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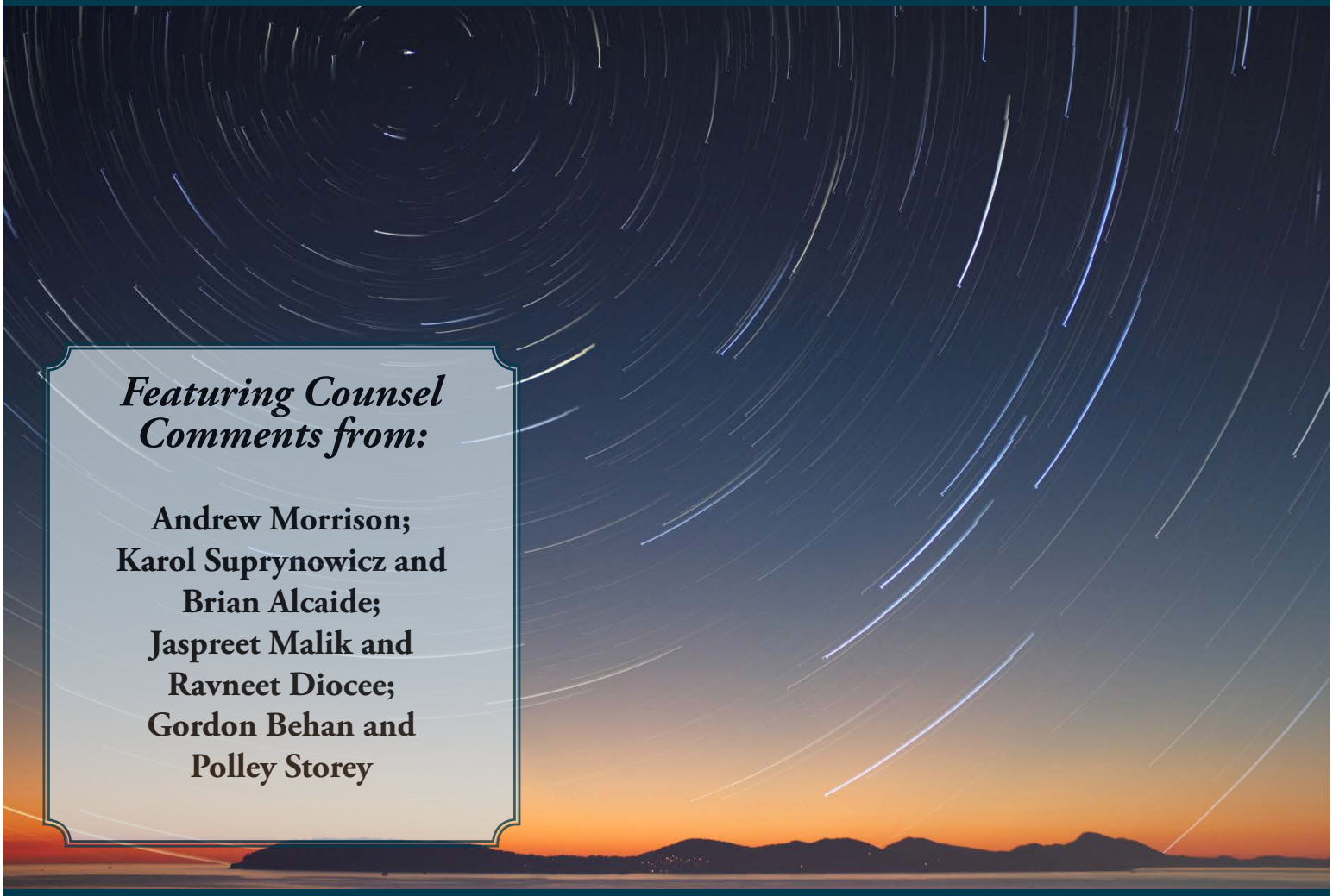

Featuring Counsel Comments from:

Andrew Morrison;
Karol Suprynowicz and Brian Alcaide;
Jaspreet Malik and Ravneet Diocee;
Gordon Behan and Polley Storey

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Kim v Argo Ventures Inc, 2025 BCCA 350

Areas of Law: Contract Law; Contractual Interpretation; Blue-Pencil Severance

~Blue-pencil severance of an exclusionary clause was unavailable in the circumstances; removal of the clause would significantly alter the parties' agreement~

CLICK HERE TO ACCESS THE JUDGMENT

Mr. Hong, through his company Argo Ventures Inc. ("Argo") and related entities, AMF3 and AMF5, was involved in raising capital for the Olympic Village Project in Vancouver. When the withdrawal of Argo's joint venture partner forced Argo to restructure the project's financing, putting AMF3's $8.5 million investment at risk, Mr. Hong sought capital from, among others, Mr. Kim, an investor in a related project called RSJV. The agreements between Mr. Hong and these later investors provided for various incentives, including a reduced management fee and a liquidation bonus calculated using a fixed absolute contribution ratio, in exchange for allowing RSJV's equity to be used as collateral by AMF3 in the project. Certain investors, however, were excluded from these incentives by operation of an exclusion clause contained in the proposal. Mr. Kim accepted the proposal and entered into an agreement (the "RSJV agreement"), but did not receive either the promised management fee reduction or the liquidation bonus from Argo. Mr. Kim later commenced an action seeking his share of the incentive.

The trial judge found that Mr. Kim was entitled to the incentive. He held that the claim was not statute-barred, that uncollected interest did not need to be accounted for in determining the amount of the incentive, and that the exclusion clause was void for uncertainty and severable from the RSJV agreement. In his view, the exclusion clause was minor and effectively severable from the balance of the contract; he considered it relevant that the exclusion clause was not included in all the proposals Mr. Hong sent to investors, that the agreement had been partially performed, and that it would be unfair to conclude that the provision respecting the payment of incentives was void.

Kim v Argo Ventures Inc, (cont.)

In interpreting the incentive provisions, the judge concluded that the liquidation surplus ought to be reduced by AMF3's original $8.5 million investment principal. He held that the "absolute contribution" ratio by which the incentive was calculated was fixed and not dependent upon how much money was actually raised; having accepted the proposal, Mr. Kim must have expected that he would be paid an incentive based on his proportionate share of his investment in RSJV, reduced by the absolute contribution ratio. Applying these findings, the judge awarded Mr. Kim $34,543 as his share of the incentive.

Mr. Kim appealed the judge's ruling as to the amount of the incentive awarded; Argo cross-appealed on the basis that the judge had erred in granting the remedy of severance.

APPELLATE DECISION

The Court of Appeal dismissed the appeal and allowed the cross-appeal.

On the appeal, the court held that the judge had applied the correct principles of contractual interpretation and had reached an interpretation of the RSJV agreement that was available to him based on the wording and surrounding factual matrix. Mr. Kim was unable to identify any extricable legal errors. As a result, the judge's interpretation of the agreement raised questions of mixed fact and law and his conclusions were entitled to deference. The court held that the judge had not erred in deducting the $8.5 million investment principal in determining the amount of the AMF3 liquidation surplus; the judge accurately described the factual circumstances, and his conclusion aligned both with the language used by the parties and with commercial sense. The court rejected Mr. Kim's argument that the judge's reasoning improperly pierced the corporate veil, finding instead that the judge

Kim v Argo Ventures Inc, (cont.)

had simply applied the plain meaning of the phrase "investment principal". Finally, the judge had not erred in applying a fixed contribution ratio given the language contained in the agreement.

On the cross-appeal, the court found the judge had erred in granting severance of the incentive clause on the basis of uncertainty. Applying a correctness standard of review, the court concluded the judge had not applied the correct legal principles in finding the uncertain incentive clause to be minor, divisible, or subsidiary to the incentive provisions contained in the RSJV agreement. He had essentially engaged in notional severance rather than blue-pencil severance, given that he effectively altered a vital term of the provisions: namely the identity of the parties who were entitled to the incentives. The judge's reasons for severing the incentive clause did not support a finding that identifying the parties entitled to the incentives was inessential to the agreement's incentive provisions; none of the judge's specific considerations, namely differences among the various agreements, fairness, or partial performance, should have weighed in the severance analysis.

COUNSEL COMMENTS

Kim v Argo Ventures Inc, 2025 BCCA 350

Counsel Comments by Andrew Morrison,
Counsel for the Respondent/Appellant on Cross Appeal

Andrew Morrison

a) Introduction

In *Kim v. Argo Ventures Inc*, the Court of Appeal described the principles to be applied to decide whether a contractual term could be severed to preserve a contract that contained an uncertain term.

The concept of severance permits the court to strike out or read down a term that is uncertain or illegal to preserve the contractual bargain between the parties.

Most decisions addressing severance concern severance of an illegal term (such as an illegal interest rate) or term an employment contract (such as a restrictive covenant), in which overarching policy concerns can shape the reasoning of the court. Indeed, in *Argo Ventures*, Mr. Kim argued that principles arising from severance cases involving illegal terms or restrictive covenants should not be applied to commercial cases.

The decision of the BC Court of Appeal in *Argo Ventures* is the only recent appellate level decision concerning the principles a court should follow when deciding whether to sever an uncertain term from a commercial contract.

b) Background

Argo Ventures made an agreement with investors in a project it managed (RSJV) to provide funding to support a troubled project in the Olympic Village in which many of the RSJV investors held an interest. To incentivize the RSJV investors, Argo provided three incentives, but the primary incentives (a reduced management fee and a share of potential profits of the Olympic Village project were only available to investors that were not 'related' to the Olympic Village project. Mr.

COUNSEL COMMENTS

Kim was an RSJV investor and, though his family, held an interest in the Olympic Village project.

From the start, Argo offered different incentives to two different classes of investors. Unrelated investors would receive all three of the incentives, but investors 'related' to the Olympic Village project would only receive one of the three incentives and would not receive the most lucrative incentive, a share of the profit of the Olympic Village project.

The trial judge could not determine whether Mr. Kim was eligible for the profit-sharing incentives because he found the term 'related' to be uncertain. He decided to sever the portion of the agreement that limited the key incentives to investors who were not 'related' to the project, which meant that all investors would be eligible for all incentives.

The trial judge found that the concept of 'related' investors was uncertain, in part because two translated Korean documents used the term differently. In fact, the original Korean documents used identical characters, meaning that the differences identified by the trial judge were a result of slight differences in the translation, not the original. The Court of Appeal warned that it may be 'unsafe to place undue weight a small wording differences' in translated documents.

c) Key Principles for Severing a Contractual Term

The Court of Appeal emphasized that the purpose of severance was to preserve the intentions of the parties. It criticized the trial judge for making a new contract he considered to be fair.

The court must use 'restraint' in applying severance and must avoid altering contracts to create new or materially different obligations:

> '… Where a provision has been found to be uncertain, a court cannot resolve the uncertainty by making a new agreement for the parties based on what it considers to be reasonable.'

COUNSEL COMMENTS

Fundamentally, severance can only be used when it will not alter a vital or essential term and when it will preserve, rather than alter, the bargain between the parties.

The Court of Appeal identified the following principles to be applied when deciding whether to sever a contractual term:

(a) severance must be used 'sparingly' and with 'restraint';

(b) severance must be used only to give effect to the intentions of the parties;

(c) the court must avoid creating new obligations obligations on the parties by severing a term;

(d) the court cannot resolve uncertainty by making a new agreement it considers to be reasonable; and

(e) fairness or unfairness of the result is an irrelevant consideration, especially when fairness considerations are viewed from the perspective of only one party. Severance cannot be imposed to prevent a windfall.

d) The Take-Away

Given that the vast majority of severance cases arise in the context of illegality or the enforceability of restrictive covenants in an employment agreement, the decision in *Argo Ventures* will be highly influential for judges and counsel confronted with uncertain terms in a commercial contract."

King v Karpenko, 2025 BCCA 357

Areas of Law: Tort Law; Non-Pecuniary Damages; Past and Future Loss of Earning Capacity; Cost of Future Care

~In the court's assessment of damages for loss of earning capacity, a hypothetical possibility should only be taken into consideration if it is "real and substantial" and not mere speculation~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal arose from an order of the trial judge awarding Mr. Karpenko over $500,000 in damages following a motor vehicle accident. Mr. Karpenko was formerly a high-ranking police and military officer in Ukraine. On immigrating to Canada, he had worked primarily in construction; he also worked in the security industry and had volunteered as an auxiliary RCMP member with the goal of becoming a police officer. He had applied to several police forces, but was only prepared to accept a high-ranking position. In June 2014, his vehicle was rear-ended by Mr. King. Mr. Karpenko sustained soft-tissue injuries leading to chronic pain that limited his capacity for heavy physical work, particularly in construction and masonry. He eventually ceased pursuing policing and auxiliary duties and later obtained steady work as a bylaw enforcement officer.

The trial judge awarded Mr. Karpenko $100,000 in non-pecuniary damages, $37,000 in special damages, $100,000 for past loss of earning capacity, $300,000 for future loss of earning capacity, and $40,000 for cost of future care. Regarding future earning capacity, the judge took into account his finding of a "20% possibility" that, had the accident not occurred, Mr. Karpenko would have become a police officer. Mr. King appealed the judge's order of damages for loss of earning capacity; Mr. Karpenko cross-appealed on the same issue, as well as regarding non-pecuniary damages and cost of future care.

King v Karpenko, *(cont.)*

APPELLATE DECISION

The Court of Appeal allowed the appeal in part and dismissed the cross-appeal. On the appeal, the court agreed with Mr. King that the judge had erred in concluding there was a 20% possibility that Mr. Karpenko would have become a police officer. The judge had acknowledged the absence of any independent evidence from any police force regarding whether they wished to hire Mr. Karpenko; the judge also expressed concern that Mr. Karpenko had made no reasonable efforts to pursue his goal of becoming a police officer in the two years prior the accident, or to apply for any job in policing after the accident. The judge was not satisfied that the accident-related symptoms had prevented Mr. Karpenko from at least making further inquiries or applications. The court concluded that it was not possible to reconcile the judge's factual findings with his conclusion that there remained a possibility Mr. Karpenko would have become a police officer by January 2016, a conclusion the judge did not explain. This error impacted the judge's capital-asset assessment of future loss of earning capacity, which was premised, in part, on Mr. Karpenko's hypothetical earnings as a police officer. The court set aside the $300,000 award and substituted an award of $164,500. The error did not impact the $100,000 award for past loss of earning capacity, which was supported by the evidence, specifically Mr. Karpenko's reduced construction capacity; the award was not inordinately low or high.

King v Karpenko, *(cont.)*

On the cross-appeal, the court rejected Mr. Karpenko's submission that the judge had erred in his assessment of non-pecuniary damages. The court concluded that the judge had not misapprehended Mr. Karpenko's stoicism as an ability to continue his activities post-accident unchanged; the judge was aware that a finding of stoicism is not a factor which should penalize the plaintiff. The judge appropriately considered the relevant factors in his analysis, and his assessment of non-pecuniary damages was consistent with the evidence. The court also upheld the cost of future care award, concluding that the award of $40,000 was supported by the evidence and was not inordinately low in the circumstances. Given its earlier conclusion regarding the judge's error in the loss of earning capacity analysis, the court found it unnecessary to address Mr. Karpenko's cross-appeal on this issue.

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Paige v Noel, 2025 BCCA 358

Areas of Law: Wills and Estates; Statutory Interpretation; Evidence

~A court's conclusion regarding a testator's "fixed and final intention" must be grounded in the record, document or writing itself; in other words, there must be evidence that the document itself is intended to effect the testator's intention~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal arose out of a judge's order removing the appellant, Jennifer Paige, as a beneficiary under the will of Barbara Ann Kissel, deceased, pursuant to s. 58 of the *Wills, Estates and Succession Act*, SBC 2009, c 13 ("*WESA*"). The deceased had left a will in 2014 naming her son, Adrian, and her former common law partner's daughter, Jennifer, as equal residual beneficiaries. In 2022, after a conflict arose between the deceased and Jennifer, the deceased sent a text and email to her friend and executrix, Michelle Dianne Noel, indicating she wanted to "redo" her will and that "Jennifer is out" (the "Messages"). She met with a notary regarding the planned changes, but never executed a new will before her death in January 2023.

The chambers judge concluded that the Messages represented the deceased's "fixed and final intention" to alter her existing will by removing Jennifer as a beneficiary. The judge did not interpret the deceased's statement that the current will would stand until she obtained a new one as negating or undermining the deceased's intention to remove Jennifer from her will. The judge also declined to interpret the deceased's reference to making a "minor change" in her will as inconsistent with this intention. Although the judge appreciated that the Messages contemplated the preparation of a new will, she concluded that they reflected the deceased's fixed and final intention to remove Jennifer as a beneficiary.

Paige v Noel, *(cont.)*

APPELLATE DECISION

The Court of Appeal allowed the appeal. The court found that the chambers judge had overlooked the requirement of s. 58 of *WESA* that the deceased must have intended for the documents themselves to effect his or her testamentary intentions. The court's task under s. 58 is to determine, on a balance of probabilities, whether a non-compliant document embodies the deceased's testamentary intentions at the material time—usually, at the time the document was created. Extrinsic evidence regarding the deceased's state of mind both before and after the document was created, as it relates to testamentary intention, is admissible in the analysis. The court found that the chambers judge had erroneously considered a "fixed and final intention" as equivalent to an "unwavering stated intention", rather than requiring that the document itself represent the deceased's testamentary intentions at the material time. The deceased had an operative will; she expressly stated in

Paige v Noel, *(cont.)*

the Messages that she intended to make a new will to carry out her desire to remove Jennifer as a beneficiary, and that the current will was to stand until this was done. None of the extrinsic evidence contradicted that statement; the judge made a palpable and overriding error in concluding otherwise. The Messages were insufficient to meet the requirements of s. 58 of *WESA*.

COUNSEL COMMENTS

Paige v Noel, 2025 BCCA 358

Counsel Comments by Karol Suprynowicz and Brian Alcaide, Counsel for the Appellant

Karol Suprynowicz

Brian Alcaide

"The exact limits of the Court's curative power under s. 58 of the WESA, in allowing records, documents or writings that contain a Deceased's fixed and final intention to have testamentary effect, despite falling short of WESA's formalities under s. 37, have been stretched and put to the test since becoming law on March 31, 2014.

The facts of *Paige v. Noel*, 2025 BCCA 358 are striking because of how the chambers judge in *Kissel Estate (Re)*, 2025 BCSC 260 was willing to stretch the application of this curative provision to text messages exchanged between the Deceased and her appointed executor.

Text messages have traditionally been viewed as a medium for casual communication between individuals, which prior to 2014 ran contrary to the rigid methods of execution required to ensure the validity of a will.

The chambers judge initially found that this informal method of communication was enough for the curative provisions of WESA to kick in and disinherit the Deceased's stepdaughter.

The chambers judge held that the words 'Jennifer is out' communicated by the Deceased to her executor by text message, along with extrinsic evidence of her limited engagement with legal professionals and a falling out between her and her stepdaughter, were enough to represent her fixed and final intention to disinherit her stepdaughter.

Importantly, the Deceased explicitly communicated to her executor via

COUNSEL COMMENTS

email that 'the current will that you have will stand until I get a new one'.

While the chambers judge was focused on the Deceased's intended disinheritance, she failed to take into account the Deceased's awareness and respect for the formal process of executing a new will. In other words, although she expressed an intention to leave her stepdaughter out of her new will at one point, she clearly expressed her desire for her will to stand until a new one was executed.

A key consideration applied by the Court of Appeal was the 'further departure' principle: 'the further a document departs from formal requirements, the harder it is for a court to find it represents a Deceased's testamentary intention' - *Estate of Young*, 2015 BCSC 182.

The Court of Appeal's characterization of text messages and how they should be treated in the context of fixed and final intention was aptly summarized in para. 43 of the judgment:

> 'Here, had the deceased's communications with Michelle on October 6 and 15, 2022 taken place by telephone or in person, no application under s. 58 would be possible. The fact that these communications were recorded in an electronic record does not transform a casual conversation into a legally operative testamentary record unless the content of that conversation demonstrates a fixed and final intention to effect a testamentary disposition.'

The Court of Appeal held that although the chambers correctly identified the principles relevant in making a s. 58 determination, it was her application of those principles that revealed a fundamental misconception of the meaning of 'fixed and final intention' in the context of the Court's curative powers.

The Court of Appeal discusses how the chambers judge appears to have considered a fixed and final intention to be equivalent to an unwavering stated intention rather than an intention that the document represents the testamentary intention of the Deceased at the material time.

COUNSEL COMMENTS

The Respondent argued unsuccessfully that s. 58 does not require an intention that the document itself be testamentary. At para. 48 the Court of Appeal applied the modern approach of statutory interpretation to the words of s. 58(2) and determined that the document itself needs to reflect the Deceased's fixed and final testamentary intention. Otherwise, there would be no basis on which the document could be admitted into probate.

The Court held that the Deceased's intention could not be considered fixed and final because it was clear that she intended to effect any alteration by making a new will, and until she did so, the 2014 will was to remain operative.

Ultimately, the Court of Appeal unanimously ruled that the chambers judge made a palpable and overriding error by failing to conclude that the Deceased intended the old will to stand until a new will was carried out, which in turn ensured the stepdaughter's entitlement to her share of the estate as expressed in the old will."

COUNSEL COMMENTS

Paige v Noel, 2025 BCCA 358

Counsel Comments by Jaspreet Malik and Ravneet Diocee, Counsel for the Respondent

Jaspreet Malik

Ravneet Diocee

"There are two important legal issues this appeal addresses. The first is that the surrounding circumstance of the transaction is an essential part of the *Sale of Goods Act*. The second is that the due diligence branch of the fresh evidence test is not lightly overlooked.

The appeal concerned a dispute over the ownership of a motorcycle. The Appellant signed a standard form contract for the purchase of the motorcycle from a vehicle dealership operated by the Respondent. Despite signing a contract and a transfer document, the Appellant was dissatisfied with the condition of the motorcycle and failed to pick up the motorcycle when notified that it was ready. The Respondent then cancelled the sale and issued a refund. The Appellant took the position that he was entitled to the motorcycle, and he did not want a refund.

As an aside, the purchase price was approximately $14,000. The cost of litigation and the appeal far exceeded the value of the motorcycle in issue. Litigating over principle is too expensive and should be avoided.

The *Sale of Goods Act* expressly incorporates the surrounding circumstances in sections 22 and 23 of the *Sale of Goods Act*. The Court held that findings as to intention are findings of fact and reviewable at the higher standard of overriding and palpable error.

There was a signed transfer document that was not before the trial judge. The Appellant sought to introduce it as fresh evidence.

COUNSEL COMMENTS

In applying the *Palmer* test, the Court of Appeal held that the fresh evidence should not be admitted as there was an absence of due diligence. The lawyer at the lower Court (not the lawyer on appeal) swore an affidavit advising that he had signed transfer notice in his file and failed to include it.

The Court also held that the fresh evidence would not have affected the result in any event, such that its admission is not required in the interests of justice. The signed transfer notice was not determinative of a transfer in ownership but rather evidence relevant to the assessment of contractual intent.

The lessons:

- the surrounding circumstances almost always matter
- fresh evidence requires due diligence
- litigating over principle is almost always too expensive ”

St Alcuin College for the Liberal Arts Society v. Montaigne Group Ltd, 2025 BCCA 370

Areas of Law: Property Law; Contract Law; Remedies; Specific Performance; Certificate of Pending Litigation; True Condition Precedent

~Specific performance is an equitable remedy that compels the performance of existing contractual obligations; however, a contingent equitable interest in property may validly ground a CPL~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal arose from an order dismissing an application by St. Alcuin College for the Liberal Arts Society ("Alcuin") seeking summary judgment to strike portions of a claim by Montaigne Group Ltd. ("Montaigne"), along with an application to cancel a certificate of pending litigation ("CPL") on the basis of hardship and inconvenience.

Alcuin had acquired land to build a school and subsequently entered into an unusual, bespoke construction contract with Montaigne. The contract contemplated adding a fourth floor to the planned structure (the "Montaigne Amenity Space") that would be transferred to Montaigne, following stratification, in compensation for constructing the building. Construction came to a halt due to significant cost overruns. Montaigne proposed to cover part of the additional costs required, leaving Alcuin to cover the rest; Alcuin declined the proposal and purported to terminate the agreement. Montaigne sued, seeking an interest in the Montaigne Amenity Space, and obtained a CPL.

Alcuin applied for summary judgment, arguing that no equitable interest could exist because specific performance was unavailable. The chambers judge disagreed, concluding that it was not plain and obvious that specific performance was unavailable in the circumstances, or that all equitable claims must fail. In doing so, he distinguished the case law relied on by Alcuin, noting the unique nature of the agreement in this case. The chambers judge declined to cancel the CPL given his conclusion that there existed a triable issue and held that, in any event, Alcuin's evidence of hardship was insufficient

St Alcuin College for the Liberal Arts Society v. Montaigne Group Ltd, *(cont.)*

to justify cancellation under s. 256 of the *Land Title Act*. In his reasons, he indicated that Alcuin was at liberty to apply again with better evidence of hardship; for unknown reasons, this holding was not included in the entered order.

APPELLATE DECISION

The Court of Appeal allowed the appeal in respect of the cancellation application to a limited extent by granting Alcuin liberty to reapply for cancellation in the Supreme Court on fresh materials. Otherwise, the court dismissed the appeal.

The court held that the chambers judge had erred in concluding that specific performance could be available in the circumstances. Even if Alcuin were at fault for the breakdown of the relationship between the parties, an order for specific performance would impose upon Alcuin obligations not contemplated in the contract. Despite this error, the court concluded that it was at least arguable that Montaigne held a contingent equitable interest in the Montaigne Amenity Space dependent upon eventual subdivision. In contracts such as this one, an equitable interest may arise by virtue of a promise contained in a contract, among other scenarios. Considering the effect of clause 5.3.1 (breach by Montaigne), the court held that Montaigne was expressly promised the Montaigne Amenity Space under certain circumstances, such that it was not manifestly clear that Montaigne was not legally entitled to an equitable interest in Alcuin's property. Montaigne's interest could be contingent in nature. The court also held that Montaigne's potential claim to an equitable interest was not excluded by s. 73 of the *Land Title Act*. Subdivision approval was not a true condition precedent in this case, because the contract imposed obligations on both parties in advance of subdivision approval; s. 73 therefore did not automatically bar recognition of a contingent equitable interest.

Tichopad v One West Auto Ltd, 2025 BCCA 371

Areas of Law: Commercial Law; Sale of Goods; Contract Law; Tort Law

~The application of s. 23(2) of the Sale of Goods Act *is subject to the court's evidentiary findings regarding the contracting parties' intentions~*

CLICK HERE TO ACCESS THE JUDGMENT

The appeal arose from an order dismissing Jiri Tichopad's claim in relation to legal ownership of a motorcycle. Mr. Tichopad had entered into a standard-form motor vehicle purchase agreement to purchase a used motorcycle from the respondent, One West Auto, for $13,647.90. On October 19, 2022, he paid the purchase price and drove the motorcycle off the dealership lot. He returned ten minutes later, raising concerns about the condition of the brakes and tires. One West arranged for an independent inspection and concluded that the tires were roadworthy, but this conclusion was not satisfactory to Mr. Tichopad. Mr. Tichopad failed to pick up the motorcycle when it was ready; as a result, One West cancelled the sale and mailed him a refund. Mr. Tichopad claimed never to have received the refund. Mr. Tichopad commenced a claim seeking an order that One West deliver the motorcycle to him, or damages in the alternative; One West opposed the order compelling delivery of the motorcycle to Mr. Tichopad but did not dispute his right to the refund.

Tichopad v One West Auto Ltd, *(cont.)*

The summary trial judge dismissed Mr. Tichopad's claim on the basis that ownership of the motorcycle had not passed to Mr. Tichopad on October 19, 2022. Taking into account s. 22 of the *Sale of Goods Act*, RSBC 1996, c 410 and s. 17(1) of the *Motor Vehicle Act*, RSBC 1996, c 318, the judge concluded that if the plaintiff had found the motorcycle to be in satisfactory condition after he left the dealership on October 19, he would still have been required to sign the transfer forms. In deciding not to collect the motorcycle when notified that it was ready, Mr. Tichopad risked cancellation of the purchase agreement. One West was entitled to, and did, exercise its right to cancel the sale under the terms of the purchase agreement.

APPELLATE DECISION

The Court of Appeal dismissed the appeal, along with Mr. Tichopad's application to adduce fresh evidence. As a preliminary point, the court noted the inconsistency between the claim as pleaded (citing the tort of conversion, normally remedied in damages) and the relief sought (an order that the motorcycle be returned to him, a remedy for the tort of detinue); however, the outcome did not turn on this technical point, as the claim was always focused on delivery of the motorcycle to Mr. Tichopad and One West had not objected to how the pleadings were framed.

The court noted that the proper interpretation of a contract is generally a matter of mixed fact and law; while an exception to the general rule may arise in relation to a standard form contract, the exception did not apply this case given that s. 22(2) of the *Sale of Goods Act* provides that the conduct of the parties, as well as the surrounding circumstances, must be considered in ascertaining the parties' contractual intent. The judge's analysis included a consideration of the case-specific circumstances informing the contractual intent of the parties. These conclusions could not be disturbed absent a palpable and overriding error or extricable error of law, neither of which existed in this case.

Tichopad v One West Auto Ltd, *(cont.)*

The court held that the summary trial judge correctly applied s. 22 of the *Sale of Goods Act*, and that treating the absence of a transfer notice as an important surrounding circumstance was permissible. The judge did not err in failing to apply s. 23(2) of the *Sale of Goods Act*. The judge's reasons as a whole made clear his finding that the parties intended that ownership of the motorcycle would not pass to Mr. Tichopad until the motorcycle was in a deliverable state and he accepted delivery. These considerations effectively ousted s. 23(2). One West validly cancelled the agreement once the motorcycle had twice been found roadworthy and Mr. Tichopad continued to refuse to accept delivery.

The court also dismissed Mr. Tichopad's fresh evidence application, in which he sought to adduce an executed vehicle transfer document dated October 19. Even if admitted, and leaving aside significant credibility concerns regarding the evidence, it would not have affected the judge's conclusions as to the parties' overall contractual intentions.

COUNSEL COMMENTS

Tichopad v One West Auto Ltd, 2025 BCCA 371

Counsel Comments by Gordon Behan and Polley Storey,
Counsel for the Respondent Adrian Joseph Kissel

Gordon Behan

Polley Storey

"In *Paige v. Noel*, 2025 BCCA 358, the Court of Appeal for British Columbia considered when a Court may 'cure' a will which fails to comply with the statutory formalities under section 58 of the *Wills, Estates and Succession Act*. The case was the first appellate decision to squarely engage s. 58 since the Court's decision in *Hadley Estate (Re)*, 2017 BCCA 311, and concerned whether certain electronic communications expressing an intention to exclude a beneficiary could be cured pursuant to s. 58 of the *WESA*.

Under section 58, a court must be satisfied that a potential testamentary document (1) is authentic; and (2) represents the fixed and final testamentary intentions of the deceased at the material time. *Paige v. Noel* provided the Court with an opportunity to clarify the legal test and comment on the evidence needed to find that a record represents a deceased 'fixed and final intention'.

In considering the applicable test, the Court referred to the Australian decision of *Nicol v. Nicol* [2017] QSC 220, a case where a text message had been deemed to be a valid testamentary instrument. The Australian legislation uses different wording than the British Columbia statute, requiring a deceased person to have 'intended the document or part to <u>form</u> the person's will' (emphasis added). By contrast, s. 58 of the *WESA* requires that a Court be satisfied that a 'record, document or writing or marking on a will or document <u>represents</u>' a deceased person's testamentary intention (emphasis added).

Relying on the modern approach to statutory interpretation, however, and

COUNSEL COMMENTS

the Manitoba Court of Appeal's decision in *George v. Daily*, 1997 CanLII 17825 (MB CA), the Court found the wording used to be, in effect, a distinction without a difference. For s. 58 to be engaged, 'A fixed and final intention must be grounded in the document itself, in that the document is intended to effect the testamentary intention' (para. 23). The document must have been intended to operate as a will, or as an alteration or revocation of an existing will. Otherwise, the Court held, there would be no basis upon which the document could be admitted to probate.

This articulation of the law narrows the expansive approach that has sometimes been taken by the Supreme Court in its application of s. 58.

Having clarified this test, the Court went on to comment on the evidence needed to meet this threshold. Here, the Court noted that had the deceased's communications taken place verbally, s. 58 could have had no application. '[T]hat these communications were recorded in an electronic record does not transform a casual conversation into a legally operative testamentary record unless the content of that conversation demonstrates a fixed and final intention to effect a testamentary disposition' (para. 43, emphasis added).

Here, the Court held that in order for s. 58 to operate to cure the text message and email as a will, or an alteration to an existing will, the deceased must have intended that the communications themselves to effect her intention to remove the beneficiary. However, the evidence indicated that the deceased intended to effect the change by making a new will with a notary or lawyer. Indeed there was evidence indicating that the deceased attempted to do just that three times before her death, but ultimately did not do so. While the Court accepted that a record which contemplates preparation of a new will can nonetheless represent a testamentary intention at the material time, whether or not that is so depends on the facts of the case. Given that the deceased intended that her prior will stand until she could make a new will, the text message and email expressed an intention which the Court found was not fixed and final.

Paige v. Noel provides important guidance regarding the legal test and evidentiary standard for curing deficiencies under s. 58 of the *WESA*. Despite the broad wording of the provision, in order for a document to be cured under s. 58, the law is now clear that the deceased person must have intended that the document itself effect their testamentary intention."

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