
CANADA / JUDGMENT

Re Newton Trust

2013 BCSC 1665

COURT

Supreme Court of British Columbia

DECIDED

10 September 2013

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2013 BCSC 1665 Re Newton Trust

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re Newton Trust,

2013 BCSC 1665

Date: 20130910

Docket: S114597

Registry: Vancouver

Between:

Re Graham C. MacKenzie and the Newton Trust,

constituted by Deed of Settlement of Samuel Joseph Cohen

made on December 17, 1959

Corrected Judgment: The text of the judgment was corrected at paragraphs

81 and 82 where changes were made on November 5, 2013

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Petitioner:

G. Turriff, Q.C.

Counsel for the Respondent:

H. Shapray, Q.C.

Counsel for the Attorney General of

British Columbia:

N. E. Brown

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 17 - 20 and

July 16, 2013

Place and Date of Judgment:

Vancouver, B.C.

September 10, 2013

Introduction

- [1] Jacqueline Cohen applies to dismiss the petitions brought by Graham MacKenzie, Q.C. seeking to nullify the decision of Registrar Blok (as he then was), indexed at 2005 BCSC 1049, in Action number A861861 on the basis he lacked jurisdiction to hear and determine the passing of a trustees' accounts. She also seeks special costs or costs in any event.
- [2] These petitions arise in a series of matters arising from a trust known as the Newton Trust, established by Samuel Cohen in 1959. I summarized the history of these proceedings in my reasons for judgment indexed at 2013 BCSC 799 at paras. 8 - 13.
- [3] Mr. MacKenzie is one of three trustees of the Newton Trust. Ms. Cohen is the only living granddaughter of Samuel Cohen. She is also a trustee and beneficiary of the Newton Trust. On May 8, 2013, I appointed Kip Woodward as trustee to fill the vacancy created by the death of former trustee Tom Mayson, Q.C.
- [4] Two petitions are before me in relation to the jurisdictional question. Mr. MacKenzie's petitions raise a number of constitutional challenges in relation to the Court Rules Act, R.S.B.C. 1996, c. 80 [Court Rules Act], the Rules of Court, B.C. Reg. 221/90, now repealed [former Rules] and the Trustee Act, R.S.B.C. 1996, c. 464 [Trustee Act].
- [5] On July 8, 2011, Mr. MacKenzie filed his first petition (Action No. 114597 (petition #1)), amended on August 17, 2011, to nullify the decision of Registrar Blok and all related proceedings by challenging the constitutionality of the Court Rules Act as well as R. 32(2) of the former Rules. Ms. Cohen's response to the petition was filed on October 5, 2011 and amended on September 25, 2012. On November 26, 2012, Mr. MacKenzie filed a second petition (Action No. S-128332 (petition #2)), seeking the same relief as petition #1 with the exception of his allegation that the Trustee Act provisions are also unconstitutional. This petition is brought instead of amending petition #1. Mr. MacKenzie says he commenced

petition #2 because counsel for Ms. Cohen refused to agree to amendments to petition #1. Ms. Cohen filed her response to petition on January 2, 2103.

[6] The grounds for dismissal raised by Ms. Cohen are as follows:

- i. the petitioner has no standing to attack the constitutionality of the impugned legislation because his original claims before Registrar Blok are statute-barred and their dismissal became res judicata when he failed to apply for review under the Trustee Act. Also, the issue is moot;
- ii. even if the petitions succeed, the order of Registrar Blok and related orders are not nullities by reason of the de facto doctrine;
- iii. even if the impugned legislation was held to be ultra vires, it is plain and obvious that the declarations of invalidity sought by Mr. MacKenzie in order to resurrect his original claims in respect of the Newton Trust could not be properly or reasonably granted;
- iv. the petition is a collateral attack on orders of the Supreme Court of British Columbia, amounting to an abuse of process;
- v. petition #2 is an abuse of process in that it seeks the same relief as a prior pending petition #1; and
- vi. these proceedings are an abuse of process because they are without foundation or are likely to cause vexation and oppression.

[7] Mr. MacKenzie opposes this application. In essence, he submits that Ms. Cohen's application should be limited to consideration of her argument pursuant to R. 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. He suggests his petition has merit: Registrar Blok had no authority, nor could he have been granted the authority, to render his decision with respect to the trustees' accounts.

[8] He also submits there is nothing abusive about the proceeding. It cannot be proved this petition was brought for an improper motive or that it is hopeless. He suggests that the doctrine of res judicata does not apply in circumstances where decision-makers do not have any jurisdiction.

[9] If the application is allowed, Mr. MacKenzie stresses that there is no basis for an order of special costs against Mr. MacKenzie for reprehensible conduct.

Background

[10] Ms. Cohen was appointed a trustee of the Newton Trust in 1997. At that time, the other two trustees were Mr. MacKenzie, appointed in 1977, and Garth Kennedy, trustee of the Newton Trust from 1972 to 1998. After Mr. Kennedy's death in 1998, Mr. Mayson was appointed as trustee, a position which he retained until his death in 2010.

- [11] On October 4, 2002, Mr. MacKenzie brought an ex parte application to the Supreme Court of British Columbia to have his trustee's account audited, passed and approved, among other items of relief. He specifically sought additional remuneration for himself and the estate of Mr. Kennedy, which exceeded \$800,000.
- [12] On October 4, 2002, Master Groves (as he then was) made several orders in regard to Mr. MacKenzie's application. He ordered, inter alia, that the accounts of the trustees of the Newton Trust be audited, taken and passed before the Registrar in respect of their administration and management from March 1, 1998 to February 29, 2000. The Registrar was ordered to recommend a fair and reasonable remuneration to the trustees of the Newton Trust as well as a fair and reasonable allowance as a care and management fee during that time. Master Groves further ordered that the Registrar review "the unauthorised pre-taking of fees (based on income of the [Newton] Trust) by two of the three Trustees for the period ending February 29, 2000, and decide whether such fees should be repaid to the [Newton] Trust with interest." The Registrar was also ordered to review the payment of director's fees received by two of the three trustees.
- [13] The hearing as directed by Master Groves took place before Registrar Blok over the course of seven days between February and September 2004. No objection to the jurisdiction of Registrar Blok to hear the matter was raised.
- [14] On July 11, 2005, Registrar Blok published his reasons for judgment.
- [15] I have excerpted his key findings:
- [130] Mr. MacKenzie's evidence and argument emphasized the work he did to manage, maintain and refurbish assets owned by N.I.L. [the Newton Trust asset]. For the purposes of his argument he treated the work he did for N.I.L. as being work done for the Trust. Although, arguably, this is inconsistent with the general approach adopted by the courts [see, by analogy at least, *British Columbia (Public Trustee) v. Lohn Estate* (1994), 98 B.C.L.R. (2d) 26 (C.A.)], I will assume for the moment that this is a correct approach. However, I conclude that this necessarily raises the question of the remuneration already received by Mr. MacKenzie for the work he did for N.I.L.
- [133] Mr. MacKenzie argued that this clause entitled him to be paid for all of the services he provided (and billed) to N.I.L. in addition to the full trustee's fees he is entitled to receive.
- [134] Mr. MacKenzie cited *Re Heap Estate* (1951), 4 W.W.R. (N.S.) 206 (B.C.S.C.) in support of his submission. In that case two beneficiaries of an estate opposed the fees of the estate solicitor, charged at the rate of 2% of the value of the estate (in accordance with the tariff of the time), on the grounds that the fees ought to be reduced to reflect the fact that the solicitor was also receiving remuneration as an executor of the estate. There was a charging clause in the will.

- [137] To interpret the charging clause in the manner submitted by Mr. MacKenzie would mean that he would be paid for managing the assets of N.I.L. at, say, \$250 per hour and he would still be entitled to full trustee remuneration for the identical services. This is inconsistent with Re Heap Estate and with the established view that is taken of that case.
- [138] Mr. MacKenzie's interpretation would mean that, in some cases, a trustee could rely on a charging clause to recover remuneration that is in excess of the limits prescribed by the Trustee Act. It is well-established that trustees cannot, in effect, "subcontract" their duties to others (or as here, to one of their own) without having the cost of those services taken into account in some way, often by deducting the cost from the trustee's remuneration. To hold otherwise would be to invite a doubling of the administration cost of estates.
- [144] From June 1991 to December 1999, a period of 8½ years, billings totalled \$850,000, an average of \$100,000 per year. The accounts that are available for certain periods in 1984, 1985, 1987, 1988 and 1989 show billings averaging about \$35,000 per year, these being periods of perhaps moderate activity on Mr. MacKenzie's part. There are over 10 years of billings unaccounted for, some being times of lesser activity and some being times of intense activity on Mr. MacKenzie's part. Having regard to the lower billing rates that would have applied in the earlier years, I am satisfied that Mr. MacKenzie would have billed N.I.L. an average of at least \$30,000 each year in the years for which records are missing. This results in further billings of \$300,000 to be added to the known total of \$943,000, for a grand total of \$1,243,000.
- [145] Applying the earlier conclusion that no more than 20% of fees billed related to legal work, it is evident that even on a conservative approach to the evidence Mr. MacKenzie has been paid at least \$1 million for his work in managing the assets of N.I.L. over the years.
- [146] In addition, Mr. MacKenzie was paid about \$17,000 by way of bills rendered directly to the Trust for such things as passings of accounts, and he was (or is to be) paid a total of \$130,490 for trustee's fees.
- [150] Against all of Mr. MacKenzie's efforts, both those for the Trust and those for N.I.L., must be weighed the estimated amount of \$1 million and the actual amounts of \$17,000 and \$130,490 paid to Mr. MacKenzie. Mr. MacKenzie was paid at \$250 per hour, or a rate that was equivalent in earlier years, for any and all activities he undertook on behalf of the Trust and N.I.L., and he was paid (or is to be paid) sums totalling \$130,490 in addition to the hourly billings. Importantly, he was paid at a professional's rate for work that did not require professional expertise. He was paid at \$250 per hour, or the equivalent, for all his activities in administering, caring for and managing the assets of N.I.L., which included important things such as contract management but which also included such mundane tasks as shopping for televisions and mattresses and attending staff events. Clearly he was overpaid for all of the latter type of activities, and the evidence showed that the time spent on these types of matters was significant. Only at the more sophisticated end of his managerial duties did the rate of \$250 per hour (or its equivalent) approach an appropriate

level of compensation.

- [151] Ms. MacKenzie also benefited from the fact that, unlike most trustees, he was paid when he billed and for most of his remuneration he did not have to wait for a passing of accounts. I cannot help but observe that, in some sense at least, there was an element of pre-taking to much of Mr. MacKenzie's own remuneration.
- [152] Having regard to all of the factors discussed above, and taking a view of the value of the N.I.L. shares and N.I.L. assets that is most favourable to Mr. MacKenzie, I am of the view that Mr. MacKenzie has been fully and fairly remunerated for all his services as trustee.
- [167] I conclude that, in the circumstances of this case, it is not open to Mr. MacKenzie to claim a care and management fee for services he provided during periods of time covered by previous passings of accounts. Mr. MacKenzie was fully aware of his right to claim this "annual" fee but chose not to do so and, unlike the situation with the capital fee, did not reserve his right to claim the fee at a later date. I conclude that, the capital fee aside, the trustees were entitled to consider that the books were closed for these periods.
- [168] In any event, I would not have considered an award of a care and management fee to Mr. MacKenzie and Mr. Kennedy as it is my conclusion that these trustees were already adequately remunerated elsewhere.
- [16] Registrar Blok ordered, in relevant part, that the trustees Mr. MacKenzie and the estate of Mr. Kennedy were not entitled to a care and management fee for those periods of time covered by previous passing of accounts. Furthermore, Mr. MacKenzie and the estate of Mr. Kennedy were not entitled to a care and management fee for the period from March 1, 1998 to February 29, 2000.
- [17] A notice of appeal of Registrar Blok's decision was filed by Mr. MacKenzie and the estate of Mr. Kennedy on July 22, 2005 with the Supreme Court of British Columbia. Those grounds of appeal were:
- (a) Registrar Blok erred in concluding that the amounts paid to the trustees represent full, fair and reasonable remuneration in respect of the capital distributions in 1992 and 1998;
 - (b) Registrar Blok erred in his interpretation of and application of the law by concluding that no trustee fee should be paid to Mr. MacKenzie and the estate of Mr. Kennedy on the capital distributions made in 1992 and 1998;
 - (c) Registrar Blok erred in his interpretation and application of the law to the charging clause set out in the Trust;
 - (d) Registrar Blok erred in concluding that Mr. MacKenzie and the estate of Mr. Kennedy are not entitled to claim a care and management fee for periods of time covered by previous passings of accounts.

- [18] Appearances were entered on behalf of Mr. Mayson and Ms. Cohen. The proceedings, for the time being, did not progress any further. On application of Ms. Cohen, filed December 21, 2011, the appeal was dismissed for want of prosecution by order of Mr. Justice Myers, entered on November 19, 2012. Mr. MacKenzie was ordered to pay special costs.

The Grounds of Relief Sought in the Petitions

- [19] Mr. MacKenzie submits the Court Rules Act is ultra vires the legislative assembly of British Columbia as this law undermines judicial independence by authorizing the Lieutenant Governor of British Columbia to make rules governing the conduct of proceedings in the Supreme Court of British Columbia. On this basis, R. 32(2) of the former Rules was unconstitutional and of no force and effect. In any event, he submits, R. 32(2) was unconstitutional and of no force and effect because it was a rule about jurisdiction and the Court Rules Act did not sanction the making of a rule about jurisdiction.
- [20] Further, Mr. MacKenzie says R. 32(2) was ultra vires the Lieutenant Governor in Council and of no force and effect because it authorized an officer of the Supreme Court of British Columbia to answer questions of law and to make binding decisions that only judges appointed pursuant to s. 96 of the Constitution Act, 1867 (UK), 30 & 31 Vict. c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [Constitution Act, 1867] can answer and make.
- [21] Mr. MacKenzie argues that R. 32(2) was unconstitutional and of no force and effect because it authorized an officer of the Supreme Court of British Columbia to make an order in the name of the court.
- [22] Mr. MacKenzie further argues that ss. 88, 99 and 100 of the Trustee Act are ultra vires the provincial legislature as they sanction the unconstitutional distribution of judicial power by authorizing judges of the Supreme Court of British Columbia to delegate their judicial function to people who are not appointed pursuant to s. 96 of the Constitution Act, 1867. These laws encroach upon judicial independence.
- [23] He seeks the following orders:
- i. a declaration that the Court Rules Act is ultra vires the provincial legislature and that former R. 32(2) was invalid;
 - ii. a declaration that former R. 32(2) was ultra vires the Lieutenant Governor in Council;
 - iii. a declaration that ss. 88 and 91 of the Trustee Act are ultra vires the provincial legislature insofar as they have authorized and authorize judges of the Supreme Court of British Columbia to distribute judicial power by delegating part of their judicial function or power to people who are not judges appointed pursuant to s. 96 of the Constitution Act, 1867; insofar as they have authorized and authorize a Registrar of the Supreme Court of British Columbia, if directed by the Court, to allow a trustee under a deed a fair and reasonable allowance for his or her care, pains and trouble in and about a trusteeship; and insofar as they have authorized and authorize a Registrar to make an order for such an allowance;

- iv. a declaration that s. 100 of the Trustee Act is ultra vires the provincial legislature to the extent it may have sanctioned the making of rules pertaining to procedures of the Supreme Court of British Columbia;
- v. a declaration that each of the following occurrences, matters or steps in Action number A861861 is a nullity:
 - a. the order of Master Groves dated October 24, 2002;
 - b. the hearing before Registrar Blok on February 2 - 4, 2004; May 26 - 28, 2004 and September 7 - 8, 2004;
 - c. reasons for judgment of Registrar Blok dated July 11, 2005;
 - d. the order of Registrar Blok dated July 11, 2005;
- vi. a declaration that there has been no judicial decision of the matters that were the subject of the hearing before Registrar Blok;
- vii. a declaration that Registrar Blok's findings from the hearing before him are not available for use in any proceeding; and
- viii. an order that Mr. MacKenzie's special costs of the proceeding be paid from the Newton Trust.

Legislation

Trustee Act

[24] Sections 88, 89, 91 and 100 of the Trustee Act provide:

Setting remuneration of trustees and guardians

88 (1) A trustee under a deed, settlement or will, an executor or administrator, a guardian appointed by any court, a testamentary guardian, or any other trustee, however the trust is created, is entitled to, and it is lawful for the Supreme Court, or a registrar of that court if so directed by the court, to allow him or her a fair and reasonable allowance, not exceeding 5% on the gross aggregate value, including capital and income, of all the assets of the estate by way of remuneration for his or her care, pains and trouble and his or her time spent in and about the trusteeship, executorship, guardianship or administration of the estate and effects vested in him or her under any will or letters of administration, and in administering, disposing of and arranging and settling the same, and generally in arranging and settling the affairs of the estate as the court, or a registrar of the court if so directed by the court thinks proper.

- (2) The court or a registrar of the court if so directed by the court, may make an order under subsection (1) from time to time, and the amount of remuneration must be allowed to an executor, trustee, guardian or administrator, in passing his or her accounts, in addition to any other allowances for expenses actually incurred to which the trustee, executor, guardian or administrator may by law be entitled.

- (3) A person entitled to an allowance under subsection (1) may apply annually to the Supreme Court for a care and management fee and the court may allow a fee not exceeding 0.4% of the average market value of the assets.

Application for remuneration

89 The court may, on application to it for the purpose, settle or direct the registrar to settle the amount of the compensation, although the estate is not before the court in an action.

Review of order or certificate of registrar

91 (1) An order or certificate made by a registrar under section 88 or 89 is subject to review by the court on application by summons to be made before the expiration of 14 clear days after the entering of the order or the filing of the certificate.

- (2) Unless varied or discharged by the court, the order or certificate is binding on the trustee, executor, administrator or guardian, and all parties interested in the trust estate.

Power to make rules

100 The Lieutenant Governor in Council may make rules for carrying into effect the provisions of sections 88, 89, 91 and 99.

Court Rules Act

[25] Section 1 of the Court Rules Act establishes the power of the Lieutenant Governor in Council to make rules by regulation they consider necessary or advisable governing the conduct of proceedings in the Court of Appeal, the Supreme Court and the Provincial Court. The provisions provide further specificity as to the matters with regard to which these rules may be made as well as requirements of consultation in relation to certain rules.

Former Rules

[26] The former Rules provide under R. 32(2):

The court may direct that the result of an inquiry, assessment or accounting held by a master, registrar or special referee be certified by that person, and the certificate, when filed, shall be binding on the parties to the proceeding.

[27] This Rule is now found under R. 18-1(2) of the Rules.

Positions of the Parties

The Applicant

[28] Ms. Cohen raises many challenges in this application against the petitions. Most of those arguments point to how the petitioner cannot be granted the relief he seeks in any event.

- [29] The applicant suggests this proceeding is brought for the ulterior purpose of enabling the petitioner to use the Court's process to assert once again an entitlement to \$800,000 in trustee fees in payment for the fulfillment of his responsibilities as trustee of the Newton Trust.
- [30] The applicant suggests the Court is in a position to evaluate the petitioner's submissions in order to finally determine how the court would dispose of the issues. All of the facts in issue are already before the Court. Any further hearing would replicate the arguments made and the evidence considered in this application.
- [31] In the alternative, the applicant suggests that it makes no difference to the outcome of this application whether the legislation is ultra vires the provincial legislature. The applicant submits it is "plain and obvious" that Mr. MacKenzie is not entitled to the relief sought in any event.
- [32] As a preliminary observation, the applicant notes the Trustee Act grants jurisdiction to the Supreme Court of British Columbia to authorize a Registrar of the court to evaluate and draw conclusions on the fairness and reasonableness of a claim by a trustee for remuneration for their care and management of the trust. This authority is a subordinate and delegated jurisdiction. The applicant submits that this delegation does not affect a Supreme Court judge's authority to make a final order under ss. 88 or 91 of the Trustee Act. A decision by a Registrar under s 88 is reviewable upon application by the Supreme Court of British Columbia pursuant to s. 91 of the Trustee Act. The Registrar's decision, the applicant suggests, is not a final adjudication unless both parties accept it as such.
- [33] The applicant takes the position that the power of the superior courts to delegate their authority to officers of the superior courts has a lengthy history in English and Canadian common law traditions. The constitutional authority for the office of the Master and the Registrar in British Columbia is grounded in s. 92(14) of the Constitution Act, 1867, which grants the provincial legislature the exclusive authority to make laws in relation to the administration of justice in the province, including the constitution, maintenance and organization of the provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.
- [34] The applicant says that on these facts, the constitutional challenges to the jurisdiction of Master Groves to make his order and for Registrar Blok to conduct the review and pass the Newton Trust accounts are patently frivolous and vexatious.
- [35] She says it is a "legal non sequitur" to say that if the impugned legislation is struck down, all previous proceedings are void.
- [36] The applicant identifies several plain and obvious reasons why this Court should not reasonably exercise its discretion to make the declarations sought by Mr. MacKenzie.

- [37] As the impugned proceedings were concluded in 2002 and 2005, they could not be cleared nullities by reason of the application of the de facto doctrine. The operation of the rule of law doctrine and derivative principles prevent decisions of the court from being treated as if they were nullities. The rights and obligations and other effects of those decisions will continue to have the same force and effect that they would have had if they arose under valid enactments, referring to the *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721. The Court discussed the de facto doctrine, a doctrine of "ancient and venerable origin", which holds that: "The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, ... legal and binding."
- [38] The Court continues at para. 79:
- There is only one true condition precedent to the application of the doctrine: the de facto officer must occupy his or her office under colour of authority. This is consistent with the rationale for the doctrine, viz., that the members of the public with whom the officer dealt relied upon his ostensible status. Simply put, "[a]n officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law". *R. v. Corporation of Bedford Level* (1805), 6 East 356; 102 E.R. 1323 at p. 1328 (per Lord Ellenborough C.J.). See also *Parker v. Kett* (1702), 1 Ld. Raym. 658; 91 E.R. 1338, at p. 1340.
- [39] The applicant submits Master Groves and Registrar Blok meet that precondition.
- [40] Mr. MacKenzie's claims before Registrar Blok are res judicata, even if the impugned legislation was held to be unconstitutional. The applicant submits that it is a matter of practical necessity to have finality and certainty as essential elements of the administration of justice.
- [41] The applicant notes that Mr. MacKenzie says he and his counsel were ignorant of the possible constitutional challenge at the hearing of his claims before Registrar Blok. The applicant submits this cannot be a basis to avoid the defence of res judicata as the "law is always present to be discovered through the exercise of 'reasonable diligence'." Mr. MacKenzie was free to challenge the jurisdiction of Master Groves and Registrar Blok at the time of the hearing of the matters. He filed an appeal, which was later dismissed for want of prosecution. It would be fundamentally unfair, in Ms. Cohen's submission, if Mr. MacKenzie was permitted to relitigate his original application before Registrar Blok.
- [42] Ms. Cohen notes that the limited scope of jurisdiction of the Registrar upon a reference from the court has already been reviewed, referring to *Larson v. Larson* (1993), 80 B.C.L.R. (2d) 303 (C.A.) at para. 60.
- [43] If Mr. MacKenzie had any right to raise the issue of the jurisdiction of Registrar Blok, he was required to do so on appeal. The proper remedy for any excess of jurisdiction was a review authorized by s. 91 of the Trustee Act. He did nothing, in essence, to pursue that right and having failed to do anything, his petitions are barred from proceeding on the basis of res judicata.

- [44] Ms. Cohen argues that late efforts to attack collaterally judicial proceedings, even on constitutional grounds, are an abuse of process. Both petitions are prohibited as collateral attacks on Mater Grove's order and Registrar Blok's order and are an abuse of process.
- [45] Ms. Cohen says that it would be inequitable and contrary to the interests of justice to grant the declarations sought in the petitions. The applicant notes a number of bases upon which the Court could withhold its discretionary power to grant the declarations sought in the petitions. Ms. Cohen submits the petitions are statute barred by operation of s. 3(5) of the Limitation Act, R.S.B.C. 1996, c. 266 (now repealed); they are also barred on the basis of laches. As his claims are statute barred, he has no standing. Certainly, he does not have public interest standing because many others can raise the same issue whose future rights may be genuinely affected by the exercise of an unconstitutional jurisdiction. She says the constitutional issues raised in the petitions are moot. She also relies on s. 11 of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 where an application for judicial review will not be barred by passage of time unless an enactment provides otherwise and the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.
- [46] In sum, the applicant submits the petitions are an attempt to relitigate a claim or claims that have already been determined by an adjudicative process.

The Petitioner

- [47] The petitioner submits the real issue is whether the petitions may be struck pursuant to R. 9-5(1) of the Rules. This will fall to be determined on the basis of whether it is plain and obvious the claims disclose no reasonable cause of action, whether the claims may prejudice, embarrass or delay the fair trial of the hearing or whether the claims are otherwise an abuse of process.
- [48] Mr. MacKenzie submits that these proceedings raise serious, difficult questions of constitutional law of general importance. It is not plain and obvious that the petitions disclose no reasonable cause of action.
- [49] He submits that this court should not to allow these applications turn into a hearing of the petitions on their merits.
- [50] He says the potential for a respondent to present a strong defence is not a ground justifying an order under R. 9-5(1) of the Rules. He submits that Ms. Cohen's arguments about standing, expiry of the limitation period, laches, res judicata, collateral attack, de facto doctrine and the rule of law are all defences to Mr. MacKenzie's claims raised in his petitions.
- [51] Mr. MacKenzie says that when steps were taken that led to Registrar Blok's decision, neither he nor his lawyer had considered the question of whether a Registrar has jurisdiction to certify the result of an accounting. It cannot be said, therefore, that he waived any

jurisdiction argument by having obtained Master Grove's order or by proceeding with the directed accounting before Registrar Blok. As lack of jurisdiction was unknown, "it could not be said that either Master Groves or Registrar Blok was a quasi-arbitrator extra curiam against whose actions no relief could be obtained at court."

- [52] Mr. MacKenzie's position is that the Court Rules Act undermines judicial independence; therefore, any rule of court made pursuant to the Court Rules Act was or is invalid, including former R. 32(2). He suggests it is not plain and obvious this question fails to disclose a reasonable claim.
- [53] As Registrar Blok is not appointed pursuant to s. 96 of the Constitution Act, 1867, he had no jurisdiction to make any binding pronouncement.
- [54] He submits the issue of whether the Registrar has jurisdiction to grant a binding certificate has never been decided, distinguishing the case of Larson, which dealt with Registrar's recommendations.
- [55] Mr. MacKenzie submits he has standing because he is directly affected by the statutes and rules whose validity he challenges.
- [56] He submits his remuneration claim before Registrar Blok is not statute-barred. He says that if he obtains the declarations he seeks, he will be free to apply under s. 99(1) of the Trustee Act for a direction that he pass the accounts that were the subject of the hearing before Registrar Blok.
- [57] Mr. MacKenzie submits Ms. Cohen cannot simultaneously rely on Master Groves' order and also argue Mr. MacKenzie missed the limitation period for bringing the petitions. Nor are constitutional challenges time-limited.
- [58] He says the petitions are not an attempt to relitigate. As Registrar Blok had no jurisdiction to grant the order, there has been no litigation that could be relitigated.
- [59] Mr. MacKenzie submits the de facto doctrine has no application in these proceedings. Registrar Blok's decision is invalid because he had no jurisdiction in the first place.
- [60] Mr. MacKenzie suggests that no legal vacuum would result from granting the declarations sought as jurisdiction to make final decisions would remain with the Supreme Court of British Columbia.
- [61] The proceedings are not frivolous, vexatious or oppressive; they are not an abuse of the court's process. There is no evidence that he brought this proceeding otherwise than in good faith. In any event, his motive for bringing the petitions could be tried. As constitutional claims can be brought at any time, there is no abuse of process arising from the delay of bringing the petitions.
- [62] He notes declarations of constitutional invalidity are not discretionary. A court must declare legislation unconstitutional if invalidity is proved.

Attorney General

- [63] The Attorney General appeared at the hearing of this matter as an interested party in the constitutional questions raised by Mr. MacKenzie. The submissions were limited as this was not the actual hearing of the constitutional questions
- [64] The Attorney General's interest beyond merely the constitutional question at issue is in the finality of decisions of this court and preventing abuses of process, collateral attack, duplicative proceedings and the interests of judicial economy. The Attorney General declined to make any submissions as to whether those grounds were made out.
- [65] In respect of issue estoppel and res judicata, the Attorney General drew the Court's attention to the more recent case of *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, which affirms *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 as the authoritative statement of the law of issue estoppel.
- [66] The Attorney General also raised the issue of the general principle that a court should be reluctant to consider and determine a constitutional question if it is not necessary to decide, referring to *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paras. 8 - 9 and *Reference Re Remuneration of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 301.

Analysis

- [67] In essence, the real question that I must determine is whether a party can bring a second action in relation to a previous proceeding he commenced that challenges the constitutional basis for that action.
- [68] Mr. MacKenzie has attempted to frame this claim as an entirely new proceeding on the basis of the substantive issues he raises in the petitions. However, he expressly asks this Court to set aside the impugned judgment of Registrar Blok. These circumstances raise the question of whether the collateral attack rule is engaged.
- [69] In *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599, Mr. Justice McIntyre described the rule of collateral attack:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally--and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

[70] In *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 60, the Court affirmed this description of collateral attack and reviewed the principles underpinning the rule:

[61] The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 72:

The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it. [Emphasis added.]

[62] In *R. v. Litchfield*, [1993] 4 S.C.R. 333, the criminal case referred to in *Garland*, the Court declined to apply the rule against collateral attack. In *Garland* itself, class action plaintiffs brought a claim against a gas company seeking restitution on the grounds of unjust enrichment of late payment penalties previously approved by the Ontario Energy Board. In its defence, the gas company argued that the claim for restitution was a collateral attack on the Board's order. The defence failed.

[71] As noted by Madam Justice Arbour, writing for the majority in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, the focus of the collateral attack rule is on attacking the order itself and its legal effect (para. 34).

[72] In her summary of the law of collateral attack, Arbour J. referred to *R. v. Sarson*, [1996] 2 S.C.R. 223, which is also raised in the applicant's arguments in this case. The circumstances in that case are relevant to this application. Mr. Justice Sopinka, writing for the majority, held that a prisoner's habeas corpus attack on his criminal conviction pursuant to a law later declared unconstitutional must fail under the rule of collateral attack and the doctrine of res judicata. The offender's conviction was a matter of settled law as a judgment of a court of competent jurisdiction. Citing from Professor Hogg, Sopinka J. noted that only an absence of jurisdiction, rendering a decision a nullity, would expose a judicial decision to collateral attack (para. 35).

[73] Counsel for Mr. MacKenzie argues that the rule of collateral attack does not apply as it first requires that the impugned order be made by a court of competent jurisdiction. He says that Registrar Blok was not of competent jurisdiction to grant his order. Therefore, collateral attack cannot be raised.

[74] Donald Lange's text *The Doctrine of Res Judicata in Canada*, 3rd ed. (Markham: LexisNexis, 2010) states at 464 - 465:

There are two kinds of lack of jurisdiction for the purpose of a judgment. An important distinction must be made between a judgment rendered where there is no jurisdiction, in and of itself, and a judgment rendered where there is no jurisdiction although jurisdiction is assumed to

exist because of a set of facts which are assumed to exist. The former is a nullity and assailable in a subsequent proceeding as a defence to an estoppel argument. It is not viewed as a collateral attack on the judgment. The latter is only assailable by way of appeal. If it is attacked in a subsequent proceeding, it is viewed as a collateral attack on the judgment.

[75] As stated by the Manitoba Court of Appeal in *Volhoffer v. Volhoffer*, [1925] 3 D.L.R. 552 (M.B.C.A.) at 556 - 557:

From these authorities, the law would appear to be that, if a tribunal which has jurisdiction over a subject-matter, provided a given state of facts exists, makes an order in respect of that subject-matter in the absence of the existence of that state of facts, and, therefore, without jurisdiction, such order must be treated as valid and binding until it is reversed upon an appeal, and, generally speaking, it cannot be attacked in a collateral proceeding. But where the tribunal has not been given any jurisdiction over the subject-matter, no matter what state of facts may exist, an order made in respect of it is a nullity, and need not be appealed against, and its invalidity may be set up as an answer in any proceeding taken under it.

[76] I also note the British Columbia Court of Appeal's findings in *R. v. J.L.S.*, 2002 BCCA 174:

[36] The appellant argues that just as the Provincial Court has no power to issue injunctions, the Youth Court has no power to place young persons on recognizances.

[37] As counsel for the respondent has pointed out, the distinction between errors of law or fact on the one hand and errors of jurisdiction on the other is sometimes difficult to draw but, in the context of the rule against collateral attack, the distinction may be drawn by asking whether the judge who had the order under attack had the general power to make the type of order in question, even if he or she arguably should not have made the order in the particular circumstances of the case under consideration. If the question is framed that way, Mr. Ehrcke argued, then the issue is not whether Judge Lemiski should have placed the appellant on the recognizance nor whether he erred in law in doing so. Instead, the question is whether he lacked the power to place young persons on recognizances at all.

[38] While a Youth Court judge cannot order a young person to enter into a recognizance under s. 810 of the Criminal Code, Youth Court judges do have the power to place young persons on recognizances. Clearly they do so in the context of bail applications and s. 49 of the Young Offenders Act makes explicit reference to "a recognizance binding a young person". In my view, the recognizance order made by Judge Lemiski falls into the category of an erroneous exercise of jurisdiction and, as such, would be immune from collateral attack. The proper forum in which to attack the order placing the young person on a recognizance was an appeal from the original order, not in proceedings commenced for breach of recognizance.

[39] As the order was immune from collateral attack, the appeal from Mr. Justice Romilly's order must be dismissed.

- [77] If Mr. MacKenzie was concerned about the jurisdiction of Registrar Blok, he could have raised that issue at the hearing of the matter or upon appeal. I agree with the submission of the applicant that he could have discovered this challenge by exercising reasonable diligence.
- [78] It is inappropriate for this Court to allow a proceeding to continue on the basis the litigant has now come up with a constitutional argument six years later that attacks the legal basis of the original judgment, which obviously did not fall in his favour. He has squandered his right to appeal the decision for want of prosecution. That was the proper avenue for challenging Registrar Blok's decision.
- [79] It is also well established under the doctrine of *res judicata* that the courts will not permit the same parties to open the same subject of litigation in respect of a matter which the parties, exercising reasonable diligence, might have brought forward at the time. As stated by Madam Justice Newbury in *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at para. 28:

Although grounded in the same basic considerations, each form involves, or has traditionally involved, criteria that have been expressed in slightly different terms. The traditional criteria for cause of action estoppel, confirmed in Canada in *Angle*, supra, were summarized by Chief Justice Hewak in *Bjarnarson v. Manitoba* (1987) 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, aff'd. (1987) 45 D.L.R. (4th) 766 (Man. C.A.), as taken from *Grandview v. Doering* [1976] 2 S.C.R. 621:

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
3. The cause of action and the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [At para. 6; emphasis added.]

It is perhaps unnecessary to state that the doctrine contemplates two "causes" - the first having ended in a final judgment that bars a "second claim for the same cause": see *Mohl v. University of British Columbia*, 2006 BCCA 70 at paras. 23-4. In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy: see also *Lange* at 147; *Comeau v. Breau* (1994) 145 N.B.R. (2d) 329 (C.A.) at para. 18; and *Letang v. Cooper* [1965] 1 Q.B. 222 (C.A.) at 242-43.

- [80] In *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 1999 NSCA 77 Mr. Justice Cromwell declined to strike out the action at the preliminary stage because he was concerned that it was far from clear, based on the incomplete record, if the matter was a collateral attack (para. 60). That is not a concern for me: I have the full factual record before me.

[81] In the interest of ensuring finality, preserving the integrity of decision-making processes which are competent jurisdiction until proven otherwise and ensuring parties pursue the most appropriate avenue of challenge, I dismiss petitions 1 and 2.

Conclusion

[82] Mr. MacKenzie's petitions in Action No. 114597 and Action No. S-128332 are dismissed.

[83] Ms. Cohen is entitled to costs of this application.

[84] I have already ordered that I will address the issue of special costs after I have heard and determined all of the matters raised in all of the petitions before the Court.

"Gropper J."

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