legislature states that a society is empowered to set its own rules for dispositions of property of a society. In this case, those rules are outlined in the bylaws of the Sikh Society.

A large portion of the learned decision of the Master was determining whether the Easement Agreement was a "charge" within the meaning of a specific provision within the Sikh Society bylaws. The provision of the bylaws was section 4.2(d) which stated that:

> The Executive Committee shall have no power to convey mortgages or in any way charge the property of the Society except upon an extraordinary resolution of the Society at a general meeting.

Ultimately, the Master decided that granting the Easement Agreement was not a "charge" within the meaning of Section 4.2(d). The Court of Appeal noted that the Master's decision appropriately referred to caselaw, texts and dictionary sources for the term

COUNSEL COMMENTS

Dhillon v. Sikh Society Calgary, (cont.)

"charge". However, the Court of Appeal also noted that the Sikh Society has set its own legal definition of what a "charge" is for the purposes of its bylaws and governance and further noted that it was not strictly necessary for the Master to look for "nourishment of the meaning of the word "charge" outside of the bylaws".

The Court of Appeal stated that the rationale behind the statutory construction principle 'noscitur a sociis' was important in interpreting the word "charge" in the context of the bylaws and not in other land holding contexts. The principle '*noscitur a sociis*' refers to the fact that the language surrounding a word is relevant to its interpretation, or more interestingly put by the Court of Appeal, "*a word may be known by the company it keeps*". Specifically, the Court of Appeal stated that the word "charge" must be considered in light of the language of the bylaws of the Sikh Society.

The Court of Appeal then interpreted the word "charge" in the bylaws by stating that the Sikh Society here sought by the language it chose (in its bylaws) to protect its landholdings from being subjected to an encumbrance in the nature of a *debt* charge without the consensus of the Sikh Society having been obtained by a meeting for that purposes. However, the Court of Appeal correctly noted that the Easement Agreement was for mutual road access. As a result, the Court of Appeal noted that the Sikh Society encumbered the land in order to mutually benefit from an access road with the adjoining neighbour and not to subject the land to a debt.

The Appeal of the Master's decision was not heard by a Justice of the Court until approximately nineteen (19) months after the decision of the Master. During the 19 months, the mutual/shared access road had been constructed. The chambers judge dismissed the appellant's appeal on the basis that the underlying issues, namely the validity of the Easement Agreement had become moot. The Court of Appeal decided that the chambers judge properly rejected the Appeal as untimely and moot and had the ability and discretion to do so."

Kikino Metis Settlement v. Abtosway, 2018 ABCA 199

Areas of Law: Aboriginal Peoples; Metis; *Metis Settlements Act*; Bylaws; Membership Criteria; Tribunals

~A Metis settlement cannot, through a general reservation of a discretion over membership, effectively establish additional criteria for membership~

BACKGROUND

CLICK HERE TO ACCESS THE JUDGMENT

The Respondent, Cora Abtosway, applied for membership in the Appellant Kikino Metis Settlement. The Appellant's *Membership Bylaw* mostly parallels the membership provisions of the *Metis Settlement Act* ("*MSA*"), which set out substantive preconditions and criteria for membership in a Metis settlement. However, the *Bylaw* lists as "reasons for refusal" of membership the preconditions found in the *MSA* and goes on to indicate that the reasons for refusal are not limited to the statutory conditions. Effectively, the *Bylaw* implies that the Appellant has the discretion to withhold membership status even if an applicant meets the statutory requirements. In 2009, the Alberta Court of Appeal held that the exclusion of registered Indians from settlement membership was unconstitutional. Shortly thereafter, the Respondent Metis Settlements General Council ("MSGC") requested that the Respondent Minister of Indigenous Relations ("Minister") to temporarily extend the timelines in the application process for membership, to allow it to explore options. The MSGC further resolved to place a full moratorium on all membership applications until the matter was resolved. The *MSA* does not expressly allow the MSGC to impose a moratorium on membership applications. On October 6, 2009, the Appellant passed a resolution that in recognition of the MSGC membership freeze, only children born and raised on that settlement would be approved for membership. In 2011 the Supreme Court of Canada overturned the Alberta Court of Appeal's decision on the constitutionality of excluding registered Indians. This displaced the original reason for the moratorium. The Minister never acted on the request for extended timelines. The Appellant continued

Kikino Metis Settlement v. Abtosway, *(cont.)*

to restrict membership to those born and raised on the settlement based on its 2009 resolution, but did not amend the *Bylaw* to reflect that restriction. Ms. Abtosway is of Metis heritage and is not a registered Indian. At the time of her application, she had lived on the Appellant settlement for about seven years with her husband, children and stepchildren. Her application complied with the criteria of the *MSA*. The Appellant refused membership based on the moratorium. The Respondent Metis Settlements Appeal Tribunal ("Tribunal") allowed Ms. Abtosway's appeal and granted her membership in the settlement. It held that the Appellant's decision did not serve the objectives of the *MSA*, and that denying membership merely because the applicant was not born and raised on the settlement was improper. It went on to state that the Appellant's assertion that Ms. Abtosway's application could not be dealt with "until such time as a satisfactory process is agreed to by the province of Alberta and the MSGC" was unacceptable. It did not explain what process it was referring to, nor where any statutory authority came from to refuse membership on such a vague ground.

APPELLATE DECISION

The appeal was dismissed. The question on appeal was whether a Metis settlement bylaw can establish criteria for prospective members that are more onerous than the minimum benchmarks set out in ss. 74 and 78 of the *MSA*. If the answer to this question was yes, the Court of Appeal was further asked whether the Appellant's criteria were a lawful exercise of the jurisdiction bestowed upon it by the *Bylaw*. The Court found on the first question that it was too general to be answered at large. Rather, it could be said that the attempt to impose additional criteria over membership applications by resolution, rather than through a bylaw, is unauthorized. Furthermore, a settlement cannot through a general reservation of a discretion over membership effectively establish additional criteria for membership. However, the Court declined to find that the statute sets out a complete code on membership.

COUNSEL COMMENTS

Kikino Metis Settlement v. Abtosway, 2018 ABCA 199

Counsel Comments provided by
William McElhanney and Alexander W. Yiu, Counsel for the Appellant

"Although on the specific facts of this case the Court of Appeal ultimately dismissed Kikino Metis Settlement's appeal, the Court made several noteworthy comments in its ruling which bear on the prospect of future appeals before the Court having regard to membership decision-making by a Metis Settlement in Alberta.

William McElhanney

For example, the Court of Appeal observed that it has neither the mandate nor the remedial tools to develop a comprehensive and cohesive policy on Metis settlement membership (Court of Appeal decision at paragraph 47), and that over time a series of appellate decisions *might* eventually reveal the outlines of the entitlement to settlement membership (paragraph 47). However, importantly, the Court commented that it was neither a desirable nor an efficient way to resolve the issues presented by this appeal (paragraph 47).

Alexander W. Yiu

Additionally, the Court went on to state that it was unfortunate that the Metis Settlements General Council has not, over the past 28 years, been able to identify a consensus on the appropriate criteria "respecting membership in settlements generally" (paragraph 48), and the various stakeholders were encouraged to address the oustanding issues at the policy making level.

The fact that the Court of Appeal was not prepared to answer either of the two questions on which permission to appeal was granted (see *Kikino Metis Settlement v. Metis Settlements Appeal Tribunal (Membership Panel)*, 2016 ABCA 260)

COUNSEL COMMENTS

Kikino Metis Settlement v. Abtosway, (cont.)

is encouraging in that it is in keeping with two of the Court's earlier statements - firstly that the extent to which settlement councils can fill a vacuum in the regime is an "open question" (paragraph 39); and secondly, the extent of a settlement's discretionary control over membership was not an issue in this appeal *and would have to be left for another day* (paragraph 42).

As well, it is noteworthy that the Court of Appeal observed that another issue that has yet to be considered by the stakeholders is how to address the expectations of non-settlement Metis, having regard to the passage of time since the *Accord and the present circumstances in the settlements* (paragraph 42). This comment is of immediate import to Kikino Metis Settlement and all other Metis Settlements who have experienced and continue to experience an increased demand on the land base that was originally allocated to all eight Metis Settlements at the time of the passing of the *Accord*, as well as increased demand on settlement resources due to growing populations.

In addition to these issues that have not yet been addressed by the Alberta Courts, the Court of Appeal observed there were also three issues that were not fully addressed in its reasons (paragraph 44). First, to what extent and for what reasons can a settlement refuse membership to an applicant who meets the bare minimum statutory requirements? Second, is a settlement able to consider such things as whether an otherwise qualified applicant has any genealogical or other connections to the particular settlement? And thirdly, is the Metis Settlements Appeal Tribunal bound by any such criteria created or imposed by a settlement, or does the Appeal Tribunal still have an overriding mandate to review settlement membership decisions?

These additional legal questions further reflect the Court of Appeal's cautious approach in *Abtosway*, and highlight its reluctance to pronounce definitively on the scope of a Metis Settlement's discretionary power over membership under the *MSA*.

We expect that on a go-forward basis, all stakeholders at the policy making level will take heed of the Court of Appeal's ruling in this case and work collaboratively towards resolving the outstanding issues on membership identified by the Court."

COUNSEL COMMENTS

Kikino Metis Settlement v. Abtosway, 2018 ABCA 199

Counsel Comments provided by
Kirk Lambrecht, Q.C., Counsel to the Metis Settlements Appeal Tribunal

"The author of this comment, who serves as Counsel to the Metis Settlements Appeal Tribunal, provides the following comment on the summary of the case prepared by the Editors of Take 5. Note that the time for application for leave to appeal to the Supreme Court of Canada, late August of 2018, has not expired as of the date when this case comment was submitted to the Editors.

Two points are covered in this commentary. The first point explains the relationship between the leave to appeal and the appeal process, and offers context on how leave to appeal was given on a subject on which the Metis Settlements Appeal Tribunal did not rule. The second point offers hypertext links to the legislative context for the Court of Appeal comment in paragraph 3 that "[t]he key objectives of the *Alberta-Metis Settlements Accord*, carried forward into the recitals and text of the resulting instruments, were i) to constitutionalize the Metis land base, ii) to preserve and enhance Metis culture and identity, and iii) to promote Metis "self-governance under the laws of Alberta".

The Relationship Between The Leave to Appeal and Appeal Processes

Presentation of the application for leave to appeal included a submission that the case involved exercise of discretion by the Kikino Metis Settlement Council pursuant to *Kikino Metis Settlement Bylaw No. KMS031.*

The Court which granted leave to appeal did not have the full evidentiary record before it when framing the questions on which leave to appeal was granted. In the leave to appeal decision, *Kikino Metis Settlement v. Metis Settlements Appeal Tribunal (Membership Panel)*, 2016 ABCA 260 at paragraph 29 (CanLII) http://canlii.ca/t/gtn90, the Court stated:

COUNSEL COMMENTS

Kikino Metis Settlement v. Abtosway, (cont.)

"The Appeal Tribunal must have assumed that the *Kikino Metis Settlement Bylaw No. KMS031* was invalid or did not apply. It made no mention of it."

After leave to appeal was granted, and when the Appeal Book was filed which included a transcript of the hearing of the appeal before the Metis Settlements Appeal Tribunal, it became evident that the Tribunal members did ask the Chair about the application of the *Kikino Metis Settlement Membership Bylaw* to the facts of the case. The Chair of the Kikino Metis Settlement Council stated that the decision to refuse Ms. Abtosway's membership application was not based on *Kikino Metis Settlement Bylaw KMS031* but was based on a 2009 Resolution of Metis Settlements General Council, and on subsequent Kikino Metis Settlement motions.

The full Panel of the Court of Appeal therefore wrote at paragraph 25:

"The Appeal Tribunal did not rule on the validity of any bylaw, which is the first topic on which permission to appeal was granted. The validity of the bylaw was not discussed before the Appeal Tribunal, because the Kikino Metis Settlement made it clear that Ms. Abtosway's application had been dealt with under the moratorium, not under the bylaw. The Appeal Tribunal did not give an opinion on the validity of any bylaw, and only stated that limiting membership to those born and raised on the settlement was 'improper', at least in this instance. It also held that the moratorium on applications for membership was unreasonably applied to Ms. Abtosway, posing the question 'where Kikino's statutory authority comes from to refuse membership on such a vague ground' ".

Legislative Context for the Constitutionalization of the Metis Land Base

The *Metis Settlements Act* RSA 2000, c M-14, http://canlii.ca/t/52g79 is unique to Alberta. No other Parliament or Legislature has enacted comparable legislation. The Court of Appeal judicially considered that the intent of the legislation was "to constitutionalize the Metis land base." Part 1 Division 1 of the *MSA* creates eight Metis Settlements in Alberta http://www.mslr.gov.ab.ca/map.asp. This is the Metis land base.

COUNSEL COMMENTS

Kikino Metis Settlement v. Abtosway, (cont.)

The unique features of the MSA are evident in the Recital in section 0.1 of the MSA, which cites the Settlements Accord of July 1, 1989 http://indigenous.alberta.ca/documents/AlbertaMetisSettlementsAccord.pdf?0.9655308732458652, the Constitution of Alberta Amendment Act, 1990, RSA 2000, c C-24, http://canlii.ca/t/j8cq, the Metis Settlements Land Protection Act, RSA 2000, c M-16, http://canlii.ca/t/j8jl, the Metis Settlements Accord Implementation Act, RSA 2000, c M-15, http://canlii.ca/t/j7th, and Resolution 18 of 1985 passed unanimously by the Legislative Assembly of Alberta, discussed in Hansard http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/hansards/han/legislature_21/session_3/19880705_1430_01_han.pdf. The history of the MSA was reviewed by the Supreme Court of Canada in Alberta (Aboriginal Affairs and Northern Development) v. Cunningham, 2011 SCC 37, [2011] 2 S.C.R. 670, at paragraphs 5 to 26 htTP://CANLII.CA/T/FMD78."

Funk v. Wawanesa Mutual Insurance Company, 2018 ABCA 200

Areas of Law: Insurance Law; Unidentified Automobile; Indemnity; Injuries

~The terms of automobile insurance policies in Alberta are highly regulated and there is very little room for finding that a provision in one is "unjust or unreasonable" or contrary to public policy~

BACKGROUND

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The Respondent, Andrew Funk, suffered serious injuries following an automobile accident on May 20, 2008. He was driving at night when he noticed an oncoming vehicle swerving toward his as the two vehicles approached one another. He swerved right to avoid a collision and rolled his vehicle. There was no physical contact between the vehicles, and the other vehicle was never identified. There was some expert evidence to support his allegation that he made a sudden correcting manoeuvre that caused his vehicle to roll. The Administrator of the Motor Vehicle Accident Claims Fund paid him the statutory limit of $200,000 in damages. He then claimed a further sum under the SEF No. 44 Endorsement to his own policy with the Appellant, Wawanesa Mutual Insurance Company. The Endorsement provides coverage when the policyholder is involved in an accident with an "inadequately insured motorist", which includes an "unidentified automobile". However, the Appellant took the position that the policy requires physical evidence indicating the involvement of an unidentified automobile and physical contact of such automobile with the automobile of which the insured person was an occupant. Accordingly, the Appellant sought summary dismissal of the claim on the basis it could not succeed as pleaded. The Respondent cross-applied for summary judgment on the basis that he was entitled to coverage. The chambers judge concluded that there was no coverage on the face of the Endorsement, because the policy required physical contact with the unidentified vehicle. The judge also concluded that the Respondent could not take advantage of s. 545(1) of the *Insurance Act*, which provides that "unjust or unreasonable" terms in a policy are unenforceable, because that provision was not in force at the time of the accident. Still, the chambers judge held that the Respondent was entitled to indemnity because the requirement of "physical

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contact" in the policy would have required the Respondent to commit a tort, and was therefore contrary to public policy. He reasoned that insureds who take evasive action would have no coverage under the policy, while those who took no such action and made physical contact with the unidentified vehicle would be covered. In the alternative, he found that the absence of physical contact with the unidentified vehicle amounted to failure to perform a covenant, and that relief against penalty or forfeiture was therefore available. Both parties appealed.

APPELLATE DECISION

The appeal was allowed and the cross-appeal dismissed. The majority found that the chambers judge was correct in concluding that the Respondent was not entitled to coverage on the plain wording of the Endorsement. Nor did the judge err in concluding that the Respondent could not take advantage of s. 545(1) of the *Insurance Act*. However, it was unreasonable to characterize the wording of the Endorsement as "requiring the Respondent to commit a tort". The Endorsement does not require the Respondent to do anything, but simply provides for coverage if certain defined risks emerge. Relief from forfeiture was also not engaged on these facts. Suffering a loss from a risk that is not covered by an insurance policy is not a "failure to perform a covenant". Further, the terms of automobile insurance policies in Alberta are highly regulated and there is very little room for finding that a provision in one is "unjust or unreasonable" or contrary to public policy.

Berger JA dissented. He found that the language of the policy, the context of the incident, and the parties' reasonable expectations favoured the result proposed by the Respondent. He noted that the SEF No. 44 contract includes provisos that give the insured meaningful coverage in the circumstances of this

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case without proof of "physical contact". Where an eligible claimant alleges that both the owner and driver of an unidentified vehicle cannot be determined, the claimant's own evidence of that vehicle's involvement must be corroborated by other material evidence. This could include independent witness evidence or physical evidence indicating the involvement of an unidentified automobile. An accident reconstruction engineer concluded that the ditch entry angle of the Respondent's vehicle was consistent with him steering to the right to avoid an oncoming vehicle. This amply supported the requirement for "material evidence" corroborating the insured's testimony. Physical contact is a condition precedent for coverage under SPF No. 1, and is not required under SEF No. 44. Berger JA would have dismissed the appeal and allowed the cross appeal.

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