NOVA SCOTIA COURT OF APPEAL

Citation: *MacEachen v. Minnikin*, 2015 NSCA 81

Date: 20150828
Docket: CA 429953
Registry: Halifax

Between:

Catherine Frances MacEachen

Appellant

v.

Paula Marie Eileen Minnikin

Respondent

Judges: MacDonald, C.J.N.S., Scanlan and Van den Eynden, JJ.A.

Appeal Heard: April 13, 2015, in Halifax, Nova Scotia

Held: Appeal dismissed with costs, per reasons for judgment of Van den Eynden, J.A.; MacDonald, C.J.N.S. and Scanlan, J.A. concurring

Counsel: Kenzie MacKinnon, Q.C., for the appellant
William Ryan, Q.C., for the respondent

Reasons for judgment:

Overview

[1] The appellant (Ms. MacEachen) was married to the late Frederick C. Minnikin (Mr. Minnikin). She was his third wife. The respondent (Ms. Minnikin) was his second wife. At the time of his death, Mr. Minnikin was retired and in receipt of pension benefits from his employment with Canada Post Corporation. This appeal involves a dispute over receipt of Mr. Minnikin's survivor benefits under his pension plan.

[2] Following his death, Ms. Minnikin began receiving his survivor's pension. His widow, Ms. MacEachen, believes she is entitled to these benefits, retroactive to his date of death. She claims these benefits under the terms of a separation agreement executed between Mr. Minnikin and Ms. Minnikin and under principles of unjust enrichment. The application judge dismissed Ms. MacEachen's claim. She appeals. The question is whether the application judge erred in his interpretation and application of the operative provisions of the separation agreement and/or the principles of unjust enrichment.

[3] For the reasons that follow, I would dismiss the appeal.

Procedural Summary

[4] Ms. MacEachen filed her Notice of Application seeking entitlement to her late husband's pension benefits on October 25, 2012.

[5] Justice R. James Williams of the Supreme Court of Nova Scotia (Family Division) heard her application on November 13 and 14, 2013. Both parties filed affidavit evidence and were subject to cross examination. Williams J. issued a written decision on February 5, 2014 (2014 NSSC 47). A hearing on costs was held and an oral decision was rendered on June 3, 2014. The order appealed from was issued June 24, 2014. Pursuant to that order, Williams J. dismissed Ms. MacEachen's application and ordered her to pay costs of $20,000 plus set disbursements.

Background Summary

[6] Mr. Minnikin and Ms. Minnikin were married on June 24, 1994. They separated on January 26, 2003. They entered into a separation agreement signed by Ms. Minnikin on April 27, 2004 and Mr. Minnikin on May 4th, 2004. Both were represented by counsel at the time.

[7] The interpretation and application of paragraph 17 of their separation agreement is central to this appeal. Paragraph 17 provides:

> It is agreed by the Husband that he will continue to have the Wife as named beneficiary under his Canada Post Corporation pension and will not change her name as beneficiary until such time as he remarries. If he does not remarry, then the Wife is to be the named beneficiary under the Pension Plan and is to continue to be so as long as the plan is in effect.
>
> The Wife agrees that if the Husband does remarry, she will execute any and all necessary documents in order to release her as a beneficiary in the aforementioned plan.

[8] Mr. Minnikin and Ms. Minnikin's divorce judgment was granted on April 20, 2007. The terms of their separation agreement were incorporated into a corollary relief judgment issued on the same day.

[9] Ms. MacEachen and Mr. Minnikin married on February 17, 2008. They began cohabitating two years earlier in February 2006. Mr. Minnikin died on September 20, 2010. At the time of his death, he was 60 years old, retired and was receiving his employment pension. He had retired on or about October 31, 2006.

[10] On December 4, 2006 Mr. Minnikin executed a designation of beneficiary form for his survivor benefits. He designated Ms. Minnikin as beneficiary. This act was consistent with his obligations under paragraph 17 of their separation agreement because, at that time, Mr. Minnikin had not remarried. Pursuant to this designation, Ms. Minnikin was to receive 100 percent of the available survivor benefits. The appellant, Ms. MacEachen, witnessed Mr. Minnikin's signature to the beneficiary designation form.

[11] Although Mr. Minnikin remarried on February 17, 2008, the evidence is clear, he took no steps prior to his death (September 20, 2010) to change or attempt to change the beneficiary designation from Ms. Minnikin to Ms. MacEachen.

[12] Under the terms of his pension plan and the governing *Pension Benefits Standards Act,* (**PBSA**), the date of Mr. Minnikin's retirement and his marital status at that time are significant to beneficiary entitlement. Mr. Minnikin and Ms. Minnikin were still married but separated on the date of his retirement. Under the plan and **PBSA**, Ms. Minnikin is the defined (and entitled) spouse as at the date of Mr. Minnikin's retirement. She remains so regardless of events post retirement, including the event of his remarriage to Ms. MacEachen. Any available exceptions did not apply to the circumstances of this case.

[13] These pension entitlement provisions were set out in a letter dated November 17, 2010 from Canada Post Pension Center to Ms. MacEachen's counsel at the time. Both parties to this appeal acknowledged to the application judge that the letter from Canada Post Pension Centre accurately set out the rules on eligibility.

[14] The beneficiary designation form Mr. Minnikin signed after his retirement and while cohabitating with Ms. MacEachen (designating Ms. Minnikin), in part, provides as follows:

> I understand that if, at the time of my death, I have an eligible spouse or dependent children, applicable pension legislation and plan terms requires that death benefits be paid to my survivors. If my eligible spouse has not waived his/her benefits, benefits payable from the Canada Post Corporation Registered Pension Plan ("the Plan") in the event of my death will be paid to my eligible spouse even if I have designated someone else as my beneficiary.
>
> […]
>
> I understand that I am responsible for notifying the Canada Post Corporation Pension Administration Centre of any change of beneficiary designation. Changes to beneficiary designations must be in writing, by completing a new Designation of Beneficiary form.

[15] Notwithstanding the restrictions under the plan and **PBSA**, and noting the above requirement that a change in designation must be in writing, Mr. Minnikin never asked Ms. Minnikin to execute any documents contemplated under paragraph 17 of their separation agreement. A bit more than two years elapsed from the date of his remarriage to the date of his death. After his marriage to the Ms. MacEachen, there is no evidence he ever contacted anyone, including his plan administrator, to discuss or attempt to change the beneficiary designation from Ms. Minnikin.

[16] Mr. Minnikin took active and conclusive steps to change the beneficiary designation on life insurance policies and other benefits to which he was entitled. He either removed Ms. Minnikin as beneficiary, made his estate beneficiary or made the appellant beneficiary. All were apparently conscious decisions, which the application judge put as follows:

> [27] The evidence here does not satisfy me that Mr. Minnikin "intended to leave everything" to Ms. MacEachen. To the contrary, I would conclude he made choices about changing some things (insurance policies) and not others (the pension survivor designation).

[17] At the time of Mr. Minnikin's death, the dependent child from his marriage to Ms. Minnikin was 13 years of age. She was in the primary care of Ms. Minnikin. At the time of his death, Mr. Minnikin was in arrears of his support and/or section 7 obligations to her. Ms. Minnikin testified that Mr. Minnikin told her he would leave her as his designated beneficiary under his pension plan. According to Ms. Minnikin, this would explain why she was not asked by Mr. Minnikin, after his marriage to the appellant, to sign any waiver to survivor pension entitlement in the event of Mr. Minnikin's death.

[18] Ms. MacEachen testified that Mr. Minnikin told her she would be entitled to his survivor pension benefits; however, as noted, he did not take any steps to secure this outcome. As pointed out by the application judge, had he done so it is unknown what the response of Canada Post would have been given the plan and legislative restrictions; however, had Mr. Minnikin approached Ms. Minnikin and asked her to sign the necessary waiver documents pursuant to paragraph 17 of their separation agreement *"... she would have been compelled to do it."* (transcript page 208 and 267 of Appeal Book)

Issues

[19] Ms. MacEachen listed three issues for determination. They are as follows:

Issue 1. Did the trial judge misapprehend the terms of the agreement reached between the respondent and Frederick C. Minnikin on who should receive his pension death benefits?

Issue 2. Did the trial judge misapprehend the legal obligations on the respondent and Frederick C. Minnikin arising from their agreement on who should receive the pension death benefits of Frederick C. Minnikin?

Issue 3. Did the trial judge misapprehend whether the respondent is being unjustly enriched by receiving the pension death benefits of Frederick C. Minnikin.

[20] I would reframe the issues on appeal as follows:

(a) Did the application judge err in his interpretation and application of paragraph 17 of the separation agreement?

(b) Did the application judge err in concluding there was no unjust enrichment?

[21] In the circumstances of this case, the issues are so interconnected I will deal with them jointly in my analysis.

Standard of Review

[22] Findings of fact and inferences are reviewed on the standard of palpable and overriding error. Questions of law are reviewed on the standard of correctness. Questions of mixed fact and law are reviewed on the standard of palpable and overriding error subject to extricable issues of law which are reviewed on the standard of correctness. (See **Flynn v. Halifax (Regional Municipality)**, 2005 NSCA 81 at paragraph 13.) Respecting contractual interpretation, this involves issues of mixed law and fact. (See **Sattva Capital Corp**. **v. Creston Moly Corp.**, 2014 SCC 53 at paragraph 50.)

[23] The issues as I have framed them involve questions of mixed law and fact; reviewable on the standard of palpable and overriding error. The application judge made several key findings of fact and/or drew inferences from the evidence. I will also refer to his key findings and address whether they warrant appellate intervention based on the same standard of palpable and overriding error.

Analysis

[24] In my analysis that follows, I will briefly refer to the legal principles which underpin a claim for unjust enrichment. I will then summarize the parties' respective positions before assessing the decision under appeal.

[25] In short, to successfully sustain a claim for unjust enrichment Ms. MacEachen must show:

(a) an enrichment. She gave something to the respondent (which the respondent received and retained);

(b) a corresponding deprivation. The enrichment must correspond to Ms. MacEachen's deprivation; and

(c) the absence of any juristic reason for the enrichment. In other words, there is no reason in law or in justice for Ms. Minnikin's retention.

These principles were set out in **Kerr v. Baranow**, 2011 SCC 10. In his decision, the application judge referred to the relevant legal principles.

[26] I will now summarize the position of the parties. As paragraph 17 of the separation agreement between Ms. Minnikin and the late Mr. Minnikin is central to the issues, I set it out again:

> It is agreed by the Husband that he will continue to have the Wife as named beneficiary under his Canada Post Corporation pension and will not change her name as beneficiary until such time as he remarries. If he does not remarry, then the Wife is to be the named beneficiary under the Pension Plan and is to continue to be so as long as the plan is in effect.
>
> The Wife agrees that if the Husband does remarry, she will execute any and all necessary documents in order to release her as a beneficiary in the aforementioned plan.

Summary of Appellant's argument

[27] On appeal, to a great extent, Ms. MacEachen advanced the same arguments as she did before Justice Williams. I would summarize her arguments as follows:

(a) paragraph 17 expresses the clear intention that in the event Mr. Minnikin should remarry, his new spouse (Ms. MacEachen) is to receive his survivor pension benefits;

(b) the court should give legal effect to such intention;

(c) paragraph 17 mandates Ms. Minnikin to release herself as beneficiary or otherwise facilitate Ms. MacEachen becoming the recipient of the survivor benefits. In particular, the last sentence of paragraph 17 places this onus upon Ms. Minnikin. Mr. Minnikin did not have to do anything. He did not have to ask Ms. Minnikin to do anything; rather Ms. Minnikin was legally obliged to do something to ensure she disentitled herself to these survivor benefits in favour of Ms. MacEachen;

(d) there was nothing Mr. Minnikin could have done to ensure that paragraph 17 was implemented. It can only be implemented by a remedial constructive trust being placed on the respondent's pension plan receipts each month;

(e) there is one relevant paragraph in a letter (dated February 24, 2010) from Mr. Minnikin to his counsel at the time that may suggest Mr. Minnikin thought paragraph 17 of the separation agreement was all that was needed to effect the change in beneficiary. That paragraph is as follows:

> Frances reminded me this morning, as I read the paper, that I'll be 60 in June. My mortality briefly crossed my mind. As my widow she will be entitled to half my reduced pension. If Canada Post had not fired me, Frances and the children would be entitled to half my full pension or half my long term disability insurance.

I note this is an isolated paragraph. The balance of the letter deals with Mr. Minnikin's ongoing disgruntlement over how his employment relationship was terminated. Although he received a severance package and signed a full and final release, he was seeking advice as to whether he could reopen negotiations or pursue a claim against his former employer. The above paragraph was a passing reference in that letter.

(f) Ms. Minnikin's failure to execute all necessary documents to release in favour of Ms. MacEachen is a breach of contract and her retention of survivor benefits, constitutes unjust enrichment. Ms. MacEachen maintains all the necessary elements of her claim for unjust enrichment were made out, and she should be entitled to the constructive trust remedy she seeks.

[28] Williams J. concluded there was no enrichment or corresponding deprivation. Ms. MacEachen argues the judge erred in so finding. The application judge found it was Mr. Minnikin's actions that were at play. He found Mr. Minnikin to be *"…the author of these circumstances"* (paragraph 44 of decision). In essence, the appellant argues Williams J. took too narrow an interpretation of the evidence and the law in finding the claim failed, in part, because Ms. MacEachen was not the source of Ms. Minnikin's enrichment, and therefore there was also no corresponding deprivation to Ms. MacEachen.

[29] Ms. MacEachen argues that her claim for unjust enrichment should not be barred simply because she did not give Ms. Minnikin any pension benefits. She argues a direct nexus is not required as between herself and Ms. Minnikin respecting any enrichment and corresponding deprivation. It was argued paragraph 17 of the separation agreement creates rights for third party beneficiaries, and according to her desired interpretation of paragraph 17, it mandated Ms. Minnikin to hand over the benefits regardless of whether Mr. Minnikin had ever asked her to do so. She asserts Ms. Minnikin is in breach of the agreement and as a result of her breach, she enriched herself and the appellant has been deprived.

[30] In support of a more indirect nexus to the enrichment and corresponding deprivation components of the unjust enrichment test; the appellant suggests that the court should be more flexible. To support this proposition, she relies on several excerpts from the Supreme Court of Canada decision in **Kerr**, including paragraphs 70, 71, 72 and 73. In her factum the appellant stated:

> 77. Starting at paragraph 70, the court emphasized the importance of flexibility in determining unjust enrichment claims. At paragraph 71, the decision stated, "The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways." The court went on to quote Binnie J. in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, "the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization". In the same paragraph, Cromwell J. quoted from MacLachlin J. (as she then was) in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, "Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case". At paragraph 72, the court again referred to comments from Justice Binnie from a different case, *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, in which he "noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, 'retains a large measure of remedial

> flexibility to deal with different circumstances according to principles rooted in fairness and good conscience'".
>
> 78. The court in the next paragraph summarized the importance of flexibility, "Thus, the remedy should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it…. There is no reason to think that the wide range of circumstances that may give rise to unjust enrichment claims will necessarily fall into one or the other of the two remedial options into which some have tried to force them."

[31] Lastly, Ms. MacEachen argues there was no juristic reason to retain the benefit. She claims the eight juristic reasons cited by the application judge are not in fact reasons in law or equity for the respondent Ms. Minnikin to retain the pension benefits. For reasons I will elaborate on further, I disagree.

[32] As was correctly noted by counsel for Ms. Minnikin, the specific references to the need for flexibility (apart from general statements about the claim in paragraph 3 of **Kerr**) pertain to the remedy only <u>once</u> the claim for unjust enrichment has been made out. In other words, once it has been found that the plaintiff (here Ms. MacEachen) has enriched the defendant (here Ms. Minnikin), Ms. MacEachen has suffered a corresponding deprivation and there is no justification for Ms. Minnikin to retain the benefit, the court should then be flexible in how it fashions a remedy. Thus, the flexibility references in **Kerr** have little application to the present case.

Summary of respondent's argument

[33] Ms. Minnikin states, in effect, Ms. MacEachen is asking this Court to wholesale retry the same issues determined by the application judge. She aptly points out that an appeal is not an opportunity for a party to relitigate issues for which they were unsuccessful at trial. (See **Hayter v. Bezanson**, 2009 NSCA 113 at paragraph 31.) In reviewing the record, including the pretrial briefs before the application judge, it appears Ms. MacEachen is essentially attempting to retry her case on appeal.

[34] Turning to Ms. Minnikin's arguments respecting the interpretation of paragraph 17 of the separation agreement, I would summarize them as follows:

(a) it is implicit in the decision of the application judge that in effect he found paragraph 17 of the separation agreement did not create an

automatic change in beneficiary designation from Ms. Minnikin to Ms. MacEachen upon the marriage of Ms. MacEachen and Mr. Minnikin;

(b) under paragraph 17 of the separation agreement Mr. Minnikin retained the right and remained in control of when a change in beneficiary would be requested. He had to take action following his remarriage to change the beneficiary designation. He did not do so. On its face, paragraph 17 does not support the interpretation advocated by the appellant;

(c) respecting the elements of an unjust enrichment claim, the respondent maintains the legal principles require there be a direct enrichment by the claimant;

(d) the application judge was correct in determining, on these facts, that Ms. MacEachen did not give anything to or enrich Ms. Minnikin. There was no corresponding deprivation and her claim for unjust enrichment therefore fails; and

(e) finally, even if there was an enrichment and deprivation there were juristic reasons for Ms. Minnikin to retain the benefit, and the findings of fact which underpin the determination of the eight juristic reasons, were grounded in the evidence.

[35] The following exchange between Justice Williams and counsel for Ms. MacEachen is informative of how Justice Williams interpreted paragraph 17:

> **THE COURT:** But it doesn't say that he will change it. He says he will not change it until he's remarried. It doesn't say he will change it when he's remarried. ...
>
> **MR. MacKINNON:** But then, it also says the wife agrees, if the husband does remarry, she will execute any and all necessary documents in order to release her as a beneficiary.
>
> **THE COURT:** Yeah. If he approached her, she would have been compelled to do it.
>
> **MR. MacKINNON:** Well…
>
> **THE COURT:** ... it put control in him.

[36] I concur with the respondent that on a plain reading (of paragraph 17 of the separation agreement) it cannot sustain the interpretation advanced by the

appellant. This conclusion is strengthened when considered in light of the factual matrix; which I will address in more detail later. I reject the appellant's assertion that under paragraph 17, the onus was on Ms. Minnikin to act (without request to waive or some other action by Mr. Minnikin) to change the beneficiary. I reject the appellant's claim Ms. Minnikin breached the terms of her separation agreement by failing to execute documents on her own initiative. As determined by the application judge, on its face, paragraph 17 does not place the obligation upon Ms. Minnikin. Mr. Minnikin retained the option to pursue a change in beneficiary and request (even compel) Ms. Minnikin to release. As the application judge put it, Mr. Minnikin was in control. He took no action.

[37] As noted by the Supreme Court of Canada in **Sattva Capital Corp.** at paragraph 50 "*…Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix."* In these circumstances, there is no clear extricable question of law, so as noted, the applicable standard of review is palpable or overriding error. I see no such error made by Justice Williams in either his express or implied interpretation and application of paragraph 17 of the separation agreement.

Key findings of fact

[38] In his decision, Justice Williams made several key findings of fact or drew key inferences. I refer to the following:

> [12] Mr. Minnikin's signature on this document [being the beneficiary declaration form] was witnessed by Ms. MacEachen. I would conclude that he (and Ms. Minnikin) knew the plain meaning of this clause. They both knew a change in beneficiary designation "must be in writing".
>
> [13] There was no change of beneficiary designation made by Mr. Minnikin before his death.
>
> […]
>
> [17] Ms. MacEachen suggests this letter [letter of February 24, 2010, see paragraph 26(e) herein] indicates Mr. Minnikin thought he <u>had</u> changed the pension designation. I do not conclude that. His death was sudden, I conclude this phrasing contemplated that he <u>could</u> change the designation (perhaps wrongly). He made no attempt to change the designation.
>
> […]

> [21] I conclude that Ms. (sic) Minnikin took steps to change his insurance policy - making Ms. MacEachen the beneficiary, but did not take any steps to change the beneficiary designation on his Canada Post Survivors Pension. I conclude that he made no request to Ms. Minnikin that she execute the documents referred to in Clause 17 of their Separation Agreement.
>
> [22] Mr. Minnikin may have intended to provide for Amy (indirectly) in this fashion. He may have intended to do so until later (when Amy was older) and to then change the designation to Ms. MacEachen. He may not have intended to change the designation at all. He died without taking any steps to change the designation.
>
> […]
>
> [27] The evidence here does not satisfy me that Mr. Minnikin "intended to leave everything" to Ms. MacEachen. To the contrary, I would conclude he made choices about changing some things (insurance policies) and not others (the pension survivor designation).
>
> […]
>
> [30] The Respondent's Brief argued:
>
> > 27. In *Gaudio Estate v. Gaudio*, the Ontario Superior Court again considered this issue in the context of an insurance policy. Clarke, J. found that the separation agreement did not waive or revoke the right of the named beneficiary to the proceeds of the insurance policy and noted that it was immaterial whether the insured had left his beneficiary designation due to pure error or inadvertence or due to the erroneous impression that it was unnecessary to take any further steps to change the beneficiary designation. Clarke, J. ruled that the evidence (and particularly the absence of evidence of intention) failed to raise the issue of good conscience and call into play the doctrine of remedial constructive trust. There was no compelling evidence of the deceased's intention or what he erroneously believed that the beneficiary designation had been taken care of. [see paragraphs 7-9 of *Gaudio*]
>
> [31] My conclusion here is the same.
>
> […]
>
> [35] I agree. Here, Mr. Minnikin (as between he and Ms. Minnikin) was left in control of who would be designated as beneficiary once he remarried. Changing the designation involved taking concrete steps. He did not take those steps.
>
> [Emphasis added in original]

[39] The findings of fact as determined by Justice Williams informed and were part of his reasoning in determining whether Ms. MacEachen had satisfied all the required elements of her unjust enrichment claim. He found no enrichment and no

deprivation. Even if there were, he identified and found juristic reasons which supported the respondent's retention of the survivor benefits.

[40] The application judge held the best vantage point to find facts and draw inferences. It is well settled that deference is to be afforded to such assessments. Appellate courts are not to intervene absent palpable and overriding error. The findings of fact or inferences drawn by Justice Williams are clearly supported by the evidence. I see no palpable or overriding error.

[41] His reasons are succinct so I repeat them instead of summarizing:

> WAS THERE AN ENRICHMENT?
>
> [42] I conclude that there was not - for the following reasons:
>
> (a) Ms. MacEachen has not shown that she gave something to Ms. Minnikin, which Ms. Minnikin retained.
>
> (b) Ms. MacEachen could not have been designated a spouse at the time of Mr. Minnikin's retirement. Mr. Minnikin did not change or attempt to change the beneficiary designation. Ms. Minnikin was never asked to sign a waiver. Mr. Minnikin's actions resulted in Ms. Minnikin being designated as beneficiary. He took no steps to change that. Nothing Ms. MacEachen did enriched Ms. Minnikin.
>
> WAS THERE A DEPRIVATION?
>
> [43] There was no enrichment, and therefore no corresponding deprivation.
>
> [44] Ms. MacEachen's sense of deprivation is undoubtedly real. It is not, however, a "corresponding deprivation" as contemplated by the law of unjust enrichment. It is not a "deprivation" brought by actions or inactions by Ms. Minnikin. Mr. Minnikin is the author of these circumstances.
>
> [45] Ms. MacEachen feels she was deprived in the sense that she feels she should have the benefits that Ms. Minnikin now has. Her sense of deprivation occurred either as a result of Mr. Minnikin's failure to execute the documentation necessary to change the beneficiary designation or as a result of the operation of the PBS Act.
>
> ARE THERE JURISTIC REASONS FOR MS. MINNIKIN TO RETAIN THE BENEFIT?
>
> [46] I conclude there are juristic reasons for Ms. Minnikin to retain the benefit. They include:
>
> (a) The Separation Agreement and Corollary Relief Judgment provided she would be designated the beneficiary.
>
> (b) Mr. Minnikin designated her the beneficiary.

(c) He could not have designated anyone else at the time of his retirement (the letter from Canada Post concerning the **PBSA**).

(d) I conclude he knew that he was responsible to notify Canada Post Corporation Administration Centre of any change in beneficiary and that it must be done in writing (the Designation of Beneficiary document).

(e) He did not change the designation.

(f) He took no steps to change the designation.

(g) Ms. Minnikin could not change the designation on her own.

(h) Ms. Minnikin was not asked by Mr. Minnikin to cooperate in changing the designation.

[42] Returning to the suggested relaxed unjust enrichment requirements put forward by the appellant, I neither rule out nor in, whether in some cases, there might possibly be a more indirect route between parties respecting whether one enriched the other and whether there is a corresponding deprivation. Given the specific contractual terms of paragraph 17 of the separation agreement (between Mr. Minnikin and the respondent, Ms. Minnikin) and the unassailable findings of fact by the application judge, I need not decide that issue.

[43] Paragraph 17 of the separation agreement did not create an automatic change of beneficiary upon Mr. Minnikin's marriage to Ms. MacEachen. Mr. Minnikin was in control. He might have made a conscious decision to leave Ms. Minnikin as his designated beneficiary and not ask her to execute any waivers. Mr. Minnikin had the right to ask and obtain documents to effect a waiver. He had over two years to make such a request after his marriage to Ms. MacEachen and before his death. He did not do so.

[44] These determinations by Justice Williams are soundly anchored in both the evidence and the applicable law. I find no error.

Conclusion

[45] I would dismiss the appeal. I would order the appellant to pay costs to the respondent in the amount of $4,000.00, inclusive of disbursements.

Van den Eynden, J.A.

Concurred in:

MacDonald, C.J.N.S.

Scanlan, J.A.