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Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations), 2018 BCCA 214

Areas of Law: Judicial Review; Collateral Attack; Misfeasance in Public Office; Statutory Decision-Makers

~A civil action may be found to constitute a collateral attack where it seeks to invalidate a statutory-decision maker's decision or avoid its consequences, or fails to plead a valid private law cause of action for damages~

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The Appellant, Greengen Holdings Ltd., is an independent developer of sustainable hydropower projects in BC. In February 2005, it applied for a provincial water licence and a Crown land tenure to support a run-of-river hydropower project at Fries Creek, near Squamish. Fries Creek is within the traditional territory of the Squamish Nation. In July 2006, BC Hydro awarded the Appellant an Energy Purchase Agreement ("EPA"), under which it provided a $300,000 performance bond. In December of the same year, it obtained an archaeological overview assessment of Fries Creek, which indicated that the area had not been intensively utilized by First Nations people in the past and that the project would not have a major impact on the valley. In April 2007, the Appellant submitted a development plan for the project to the Province. In July 2007, the Province and the Squamish Nation entered into a land use agreement that provided for the protection of 22 cultural sites including Fries Creek. The Province agreed not to issue new Crown land tenures within the cultural sites.

Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations), (cont.)

The Province denied the Appellant's applications in August 2009. The decision concluded that the project was inconsistent with the land use agreement and would adversely impact the Squamish Nation's Aboriginal rights. The refusal to grant the land tenure also contributed to the decision not to issue a water licence, as that could not be issued without a prerequisite interest in land. The Appellant challenged the decisions through administrative proceedings. It also tried, unsuccessfully, to obtain the Squamish Nation's agreement to the project. The Environmental Appeal Board ("EAB") dismissed the appeal for lack of jurisdiction to provide the remedies sought, because of the lack of land tenure. In January 2016, the Appellant filed a petition for judicial review of the EAB decision as well as the Province's decisions denying the water licence and the land tenure. The petition has not yet been heard. On March 17, 2016, the Appellant filed a notice of civil claim against the Province and the Squamish Nation. The claim against the Province alleged misfeasance in public office. In October 2016, BC Hydro cancelled the EPA. This resulted in the forfeiture of the $300,000 performance bond. Both the Squamish Nation and the Province brought applications to dismiss the notice of civil claim. The chambers judge granted the Squamish Nation's application and dismissed the Appellant's claim against it as being out of time and statute-barred. The Province applied to strike the Appellant's claim as an abuse of process. The judge acceded to the Province's argument but made an order to stay the civil claim rather than strike it, until the judicial review proceedings were completed. She found the civil claim to be a collateral attack because in essence it sought to challenge the lawfulness of decisions made by statutory decision-makers, a question better addressed through judicial review.

APPELLATE DECISION

The appeal was allowed. The Court of Appeal found that deference was not owed the chambers judge upon review, as she was not required to make findings of fact but rather address questions of law. The Court applied

Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations), (cont.)

the Supreme Court of Canada decision in *Canada (Attorney General) v. TeleZone Inc.* It held that a civil action may be found to constitute a collateral attack where it seeks to invalidate a statutory-decision maker's decision or avoid its consequences, or fails to plead a valid private law cause of action for damages. In this case, the Appellant's civil action alleges that the decisions were made for improper reasons having no relation to the merits or legality of the project, thus rendering them unlawful, not for the purpose of declaring them invalid but rather to assert that the decision makers engaged in deliberate and unlawful conduct. The Court held that these purposes are distinct. Although a finding of invalidity is common to both proceedings, whether that invalidity constitutes misfeasance in public office depends on other evidence. The Appellant's action was founded on the refusal decisions and the financial losses flowing from them, and it was entitled to pursue its claim.

COUNSEL COMMENTS

Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations), 2018 BCCA 214

Counsel Comments provided by
Arden Beddoes & David Wu, Counsel for the Appellant

"This case clarifies the law of collateral attack in line with what the Supreme Court set out in *Telezone*. At paragraphs 32-34 the Court succinctly summarizes the two circumstances in which the doctrine may be applied. The "first (and most obvious)" way it may be applied is where "an action attacks the legal force" of an administrative decision. The Court stated that it does not apply "where the action attacks the factual basis for the decision".


Arden Beddoes


David Wu

The second way is "where the plaintiff fails to plead a valid cause of action for damages". In our view, this second branch is of little assistance - because the plaintiff has to plead a valid cause of action in any event. That is, such issues should be resolved under 9-5(1)(a).

In our view, a simple rule to determine collateral attack is to look at the remedy being sought. If one is seeking an administrative remedy, then it is a collateral attack to bring a civil claim. However, if one is seeking damages, then it is not. We view the Court's decision, though not expressly setting out this rule, to be in line with this reasoning.

One of the ways the Province sought to distinguish this this case from *Telezone* was that in this case there were parallel proceedings. However the Court ruled at para. 47 that this was irrelevant. A party is "entitled to elect which proceeding to prosecute – in the words of Binnie J., to be 'permitted its chosen remedy directly

COUNSEL COMMENTS

Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations), (cont.)

and, to the greatest extent possible, without procedural detours'." The Court then noted "The consequences of that election will of course have to be addressed if the party decides to continue with the second proceeding.".

Thus this case does not deal with the consequences of a party choosing to proceed with an action before a judicial review might affect the judicial review, or vice versa. Matters like issue estoppel may very well arise. It will be interesting to see how a subsequent court deals with such issues when they do arise.

It is also of note how the Court dealt with the remedy that was issued - a stay pending the conclusion of the judicial review. But as the Court notes at para. 66, such a remedy is inconsistent with a finding of collateral attack. Whether a claim is a collateral attack or not cannot change depending on the outcome of a parallel proceeding. Either a claim is a collateral attack and should be dismissed on that basis, or it is not and should be allowed to proceed.

The Province has signaled its intent to seek leave to appeal this decision. It has been 8 years since *Telezone*, and the SCC may very well wish to revisit and further clarify the law on collateral attack."

Basyal v. Mac's Convenience Stores Inc., 2018 BCCA 235

Areas of Law: Class Proceedings; Certification; Conspiracy; Unjust Enrichment; Breach of Fiduciary Duty

~Where all of a proposed plaintiff class have a cause of action on one ground, but only some of the class have a cause of action on another ground, this difficulty may be overcome by properly defining a subclass~

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The Respondents, Prakash Basyal, Arthur Gortifacion Cajes, Edlyn Tesorero and Bishnu Khadka ("Plaintiffs") are plaintiffs in a claim against the Respondent, Mac's Convenience Stores Inc. ("Mac's"), and the Appellants, Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd ("Appellants"). The Plaintiffs came to Canada through the Temporary Foreign Worker Program ("TFWP"). Through this program, Canadian employers who are not able to find employees needed in Canada for particular types of work are permitted to hire temporary foreign workers, provided such employment will not adversely affect the labour market in Canada. Employers must seek a labour market opinion from Employment and Social Development Canada. A positive labour market opinion is required for the worker to be able to come to Canada. The TFWP purports to prohibit employers from charging or recouping from the employee any fee or other payment for their recruitment. The *Employment Standards Act* imposes a similar prohibition. In early 2012, the senior recruitment manager of Mac's Western Division met with representatives of the Appellants because it was having trouble finding Canadian workers. The Appellants' brochure stated that Mac's would be required to pay fees to the Appellants for each candidate recruited. The Appellants would also charge the candidates for time and disbursements in processing immigration documents for visa-requiring countries. The Plaintiffs all attended a job fair in Dubai, where they depose that they were told that in exchange for a fee between $7,500 and $8,075, they would be guaranteed a job in Canada. Of this, $2,000 was required "up front" as a registration

Basyal v. Mac's Convenience Stores Inc., *(cont.)*

fee. Mac's appointed the president and director of two of the three Appellants to act on its behalf to obtain the labour market opinions relating to the workers. The Plaintiffs alleged that Mac's failed to provide work in the quantity promised, and in some cases any work at all. They further alleged that Mac's breached its employment contracts with them by recouping the costs of recruitment from the workers. They sought to be certified as representative plaintiffs in a class action seeking disgorgement to members of the class all profits related to charging recruitment fees, as well as damages for breach of contract and fiduciary duty, conspiracy, unjust enrichment and waiver of tort. The chambers judge briefly described the pleadings relating to each cause of action asserted, and said he was satisfied the Plaintiffs had met their burden under s. 4(1) of the *Class Proceedings Act*. Mac's and the Appellants appealed.

Basyal v. Mac's Convenience Stores Inc., *(cont.)*

APPELLATE DECISION

The appeal was allowed. Much of the Court of Appeal's analysis concerned whether the pleadings disclosed a cause of action as required in s. 4(1)(a). The Court found that a cause of action for direct breach of contract against Mac's was disclosed in the notice of civil claim, but only some of the proposed class were asserting that they got less or none of the employment offered. This created a difficulty in the definition of the plaintiff class. However, the Court found that this could be resolved through a properly defined subclass and suggested a definition. With respect to the recruitment fees, the Court noted that it was not known whether Mac's received any portion of the fees collected by the Appellants, or any other form of payment. The notice of civil claim does not assert that Mac's received payment in exchange for its role with the Appellants. There was similarly no complete cause of action with respect to the allegations of conspiracy and unjust enrichment and waiver of tort. There was no evidence of a fiduciary duty with respect to Mac's, but the allegations disclosed a cause of action for breach of fiduciary duty on the part of the Appellants. The Court stayed the action pending the Plaintiffs' amendment of the notice of civil claim to clearly state material facts relating to each cause and to the existence of an agency relationship.

H.M.B. Holdings Limited v. Replay Resorts Inc., 2018 BCCA 263

Areas of Law: Practice & Procedure; Solicitor-Client Privilege; Implied Waiver; Abuse of Process

~A party must "voluntarily inject into the litigation" legal advice it received for there to be an implied waiver of privilege regarding that advice~

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The Appellant, H.M.B. Holdings Limited ("HMB"), is the former owner of the Half Moon Bay Resort in Antigua and Barbuda. That nation's government expropriated the property in 2002. HMB has been attempting to obtain compensation for this for fifteen years. In May 2014, the Judicial Committee of the Privy Council ordered the government to pay USD $26.6 million plus interest in compensation. After this order was made, the government sold the property to the Respondent Freetown Destination Resort Limited for around USD $23 million. Freetown then made some payments to HMB. In October 2016, HMB commenced two actions in the BC Supreme Court. The first was against the Attorney General of Antigua and Barbuda, to enforce the remaining balance of the judgment. The second was against the Respondent Replay Resorts Inc., a BC affiliate of Freetown, seeking the equitable remedy of a *Norwich* order to obtain information from Replay in connection with the action against the Antiguan government. In March 2017, HMB filed a notice of civil claim in BC Supreme Court against the Respondents, based on an allegation of civil conspiracy between them and the Antiguan government. HMB indicated that it did this to preserve a limitation period, and had not yet decided whether it would proceed. In April 2017, HMB obtained *ex parte* orders in Florida and New York, compelling third parties to disclose confidential information relating to Replay. The Respondents characterized the conspiracy claim as an abuse of process, and filed an application to strike it at the same time they filed their response to civil claim and counterclaim against HMB and its Managing Director, the Appellant Natalia Querard. In support of their application to strike, the Respondents filed an affidavit with 193 pages of exhibits. On September 15, 2017, HMB applied to cross-examine the affiant. The same day, the Respondents filed an application seeking a declaration that HMB had waived privilege over documents and communications relating to the possible conspiracy claim, any limitation issue

H.M.B. Holdings Limited v. Replay Resorts Inc., (cont.)

associated with the claim, and the use of a payment Freetown made into First Caribbean International Bank on December 23, 2015. These applications form the basis of this appeal. The chambers judge found that HMB had waived privilege over its consideration of a potential claim when Ms. Querard put on the record that she was compelled to file the action out of concern about the limitation period. In the chambers judge's view this put her state of mind at issue. By justifying HMB's conduct, Ms. Querard also voluntarily placed its mind at issue as to its consideration of the claim. The timing of the claim being filed was relevant to whether they had a claim and when, and this amounted to a legal question that the Appellants put into issue as a defence to the alleged abuse of process. The chambers judge also found that HMB had waived privilege over the question of the payment into First Caribbean because it had proffered a statement made by an Antigua solicitor regarding that payment. The judge went on to find no significant contradictions in the affidavit evidence that would justify the order the Appellants sought, for cross-examination of the affiant.

H.M.B. Holdings Limited v. Replay Resorts Inc., *(cont.)*

APPELLATE DECISION

The appeal was allowed. The Court of Appeal noted that in *Soprema Inc. v. Wolrige Mahon LLP*, it held that a party must "voluntarily inject into the litigation" legal advice it received for there to be an implied waiver of privilege regarding that advice. This would normally require a pleading of reliance on legal advice. In the absence of pleadings, evidence or argument asserting reliance on legal advice, the trial judge's invocation of fairness and consistency is insufficient to ground waiver. It was an error to conclude that, by asserting it filed the conspiracy claim when it did to protect the limitation period, HMB waived privilege. It was similarly in error to conclude that the inclusion of the Antigua solicitor's statement resulted in a waiver of privilege regarding the subject matter of that statement. The test applied regarding the application to cross-examine was too strict. There were assertions in the affidavit that were central to the conspiracy claim, whether or not they were central to the application to strike. An assertion of facts was challenged and in issue. The chambers judge also mischaracterized the conflict as to whether HMB's conduct had caused the Respondents loss and damage.

COUNSEL COMMENTS

H.M.B. Holdings Limited v. Replay Resorts Inc., 2018 BCCA 263

Counsel Comments provided by
Lincoln Caylor and Jim Schmidt, Counsel for the Appellants

"Of the two decisions on appeal, the most interesting is the decision concerning waiver of solicitor-client privilege.

Lincoln Caylor

Since the early 1980s, there have been a large, possibly disproportionately large, number of decisions in the British Columbia courts about whether a party has impliedly waived privilege. The circumstances under which privilege can be impliedly waived vary but include where a party points to legal advice received as a justification for their conduct or disputes the competence of their legal advisors (these examples are taken from *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 [*Soprema*] at para 29).

Jim Schmidt

It is probably fair to say that British Columbia courts, both at the chambers and appellate levels, have been generally receptive to arguments that a party has impliedly waived privilege.

At the same time, the Supreme Court of Canada has elevated solicitor-client privilege to the most highly-protected of class privileges; it has disapproved of the practice of attempting to balance competing interests against the privilege on a case-by-case basis. See for example the discussion in *Lizotte v. Aviva Insurance Company*, 2016 SCC 52.

These streams of authority have never been adequately reconciled, although an attempt to do this was made in *Soprema*.

COUNSEL COMMENTS

H.M.B. Holdings Limited v. Replay Resorts Inc., (cont.)

In the HMB decision, the Court affirmed the approach, or the tentative approach, in *Soprema*, which is to recognize that the authority from the Supreme Court of Canada on the "near absolute protection" to be afforded solicitor-client privilege must control the analysis as to whether a party should be considered to have impliedly waived the privilege.

Another aspect of the decision that merits comment is that the judge at first instance made the declaration of waiver without considering her jurisdictional basis to make such an order, especially at a very early stage in the litigation and in the absence of discovery having been given by any party. In those circumstances, none of the *Supreme Court Civil Rules* gave the judge the power to declare there had been a waiver.

The Court of Appeal clearly disapproved of the application having been brought on, and given effect to, at such an early procedural stage.

As to the judge's jurisdiction to make the declaration of implied waiver, the Court commented that while a chambers judge has a broad inherent jurisdiction to make a declaration of waiver, it would only be in a rare and limited case that the approach taken by the judge at first instance here should be followed."

Lamb v. Canada (Attorney General), 2018 BCCA 266

Areas of Law: Constitutional Law; Medically Assisted Death; Abuse of Process; Issue Estoppel

~The Court of Appeal upheld the rejection of an application for an order to strike portions of Canada's response to civil claim on the basis that it was re-litigating findings made in relation to a previous version of the legislation~

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The Appellant, Julia Lamb, has spinal muscular atrophy type 2. Along with the Appellant BC Civil Liberties Association, she challenged the constitutional validity of certain portions of s. 241.2 of the *Criminal Code of Canada* as amended by Bill C-14 with respect to assisted dying. Specifically, they challenged the definition of a "grievous and irremediable medical condition". They characterized this litigation as a continuation of the constitutional dialogue started in the *Carter* case. In its amended response to civil claim, the Respondent, Canada, argued that the decision in *Carter* was expressly stated to be restricted to the factual circumstances of that case. It did not admit the findings in that case remain true today or are applicable in this litigation. The Appellants applied for an order striking portions of the Respondent's response and precluding the re-litigation of a number of legal and factual questions said to have been determined in the *Carter* decisions. They relied on the doctrine of issue estoppel to argue that the Respondent was

Lamb v. Canada (Attorney General), *(cont.)*

bound by certain findings in *Carter* and argued that re-litigation of these issues would amount to an abuse of process and constitute a collateral attack on prior judgments. The Respondent took the position that there is a high threshold for striking pleadings, that issue estoppel does not apply, that there is no abuse of process or collateral attack, and that the litigation was a challenge to new legislation not previously challenged. The application judge considered the law of issue estoppel and held that the findings in *Carter* applied to the previous legislation, and not the new legislation that was drafted in response to *Carter*. He went on

Lamb v. Canada (Attorney General), *(cont.)*

to state that even if all three issue estoppel preconditions were met, the court retained discretion not to apply it if its application would lead to an injustice. He similarly found no collateral attack, as the Respondent did not seek to overturn any previous judicial orders and the doctrine of collateral attack cannot be used to prevent it from mounting a full defence on the constitutionality of newly enacted legislation.

Lamb v. Canada (Attorney General), *(cont.)*

APPELLATE DECISION

The appeal was dismissed. The Appellants submitted that the chambers judge erred in his application of the doctrines of abuse of process and issue estoppel, by failing to consider relevant factors, by improperly relying on *stare decisis*, and in his application of the abuse of process doctrine with regard to subsequent judgments which considered the scope of *Carter*. The majority held that, ultimately, the chambers judge dismissed the Appellants' application because in his view invoking either issue estoppel or abuse of process to strike the impugned pleadings would work an injustice. The majority also noted that a trial judge may eventually determine that the Respondent's arguments are in fact an abuse of process or barred by issue estoppel, after hearing the evidence and arguments. The majority did not accede to the argument that the chambers judge failed to appreciate relevant factors, including that this case is part of an ongoing "constitutional dialogue" or that he failed to give appropriate weight to constitutional accountability. The majority also rejected the argument that the judge considered himself bound by a decision of the Alberta Court of Appeal. Rather, the judge said the decision enunciated principles that he accepted. The majority found the collateral attack argument to be, in effect, a re-casting of the abuse of process by re-litigation argument.

In concurring reasons, Hunter JA emphasized the limited scope of the application and its appeal. The case management judge simply declined to exercise his discretion to predetermine the evidence to be called at trial. He was appropriately deferential to the role of the trial judge in determining evidentiary matters. This decision simply dismisses the "evidentiary shortcuts and limits sought by the plaintiffs", and leaves questions of admissibility of evidence to be addressed by the trial judge.

COUNSEL COMMENTS

Lamb v. Canada (Attorney General), 2018 BCCA 266

Counsel Comments provided by
Sheila Tucker, Q.C., Counsel for the Appellants

"In *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter #1*], the Supreme Court of Canada declared the criminal prohibition against physician-assisted dying to be unconstitutional in its application to decisionally capable individuals with medical conditions causing them unbearable suffering. In 2016, after an extended period of suspension of the declaration, Canada enacted a replacement law. The *Lamb* case is a constitutional challenge asserting that the replacement law perpetuates the very constitutional flaw identified in *Carter*, in that certain individuals remain prohibited, without individual assessment, even though they come within the scope of the decision and declaration in *Carter #1*.


Sheila Tucker, Q.C.

The BC courts held that it would be unfair to Canada to treat *any* of the factual findings from the *Carter* litigation as binding "because the respective claims challenge two different pieces of legislation with arguably different objectives, purposes and effects" and that holding Canada to facts determined in a "different context" would prejudice its ability to defend the replacement legislation. However, replacement legislation by definition involves a "different" law, and a challenge to that legislation necessarily involves a new cause of action, so the courts have effectively held that abuse of process or issue estoppel can never apply to factual findings in constitutional litigation.

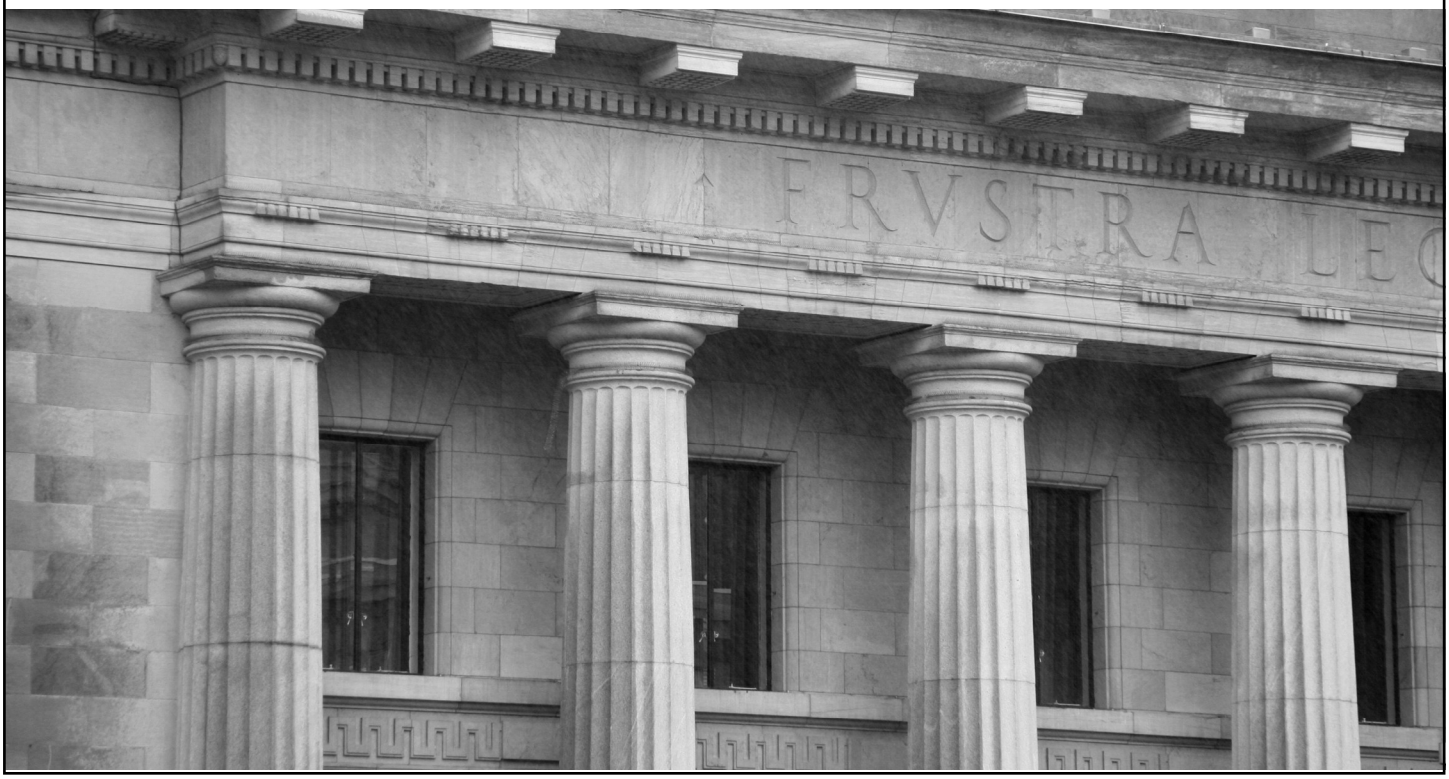
With respect, that approach is simply wrong. Every factual finding that is made in a constitutional challenge is not framed by the statutory language in question or its objectives. Basic facts remain basic facts. Further, assuming the replacement legislation remains directed to the same statutory objective

COUNSEL COMMENTS

Lamb v. Canada (Attorney General), (cont.)

(which it generally will, even when additional objectives are added), it is likely that some factual findings will continue to have the same context under the replacement legislation. Under the blanket approach adopted by the BC courts, the contrary is *presumed* without any close examination or consideration of the facts at issue. This approach effectively creates a presumption in *favour* of relitigation notwithstanding the well-recognized downsides to such.

However, the approach endorsed by the BC courts not only permits unwarranted relitigation, it *encourages* it. An unsuccessful government is free, in interpreting a court decision and declaration for purposes of drafting replacement legislation, to disregard any factual finding it continues to disagree with, secure in the knowledge that a further challenge will simply entitle it to a *de novo* hearing on the issue. Further, plaintiffs -- and public interest plaintiffs in particular – are then discouraged from challenging laws at all, given that victory may be ephemeral and the costs of litigation are so great."



All Trans Financial Services Credit Union Limited v. Financial Institutions Commission, 2018 BCCA 270

Areas of Law: Administrative Law; Statutory Interpretation; Definitions; Standard of Review; Financial Institutions

~The Financial Institutions Commission's interpretation of the term "deposit business", as it appears in the Financial Institutions Act*, is subject to review on a reasonableness standard~*

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The Appellant, the Financial Institutions Commission, found that the Respondent, All Trans Financial Services Credit Union, was carrying on an unauthorized deposit business by the use of prepaid Visa and MasterCard credit cards. The Respondent is a credit union founded in Ontario in 1939. It is not authorized by the *Financial Institutions Act* to carry on a deposit business in BC. The Appellant found in March 2017 that the Respondent was carrying on an unauthorized deposit business in BC and ordered that, *inter alia*, it cease the sale of certain prepaid Visa and MasterCard cards issued to BC customers. The parties did not agree on the definition of "deposit", which the Appellant defined as "to store or entrust with someone for safekeeping" and "pay into a bank account." The Respondent relied on a 1938 Supreme Court of Canada decision on a reference in the matter of certain Alberta financial legislation for its definition of "deposit". The reference used a common law definition of "deposit" that was limited to money a customer places in a specific account with a bank or financial institution giving rise to a debtor-creditor relationship. The Appellant did not accept this definition, and found that the Respondent was receiving money on deposit, as the money paid onto the cards was repayable on demand or at specified intervals for a specific term. The Appellant indicated that it was only registered cards with ATM functionality that were caught within the definition of "deposit business". The Respondent appealed to the BC Supreme Court. The chambers judge reviewed the Appellant's decision on a reasonableness standard. He accepted the Respondent's definition of "deposit", finding that one arises when, in exchange for the receipt of money put into a customer's account, the financial institution makes an entry of credit in the customer's favour. He held that the Appellant's interpretation would improperly give "deposit" different meanings in different sections of the *Financial Institutions Act*. The judge found that the Appellant could not expand the statutory definition in order to fulfil its

All Trans Financial Services Credit Union Limited v. Financial Institutions Commission, *(cont.)*

policy mandate. The presumption that the meaning of words used in legislation remains consistent over time was not displaced. The chambers judge held that the Appellant's decision was unreasonable and set aside the orders.

APPELLATE DECISION

The appeal was allowed. The Court of Appeal considered the chambers judge to have applied the appropriate standard of review, reasonableness. The *Financial Institutions Act* gives the Appellant authority to order various remedies based on its opinion. It is an administrative body with expertise and its decision-making should be treated with deference by the courts. The Court reviewed the legislative history of the *Act*, and considered whether, if the Respondent had made certain additional arguments that were available on the existing record, there was a reasonable basis for the Appellant to decide as it did. Applying the modern approach to statutory interpretation, the Court found that it was reasonable for the Appellant to give the ordinary meaning of "deposit" considerable weight. The Appellant has expertise in determining what constitutes a deposit business. It did not refer to other provisions in the *Act* in interpreting "deposit" as it did because these provisions were neither raised before it nor helpful to the analysis. The presumption that legislation is consistent with the common law unless the contrary intention is expressed or implied in the legislation is not a useful principle in this case. Additionally, regulation of financial institutions does not occur in the absence of legislation, and there may be no such thing as a common law definition of deposit businesses. The Appellant's decision was reasonable.

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