NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Lawen Estate*, 2021 NSCA 39

Date: 20210204
Docket: CA 492910
Registry: Halifax

Between:

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Appellant

v.

Dr. Joseph Lawen in his Capacity as Executor of the Estate of Jack Lawen and Michael Lawen

Respondents

Judge: The Honourable Justice David P.S. Farrar

Appeal Heard: February 4, 2021, in Halifax, Nova Scotia

Written Release: May 19, 2021

Subject: Sections 2(b) and 3(1) *Testators' Family Maintenance Act.* Sections 2(a) and 7 of the *Canadian Charter of Rights and Freedoms.* Dependent within the meaning of the *TFMA*. Evidence on *Charter* challenges. Public interest litigation. Costs payable out of the Estate.

Summary: Dr. Joseph Lawen, the executor of the estate of Jack Lawen, and Michael Lawen, the primary beneficiary of Jack Lawens' estate, were granted public interest status to challenge whether ss. 2(b) and 3(1) of the *TFMA* violated s. 2(a) (freedom of conscience and religion) and s. 7 (right to life, liberty and security of the person) of the *Charter*.

Sections 2(b) and 3(1) of the *TFMA* address the issue of whether a testator has made adequate provision in their will for the proper maintenance support of a dependent. The definition of dependent means the widow or widower or the

child of a testator. The definition does not require that the child or the spouse of a testator be dependent on the testator.

The Lawens sought to have the provisions of the *TFMA* read down so that non-dependent adult children were excluded from the definition of dependent.

The application judge found that the *TFMA* did not offend s. 2(a) of the *Charter*, but that it engaged the liberty interests of the testator under s. 7 and was not saved by s. 1. He read down the definition of dependent to exclude non-dependent adult children.

The AGNS appealed alleging the application judge erred in finding that the *TFMA* violated s. 7. The Lawens filed a Notice of Contention asserting the decision could be upheld on the alternative basis that the *TFMA* offended s. 2(a) of the *Charter*.

Issues:

(1) Did the application judge err in finding that ss. 2(b) and 3(1) of the *Act* infringed s. 7 of the *Charter*?

(2) Did the application judge err in finding that testamentary autonomy was not protected by s. 2(a) of the *Charter*?

(3) What is the appropriate amount of costs to be awarded to the AGNS on the application and on this appeal, and who will be responsible to pay the cost award?

Result:

Appeal allowed and the Notice of Contention dismissed. The costs awarded below against the AGNS was set aside. Costs were payable to the AGNS on the application below – Michael Lawen to pay $26,000, inclusive of disbursements, and Dr. Lawen the amount of $5,500, inclusive of disbursements. The AGNS was awarded costs of the Appeal and Notice of Contention against Michael Lawen in the amount of $10,000 and against Dr. Lawen in the amount of $2,200, both amounts are inclusive of disbursements.

The application judge erred in finding that testator's liberty interests were engaged by the provisions of the *TFMA*. The Lawens, as public interest litigants, did not put any evidence before the application judge which would have allowed him to determine that the liberty interests were engaged and, alternatively, even if they were engaged, whether they were in accordance with the fundamental principles of justice.

Similarly, the argument that a testator's freedom of conscience was engaged was totally without merit. Again, no evidence was put forward for what the testators' beliefs may have been or that they were sincerely held. The Lawens, as public interest litigants, failed to satisfy the evidentiary obligations on them and were, effectively, seeking to prosecute the *Charter* rights of a deceased individual, which are not justiciable.

The executor and Michael Lawen are ordered to pay the costs personally and not out of the estate. The public interest litigation had no substantial merit to it and the Estate should not be burdened by the ill-advised actions of the executor or the primary beneficiary.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 21 pages.

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Appellant

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Respondents

Judges:	Farrar, Bryson and Bourgeois, JJ.A.
Appeal Heard:	February 4, 2021, in Halifax, Nova Scotia
Written Release	May 19, 2021
Held:	Appeal allowed with costs, per reasons for judgment of Farrar, J.A.; Bryson and Bourgeois, JJ.A. concurring
Counsel:	Jeffrey D. Waugh and Jeremy Smith, for the appellant Lawrence Graham, Q.C., for the respondent Dr. Joseph Lawen Victor J. Goldberg, Q.C., and Richard W. Norman, for the respondent Michael Lawen

Reasons for judgment:

Introduction

[1] By a decision dated May 24, 2019 (reported 2019 NSSC 162), Justice John P. Bodurtha found that ss. 2(b) and 3(1) of the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 (the *Act*) – which address the issue of whether a testator has made adequate provision in their will for the proper maintenance and support of a dependant – violated s. 7 of the *Canadian Charter of Rights and Freedoms* (right to life, liberty and security of the person).

[2] The application judge found that the same two sections of the *Act* did not violate s. 2(a) of the *Charter* (freedom of conscience and religion).

[3] The Attorney General of Nova Scotia (AGNS) appeals arguing the application judge erred in finding the sections of the *Act* violated s. 7 of the *Charter*. The respondents have filed a Notice of Contention saying the application judge's decision can be affirmed on the basis that the sections offend s. 2(a) of the *Charter*.

[4] At the conclusion of the oral hearing, we allowed the AGNS's appeal and dismissed the Notice of Contention, set aside the cost award below and reserved decision on the issue of costs, both on the application and the appeal, with reasons to follow. These are those reasons.

Background

[5] Jack Lawen died in 2016, leaving four adult children, three daughters and one son (the respondent, Michael Lawen). His will, made in 2009, left $50,000 each to two of his daughters, nothing to his third daughter, and the residual of the estate to Michael.

[6] The three daughters (Catherine El-Tawil, Samia Khoury and Mary Lawen) commenced two actions against the Estate of Jack Lawen after probate of his will was granted. One of the actions was brought under s. 3(1) of the *Act*, alleging their father's will failed to make adequate provision for them as dependants.

[7] On November 23, 2017, Michael Lawen and the Estate's executor, Jack Lawen's brother, Dr. Joseph Lawen[1], brought an application, separate from the daughters' actions, challenging the constitutional validity of ss. 2(b) and 3(1) of the *Act* alleging those provisions contravened the freedom of conscience under s. 2(a) of the *Charter* and the liberty rights in s. 7 of the *Charter*. The three daughters were not named as parties in the *Charter* challenge.

[8] On February 8, 2018, the AGNS filed a Motion for Summary Judgment. That motion was subsequently adjourned to permit the Lawens to amend their application. On July 4, 2018, an Amended Notice of Application was filed seeking a declaration reading down the *Act* to exclude non-dependent adult children from advancing an application under the *Act*.

[9] On August 10, 2018, the Lawens were granted public interest standing in their *Charter* challenge application, (*Lawen Estate v. Nova Scotia (Attorney General)*, 2018 NSSC 188).

[10] The application was heard on November 19, 2019.

[11] The application judge held that s. 2(a) of the *Charter* was not violated by the impugned provisions, but that the definition of "dependant" was overly broad and offended the s. 7 liberty interests of testators generally. He further found that the breach of s. 7 was not saved by the operation of s. 1 of the *Charter*. Pursuant to s. 52 of the *Constitution Act, 1982*, the court read down the meaning of "dependant" in the *Act* to exclude all non-dependant adult children.

Issues

[12] I would summarize the issues raised by the Notice of Appeal and Notice of Contention as follows:

(1) Did the application judge err in finding that ss. 2(b) and 3(1) of the *Act* infringed s. 7 of the *Charter*?

(2) Did the application judge err in finding that testamentary autonomy was not protected by s. 2(a) of the *Charter*?

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[1] I will sometimes refer to Michael Lawen and Dr. Joseph Lawen as the "Lawens".

(3) What is the appropriate amount of costs to be awarded to the AGNS on the application and on this appeal, and who will be responsible to pay the cost award?

Standard of Review

[13] The first two issues in this appeal involve the application of constitutional legal principles. The standard of review is correctness. In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Court summarized the standard of review:

> Constitutional Questions
>
> 55 Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322. [emphasis added]

[14] With respect to the third issue, we are deciding costs anew – there is no standard of review.

Analysis

Issue 1: Did the application judge err in finding that ss. 2(b) and 3(1) of the Act infringed s. 7 of the Charter?

[15] Section 3(1) of the *Act* permits a judge to make an order for adequate maintenance and support of a dependant where the judges finds, in all the circumstances, the testator has not done so:

> 3 (1) Where a testator dies without having made adequate provision in his will for the proper maintenance and support of a dependant, a judge, on application by or on behalf of the dependant, has power, in his discretion and taking into consideration all relevant circumstances of the case, to order that whatever provision the judge deems adequate be made out of the estate of the testator for the proper maintenance and support of the dependant.

[16] Section 5(1) channels the judge's exercise of discretion. It sets out the matters that the judge shall inquire into and consider in making a determination

under s. 3 including, the testator's reasons (or lack thereof) for making the dispositions for a dependant:

> Inquiry by judge
>
> 5 (1) Upon the hearing of an application made by or on behalf of a dependant under subsection (1) of Section 3, the judge shall inquire into and consider all matters that should be fairly taken into account in deciding upon the application including, without limiting the generality of the foregoing,
>
> (a) whether the character or conduct of the dependant is such as should disentitle the dependant to the benefit of an order under this Act;
>
> (b) whether the dependant is likely to become possessed of or entitled to any other provision for his maintenance and support;
>
> (c) the relations of the dependant and the testator at the time of his death;
>
> (d) the financial circumstances of the dependant;
>
> (e) the claims which any other dependant has upon the estate;
>
> (f) any provision which the testator while living has made for the dependant and for any other dependant;
>
> (g) any services rendered by the dependant to the testator;
>
> (h) any sum of money or any property provided by the dependant for the testator for the purpose of providing a home or assisting in any business or occupation or for maintenance or medical or hospital expenses.
>
> Evidence at hearing
>
> (2) Upon the hearing of an application under subsection (1) of Section 3, the judge, in addition to any evidence adduced by the parties appearing, may direct evidence to be given in respect of any matter that the judge considers relevant.
>
> Evidence of testators reasons
>
> (3) Upon the hearing of an application under subsection (1) of Section 3, the judge may receive any evidence the judge considers relevant of the testators reasons, as far as ascertainable, for making the dispositions made by his will, or for not making provision or further provision, as the case may be, for a dependant, including any statement in writing signed by the testator.

[17] The definitions of "child" and "dependant" are set out in 2(a) and (b) of the *Act*:

> 2 In this Act,
>
> (a) "child" includes a child
>
> (i) lawfully adopted by the testator,

> (ii) of the testator not born at the date of the death of the testator,
>
> (iii) of which the testator is the natural parent;
>
> (b) "dependant" means the widow or widower or the child of a testator; …

[18] To be dependent within the meaning of the definition does not require financial dependency, although that is one of the considerations under s. 5(1). One need only to be a child, widow or widower of the testator. As Chief Justice MacKeigan explained in *Zwicker Estate v. Garrett*, [1976] N.S.J. No. 20 (SCAD), the question is moral not economic:

> 41 To justify interference with a will a court must thus find a failure to provide "proper maintenance and support", i.e., both a need for maintenance, relative to the size of the estate, and a moral claim, which may be of varying strength.
>
> …
>
> 47 The task before this Court is to determine whether the testator failed to make "adequate provision in his will for the proper maintenance and support" of his adult daughter … so as to warrant interference by the Court. The question to be asked is moral, not economic. <u>In ignoring the respondent in his will, was the testator in all the circumstances guilty of a "breach of morality", or a "manifest breach of moral duty"?</u> [emphasis added]

[19] The Supreme Court of Canada in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, considered provisions of the British Columbia *Wills Variation Act* that are substantively similar to the *Act*. McLachlin, J. (as she was then) described two interests protected by the legislation – the adequate, just and equitable provision for the spouses and children of testators; and the protection of testamentary autonomy:

> 16 The two interests protected by the Act are apparent. <u>The main aim of the Act is adequate, just and equitable provision for the spouses and children of testators</u>. The desire of the legislators who conceived and passed it was to "ameliorat[e] ... social conditions within the Province". … The Act was passed at a time when men held most property. It was passed, we are told, as "the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916". … It is equally reasonable to suppose that they were concerned that women and children receive an "adequate, just and equitable" share of the family wealth on the death of the person who held it, even in the absence of demonstrated need.
>
> 17 <u>The other interest protected by the Act is testamentary autonomy</u>. … The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was

> necessary to provide the latter with what was "adequate, just and equitable in the circumstances." … [emphasis added]

[20] A judge hearing an application for maintenance is required to balance the two interests.

[21] *Tataryn Estate* has been accepted and applied in Nova Scotia in a number of cases (see, for example, *Welsh v. McKee-Daly*, 2014 NSSC 356; *Walker v. Walker Estate*, 1998 NSSC 55; and *David v. Beals Estate*, 2015 NSSC 288).

[22] The application judge distinguished *Tataryn Estate*, and cases which have followed it, on the basis that they did not consider the *Charter*. While that is accurate, it does not detract from the importance of *Tataryn Estate* in its discussion of the nature of moral claims. I will have more to say on that issue later in these reasons.

[23] With these statutory and well-established case authorities the Lawens asked the court below to read down the provisions of the *Act* to exclude moral claims of non-dependent adult children (presumably this would also include non-dependent spouses as their claims would also be moral) from the operation of the *Act* because it interferes with testator autonomy thereby violating s. 7 of the *Charter*.

Section 7

[24] Section 7 of the *Charter* requires that laws or state actions that interfere with life, liberty and security of the person conform to principles of fundamental justice – the basic principles that underlie our notions of justice and fair process.

[25] In considering the Lawens' argument on the right to liberty, the application judge reasoned:

> [60] The applicants' argument would be stronger had the majority in *Godbout* accepted the minority view that the choice of location of a home is protected by s. 7, or had the majority in *Jones* specifically decided that educating one's children fell into this category. It is not, however, an absurd argument to say that the disposal of one's estate is a fundamental personal choice that is undermined by being subject to a purely "moral" claim by an independent adult child, justified by social expectations of what a judicious person would do (*Tataryn Estate* at pages 820-821). Although, the Supreme Court of Canada found a purely moral claim by an independent adult child, I am mindful that the Charter was not argued in *Tataryn*. It is clear from the review of legislation above that other Canadian legislatures have rejected this as a matter of policy.

> [61] From a *Charter* point of view, the various statements about the potential significance of testamentary autonomy, in my view, support the conclusions that (1) testamentary autonomy is not necessarily a purely economic or property matter, and (2) it can rise to the level of fundamental personal choice of the kind contemplated in the caselaw under s. 7. [emphasis added]

[26] In summary, the application judge found:

(1) It is not an absurd argument to say that the disposal of one's estate is a fundamental personal choice that is undermined by being subject to a purely "moral" claim by an independent adult child;

(2) Testamentary autonomy is not necessarily a purely economic or property matter; and

(3) Testamentary autonomy can rise to the level of fundamental personal choice of the kind contemplated in the caselaw under s. 7.

[27] From this, the application judge found testamentary autonomy is protected by s. 7 of the *Charter*, and that ss. 2(b) and 3(1) of the *Act* violate the right to liberty guaranteed by s. 7:

> [134] I conclude that:
>
> a. sections 2(b) and 3(1) of the TFMA infringe upon testamentary autonomy and violate the right to liberty guaranteed by s. 7 of the Charter and the infringement is not justified under s. 1…

[28] With respect, this is a conclusion which is not borne out by his analysis. The three statements do not support the finding that there has been a s. 7 breach.

[29] It is a mere speculation to say that under certain circumstances a s. 7 breach may occur. This is not the manner in which s. 7 rights are analyzed. The application judge made no findings of fact which support his reasoning. He does not explain how he got from an argument not necessarily being absurd to it amounting to a breach of the right to liberty. Nor do his reasons reveal the circumstances in which testamentary autonomy is not necessarily a purely economic or property matter; and, finally, when can the testator's decision rise to the level of a fundamental personal choice? What facts must be present for these circumstances to be satisfied?

[30] The application judge references the claim of an independent child as a "purely moral" claim in a manner that suggests moral claims are not worthy of recognition or are not earned. I return to *Tataryn Estate* where the Court discussed the nature of moral claims, including an independent child's contribution to the estate:

> [30] … The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.
>
> [31] For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made. [Citations omitted] [emphasis added]

[31] As can be seen from this passage, a moral claim of an independent child arises from a moral duty that a testator has toward their spouse or children, which may arise from a myriad of circumstances. Section 5 of the *Act*, as set out above, is intended to provide structure to a judge's consideration of any claim against the estate.

[32] The suggestion that claims by non-dependent adult children (or spouses by necessary implication) are "purely moral" suggests they do not merit consideration and are an unjustified fettering of a testator's autonomy. It ignores the very fact that a moral claim emerges from the moral obligations of the testator during their lifetime.

[33] The application judge did not undertake a proper analysis of s. 7, nor explain how, in light of the nature of moral claims, the history of the *Act* and the established caselaw, s. 7 liberty rights were engaged. His approach to determining a s. 7 violation did not follow the analytical process mandated by the authorities.

[34] In *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, the Court set out the requirements for a s. 7 analysis. It requires a claimant to prove a deprivation of one of the protected interests and the deprivation is not in accordance with the principles of fundamental justice:

> 12 Section 7 of the *Charter* guarantees the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. <u>This requires a claimant to prove two matters: first, that there has been or could be a deprivation of the right to life, liberty and security of the person, and second, that the deprivation was not or would not be in accordance with the principles of fundamental justice</u>. If the claimant succeeds, the government bears the burden of justifying the deprivation under s. 1, which provides that the rights guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. [emphasis added]

[35] In determining whether the deprivation is in accordance with the principles of fundamental justice, *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, held it is first necessary to identify the principles of fundamental justice and then to determine whether the deprivation of the interest thus identified is in accordance with those principles:

> 83 These "liberty" interests are, of course, very different. We propose therefore first to identify the s. 7 "interest" properly at stake, then secondly to discuss the applicable principles of fundamental justice. Thirdly we will examine whether the deprivation of the s. 7 interest thus identified is in accordance with the principles of fundamental justice relevant to these appeals. As will be seen, we find no s. 7 infringement. It will therefore not be necessary to move to s. 1 to determine if an infringement would be justified in a free and democratic society.

[36] With respect, in my view the application judge erred in finding that s. 7 liberty rights were engaged and further, even if they were, he failed to do any analysis of whether the deprivation of the testator's liberty would accord with fundamental justice.

The Right to Liberty

[37] The liberty protected under s. 7 has at least two aspects. The first is directed to a person in a physical sense and is engaged where there is a physical restraint such as imprisonment or the threat of imprisonment. This aspect is not an issue in this case.

[38] Section 7 also protects the personal autonomy of an individual involving inherently private choices that go to the core of what it means to enjoy individual dignity and independence.

[39] I had earlier noted the application judge made no findings of fact. This is not surprising as there was no evidence put before him from which he could make findings or draw inferences.

[40] The Estate and Michael Lawen sought public interest standing to question the validity of the *Act*. Having been granted that standing, they put no evidence before the Court in support of their arguments or position.

[41] The totality of the evidence before the application judge did not speak to any of the issues which the application judge had to decide. The affidavit of Michael Lawen is as follows:

> I make oath and give evidence as follows:
>
> 1. I am Michael Lawen, the Second Applicant in this proceeding.
>
> 2. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information or belief.
>
> 3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.
>
> 4. I am the son of the late Jack Lawen. My father died on January 16, 2016.
>
> 5. I am the nephew of Dr. Joseph Lawen, who is my father's brother, the executor of my father's estate, and the First Applicant in this proceeding.
>
> 6. I am the brother of Catherine El-Tawil, Samia Khoury, and Mary Lawen, all daughters of my father Jack Lawen.
>
> 7. My father Jack was born in southern Lebanon in 1936. His father was a farmer and landowner.
>
> 8. In 1959, my father, his four siblings, and his parents immigrated to Canada, arriving at Pier 21 in Halifax. The family settled in Halifax.
>
> 9. My father's first job was working as a dishwasher. He didn't receive a paycheque; he was compensated with food. He lived with his parents and siblings

at 2003 North Park St. His parents operated a convenience store at that location, lived in the building, and rented out the other rooms.

10. In or around 1960, he found work at a drycleaners on Gottingen St. in Halifax. He did piece work and operated the press, ironing military uniforms. He saved his money.

11. He married my mother Nouha. Together they had four children: Catherine was born in 1969, Mary in 1970, me in 1972, and Samia in 1974.

12. In or around 1972, he purchased his first rental property at 2013 North Park St. He lived in one unit and rented out the others.

13. Shortly afterwards, my father and his brother George bought a property on Windsor St. where they operated a convenience store. My father did shift work at the store and continued to work at the drycleaners.

14. In subsequent years, he bought and sold a number of other rental properties. In his last years, he owned five rental properties.

15. In 2009, my father made a Last Will and Testament (the "Will"). A true copy of his Will is attached as Exhibit "A". The Will left $50,000 each to Catherine and Samia. The residue of his estate was left to me.

16. On July 11, 2016, Catherine, Samia, and Mary filed a Notice of Action and Statement of Claim against me, alleging that I had used a power of attorney given to me by my father to convey certain real property to myself prior to my father's death. A true copy of the Statement of Claim, as amended, is attached as Exhibit "B". A true copy of the Statement of Defence which I subsequently filed is attached as Exhibit "C".

[42] The other affidavit which was that of Dr. Joseph Lawen is as follows:

I make oath and give evidence as follows:

1. I am Dr. Joseph Lawen, of Halifax Regional Municipality. I am the First Applicant in this proceeding.

2. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information or belief.

3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.

4. I am the brother of the late Jack Lawen.

5. Jack had four children: Catherine El-Tawil, Samia Khoury, Mary Lawen, and Michael Lawen.

6. Jack Lawen made a last will and testament in 2009 (the "Will"). Attached as Exhibit "A" is a true copy of the Will as attached to the Grant of Probate.

> 7. The Will named me and my other brother George as executors. George renounced. I applied for probate. Probate was granted on May 12, 2016. The grant is part of Exhibit "A".
>
> 8. I subsequently filed an inventory. A true copy of the Inventory is attached as Exhibit "B".
>
> 9. On April 27, 2016 a Notice of Action and Statement of Claim was filed by Catherine El-Tawil, Samia Khoury, and Mary Lawen pursuant to the Testators Family Maintenance Act. A true copy of the Statement of Claim is attached as Exhibit "C". A true copy of the Statement of Defence which I subsequently filed on August 9, 2016, is attached as Exhibit "D".
>
> 10. My nephew Michael was served with a separate Notice of Action and Statement of Claim, filed by his sisters, alleging he had taken steps to transfer certain properties during his father's lifetime and that those transactions should be reversed and the properties returned to the Estate.
>
> 11. I sought legal advice concerning my duties as Executor and, as a result, concluded that it was my duty to represent the interests of my brother, Jack, as expressed in his will and defend the claim of his [daughters] to a share of the estate beyond the gifts to them in the will.
>
> 12. The Will has not been challenged on the basis that Jack Lawen lacked testamentary capacity or on the basis that Jack was unduly influenced to execute it.

[43] There was no evidence put before the application judge to allow him to determine what a person's motives are for the decisions set out in their will, what role a person's sense of self or dignity played in the decisions, or how fundamental to a testator were their intended dispositions. Here the public interest applicants relied only on speculation and the inference of a breach of autonomy arising solely from the possible variation of the will after the death of the testator.

[44] In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, the Court found the determination of *Charter* issues requires a factual basis. The absence of a factual underpinning is fatal to a challenge to the constitutional validity of legislation. Courts cannot consider *Charter* issues in a factual void, nor can they be based on the unsupported hypotheses of enthusiastic counsel:

> [8] *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the

> importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> [9] *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel. [emphasis added]

[45] *Carter v. Canada (Attorney General)*, 2015 SCC 5, addressed physician assisted suicide; it is an example of the type of evidence needed to establish an engagement with matters critical to an individual's dignity and autonomy under the *Charter*. In that case there was an extensive evidentiary record before the application judge. The majority of the evidence was presented by affidavit and a number of expert witnesses were cross-examined. Numerous witnesses provided evidence of their experience with grievous and irremediable medical conditions. A body of evidence from other jurisdictions was produced, as well as documentary evidence.

[46] Based on the evidence, the Court found that the prohibition on physician assisted suicide deprived those suffering from grievous and irremediable medical conditions of the right to life, liberty and security of the person.

[47] *Bedford v. Canada (Attorney General)*, 2013 SCC 72, is also instructive on the type of evidence which is necessary to establish a s. 7 breach and how that evidence is necessary both when determining whether there was a deprivation and, if so, whether it was in accordance with the principles of fundamental justice.

[48] The three applicants in the *Bedford* case sought an order that provisions of the *Criminal Code* restricting prostitution were unconstitutional. Specifically, that the impugned provisions violated sex workers' s. 2(b) and s. 7 rights. The extensive evidentiary record in this case was set out as follows:

> [15] … The evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies,

> reports, newspaper articles, legislation, Hansard and many other documents. Some of the affiants were cross-examined.

[49] In *Bedford*, the applicants claimed their s. 7 right to security of the person was infringed by the relevant sections of the *Criminal Code*. The Court found the right was infringed, based on the extensive evidence, and went on to consider whether the infringement was in accordance with the principles of fundamental justice. This required an inquiry into the purpose of the law:

> 127 By contrast, under s. 7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, <u>in a manner that is not connected to the law's object or in a manner that is grossly disproportionate to the law's object. The inquiry into the purpose of the law focuses on the nature of the object, not on its efficacy</u>. The inquiry into the impact on life, liberty or security of the person is not quantitative — for example, how many people are negatively impacted — but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7. [emphasis added]

[50] In considering whether the infringements were in accordance with the principles of fundamental justice, the Court accepted the findings of the lower court, based on empirical evidence, that the prohibition was grossly disproportionate to the objective of the provision. The lower courts had identified harms caused by the law and found that they were grossly disproportionate to the object of the law (¶ 133-136).

[51] A similar analysis was undertaken with respect to the two other provisions at issue. The Court first identified the object of the provisions and then considered whether there was compliance with the principles of fundamental justice, specifically whether the law was arbitrary, overbroad or grossly disproportionate. The Court considered the evidentiary findings of the application judge in making its determinations.

[52] In this case, there was no evidence put before the application judge to establish an engagement with matters critical to a testator's dignity and autonomy. Nor was there any evidence indicating why – from a public interest perspective – testamentary capacity was a pressing issue, that testators' wishes were being arbitrarily ignored, or that testamentary autonomy to preclude a non-dependent adult child engaged the liberty interests of an individual. There was no consideration of whether s. 5 of the *Act*, which outlines the factors to be taken into account when considering a claim of a dependent, safeguarded a testator's autonomy.

[53] The application judge did not consider, even if a breach of s. 7 was made out, whether it was in accordance with principles of fundamental justice. He inferred that the AGNS accepted if a violation of the liberty interest was found it would not be in accordance with principles of fundamental justice (¶62). The AGNS did not make any such concession. It was incumbent upon the application judge to undertake this crucial aspect of the constitutional analysis.

[54] The application judge did refer to *Tataryn Estate, supra*, where McLachlin, J., explained that the purpose of the *Act* was to ameliorate circumstances of women and children at the time when men held most of the property, to ensure that women and children would receive an adequate, just and equitable share of the family wealth on the death of the person who held it, even in circumstances where they were not able to demonstrate need (*Tataryn Estate*, ¶ 16, cited at ¶ 19 herein). However, he did no analysis nor did he make any finding as to whether the objects of the *Act* were in compliance with the principles of fundamental justice.

[55] There was no finding that the impugned provisions caused harm, that they were arbitrary, overbroad or grossly disproportionate to the objectives of the legislation. All of which would have been necessary to anchor a breach of s. 7.

[56] The record here was non-existent – it was not and could not be a basis for finding a breach of s. 7. Had the application judge undertaken a proper analysis, he could not have found a violation on either part of the two-part test.

[57] For these reasons, we allowed the appeal.

Issue 2: Did the application judge err in finding that testamentary autonomy was not protected by s. 2(a) of the Charter?

[58] Section 2(a) of the *Charter* provides:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;

[59] The test for determining whether freedom of conscience and religion has been infringed requires the claimant establish (1) a sincere belief based on a subjective analysis, and (2) that their sincere belief was infringed, based on an objective analysis (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, at ¶ 86).

[60] In his Notice of Contention Factum, Michael Lawen argues that testamentary autonomy is protected by s. 2(a) of the *Charter*, "given that a testator's will reflects that individual's most sincerely held beliefs", which he says are "inextricably tied to their sense of self and morality". He says that his father's testamentary decisions were tied to his "most sincerely held beliefs".

[61] Michael Lawen also argues Jack Lawen's will is "conclusive and determinative evidence of his sincerely held beliefs".

[62] The evidentiary standard for proving a claim for freedom of conscience was described by the Ontario Court of Appeal in *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393. In considering whether a policy requiring physicians to make "effective referrals" for abortions and euthanasia violated s. 2(a), the Ontario Court of Appeal held that the evidentiary record was insufficient to support a freedom of conscience claim:

> [85] The evidentiary record in this case is insufficient to support an analysis of freedom of conscience. To the extent the individual appellants raise issues of conscience, they are inextricably grounded in their religious beliefs. There is an insufficient basis on which to determine whether there are Ontario physicians who would regard the effective referral of patients as equivalent to participating in the medical services at issue and who would object to doing so on the basis of conscience. I find that, at its core, the appellants' claim is grounded in freedom of religion. This is reflected in the factual record and in the way the case was litigated in the Divisional Court. There is an insufficient basis to determine whether the options proposed by the College would meet the concerns of physicians with conscience-based objections and, if not, how the cost or burden on those physicians is to be weighed in the proportionality analysis. It is not appropriate to explore the contours of freedom of conscience in a case that does not have a robust evidentiary record. Like the Divisional Court, given my conclusion that the Policies infringe the appellants' s. 2(a) religious freedom, I find it unnecessary to consider the appellants' alternative argument that the Policies infringe the appellants' s. 2(a) freedom of conscience. [emphasis added]

[63] The Lawens make the same arguments before us they made before the application judge which he dismissed, essentially, on the basis of a lack of evidence:

> [75] In arguing that the TFMA provisions violate freedom of conscience, the applicants essentially say no more than the testator's "moral decision" should be regarded as a matter of conscience. Whether or not "conscience" stands apart from "religion", this is insufficient as a basis for asserting a right under s. 2(a). A violation of s. 2(a) cannot simply follow from a finding that a decision is a

> fundamental personal choice of the kind discussed in the section 7 caselaw. At the very least, as the Attorney General argues, "conscience" must mean something analogous to religious belief. In my view, the applicants s. 2(a) *Charter* challenge with respect to subsections 2(b) and 3(1) of the TFMA must fail. [emphasis added]

[64] I agree with the application judge that the Lawens have failed to establish a breach of s. 2(a). First of all, there was no evidence of what Jack Lawen's beliefs may have been or that they were sincerely held. Secondly, Jack Lawen's evidence, whatever it may have been, would be irrelevant to whether ss. 2(b) and 3(1) of the *Act* offended all testators' sense of conscience.

[65] Not only is this case lacking a "robust evidentiary record", it lacks any evidentiary record. The argument that ss. 2(b) and 3(1) of the *Act* violate testators' freedom of conscience was entirely without merit. The application judge did not err in dismissing it.

[66] For these reasons, we dismissed the Notice of Contention.

Issue 3: What is the appropriate amount of costs to be awarded to the AGNS on the application and on this appeal, and who will be responsible to pay the cost award?

[67] At the conclusion of the oral hearing, we set aside the costs awards awarded by the application judge and reserved our decision on costs of the application below and costs of this appeal.

[68] The application judge awarded Michael Lawen $25,692.05 and $287.55 in disbursements and Dr. Lawen $5,456.75 plus disbursements (unquantified) on the application.

[69] For the purposes of determining costs on the application, I would simply reverse the costs ordered by the application judge to the Lawens from the AGNS with some rounding. Michael Lawen will pay to the AGNS costs in the amount of $26,000, inclusive of disbursements. Dr. Lawen shall pay to the AGNS costs in the amount of $5,500, inclusive of disbursements.

[70] For the purposes of this Appeal and the Notice of Contention, I would award 40 percent of each of those amounts to the AGNS. In other words, Michael Lawen shall pay costs of $10,000, and Dr. Lawen shall pay costs of $2,200. Both amounts will be inclusive of disbursements.

[71] I would also order that the costs be paid by the individuals directly and not out of the Estate. The Estate should not be burdened with the costs of this litigation.

[72] In my view, the Lawens were simply trying to do something indirectly that they could not do directly. As the executor and the primary beneficiary they could not argue the Estate's *Charter* rights were infringed.

[73] In *Hislop v. Canada (Attorney General)*, 2007 SCC 10, the Court was considering whether an estate could obtain *Charter* relief and whether estates had standing to bring a s. 15(1) claim. It concluded it did not:

> [72] The government submits, on the basis of the British Columbia Court of Appeal judgment in *Stinson Estate v. British Columbia* (1999), 70 B.C.L.R. (3d) 233, 1999 BCCA 761 (B.C. C.A.), that s. 15(1) rights cannot be enforced by an estate because those rights are personal and terminate with the death of the affected individual. The government also submits that estates are not individuals but artificial entities incapable of having their human dignity infringed. [...]
>
> [73] In our opinion, the government's submissions have merit. In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term "individual" in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) Charter claims. In this sense, it may be said that s. 15 rights die with the individual. [emphasis added]

[74] More recently, in *McKitty v. Hayani*, 2019 ONCA 805, the Court was considering the s. 2(a), s. 7 and s. 15 *Charter* rights of a person who had been declared brain dead. It made clear that a person who is dead lacks any present or future capacity to take advantage of *Charter* rights:

> 39 It is uncontroversial that a person whose body is dead is insensate and lacks any present or future capacity to participate in any of the human goods protected by the *Charter*. ...
>
> …
>
> 47 Similarly, the application judge was here required to interpret general terms ("everyone" or "every individual"). Uncontroversially, the ordinary meaning of these terms exclude persons who have died. …

[75] The Lawens sought public interest standing in order to attempt to do what the Estate could not. In seeking public interest standing, they stepped out of the

box of the Estate to attempt to assert the right to testator autonomy in the public interest.

[76] In my view, this case is similar to *Goguen (Succession) v. Hachey*, 2012 NBCA 56, where the Court held that a party who brings an action on behalf of an estate where there is no substantial merit to the claim must be responsible for paying the successful party:

> 33 Such an exception is described in *Jumelle v. Soloway Estate*, 2001 MBCA 61, [2001] M.J. No. 178 (QL), where the Manitoba Court of Appeal stated that a party who brings an action on behalf of an estate in circumstances where there is no substantial merit to the litigation is personally responsible for paying the successful party's costs. This principle was cited with approval in *St. Onge* (para. 63). [emphasis added]

[77] This situation is even further removed from *Goguen* in that the executor, here, took action as a public interest litigant, not on behalf of the Estate.

[78] Further, in this litigation the Lawens failed to satisfy the evidentiary obligations of public interest litigants and were, effectively, seeking to prosecute the *Charter* rights of a deceased individual, which are not justiciable. They relied on speculation, bald assertions, and tenuous arguments to attempt to establish the *Charter* breaches. The Lawens did nothing to advance the matter from a public interest point of view.

[79] It is for these reasons that the Estate is not to be depleted by the ill-advised actions of the executor or the primary beneficiary.

[80] I would pause here to make clear that we are not deciding that public interest standing confers any greater right to assert a claim on behalf of estates generally than an individual estate would have. I have considerable doubt it does, but that important issue was not before us on this appeal.

Conclusion

[81] The appeal is allowed, the Notice of Contention dismissed, with costs to the AGNS as set out above.

Farrar, J.A.

Concurred in:

Bryson, J.A.

Bourgeois, J.A.