C.A. No. 102528

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Freeman and Roscoe, JJ.A.

Cite as: Melenchuk v. Behune, 1994 NSCA 181

BETWEEN:

MICHAEL MELENCHUK	)	Peter D. Darling
	)	for the Appellant
Appellant	)	
- and -	)	
	)	J. Michael MacDonald
	)	for the Respondent
STEPHEN BEHUNE	)	
	)	
Respondent	)	Appeal Heard:
	)	September 16, 1994
	)	
	)	Judgment Delivered:
	)	September 16, 1994

THE COURT: Appeal dismissed from the order of the trial judge based upon the findings of the jury that a deed is invalid, per oral reasons for judgment of Clarke, C.J.N.S., Freeman and Roscoe, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The issue is whether errors were committed by a jury and the trial judge who instructed them in a civil trial that resulted in rendering invalid a deed by which the respondent purported to convey his farm to the appellant and himself as joint tenants.

Mr. Behune (Steve) is now 80 years old. He is a bachelor and the owner of the Behune family farm at Sydney Forks. There he has resided and tilled the land all his working life. Mr. Melenchuk (Michael) is his nephew. He is a successful businessman in Halifax who has been financially assisted in his ventures by Steve with capital contributions. He spent much of his youth working with his uncle on the farm. Until these events, there were strong family ties between the two men.

Michael contends that while he and Steve were walking back to the farmhouse after his grandmother's funeral, being Steve's mother, Steve told him to get him a will and a deed to create a joint tenancy in the farm. He says that as they sat in the kitchen, Steve gave him some old deeds.

Michael consulted a lawyer in Dartmouth who, acting on his instructions, prepared these documents. It appears from the evidence that the lawyer or Michael mailed or somehow sent these documents to Michael's mother, Catherine Melenchuk. She is a sister of Steve and lives nearby.

In due time Catherine and Steve went to Mr. Muise, a lawyer in Sydney, with the deed bearing a signature purporting to be that of Steve and witnessed by Catherine. Mr. Muise took the attesting affidavit of Catherine and completed Steve's affidavit of marital status. Otherwise, Mr. Muise was not consulted with respect to the meaning of the

document. Michael completed the deed transfer forms and paid the deed transfer tax. The deed was registered at the Registry.

Later, when some title problems arose over a right of way and Steve realized he had not been receiving any tax bills, he said he then discovered for the first time the existence of the joint tenancy deed. Steve denied his signature on the deed. He said he never signed the deed. He said he understood he was signing a will.

After attempts by Steve's lawyer to negotiate a severance of the joint tenancy failed, Steve began this action alleging non est factum, forgery, fraud and undue influence.

The trial was held in Sydney before Justice Edwards and a jury. Several witnesses were called by each party. After discussion between Justice Edwards and both counsel, the questions to be put to the jury were settled upon. The following are the questions and the responses given by the jury.

1. **Question:** Mr. Foreman, did the plaintiff Stephen Behune sign the deed of November 12, 1986?

   Answer: Yes

2. **Question:** If Stephen Behune signed the deed was the document different from what he believed himself to be signing?

   Answer: Yes

3. **Question:** If the answer to No. 2 is yes, what did Stephen Behune think he was signing?

   Answer: His Will.

4. **Question**: If Stephen Behune signed the deed, did anyone misrepresent what he was signing, to him?

   Answer: Yes

5. **Question**: If so, who made the misrepresentation and what was the misrepresentation?

   Answer: Catherine Melenchuk, in that she led Steve to believe that he was signing the Will. Had the deed been signed in the presence of Mr. David Muise he would have been bound to explain the details and contents of the document.

6. **Question**: If Stephen Behune signed the deed was he careless in signing it?

Answer: Yes

7. **Question**: If Stephen Behune was careless in what way was he careless?

   Answer: He should have obtained independent legal advise [sic] so there wouldn't be any question as to the importance of any document that he was affixing his signature upon.

8. **Question**: Was the deed signed by Mr Behune in the exercise of his own free Will and independent judgment?

   Answer: No

9. **Question**: If not, what prevented Mr. Behune from exercising his free will and independent judgment?

   Answer: We feel he was on duly [sic] influenced by Mr. Melenchuk whom he trusted to prepare a Will and was again careless in not having obtained proper legal advise [sic]. His love and trust of Mike and Catherine and his belief that they would follow his wishes prevented him from exercising his own free will and independent judgment.

Among the submissions made to the trial judge following the return of the jury, it was argued by counsel of Michael that the response was not a finding of undue influence. Based on his directions to the jury and the responses, Justice Edwards concluded the jury was "satisfied that the relationship existed which put Mr. Melenchuk in a position where he could exercise undue influence over Steve and that (the jury is) not satisfied that Mr. Melenchuk has discharged the onus on him to rebut the presumption that undue influence was exercised". On the motion of counsel of the respondent that the responses of the jury amounted to a finding of undue influence, Justice Edwards declared the deed invalid.

On appeal the appellant contends, among others, the issues surrounding undue influence should not have been left to the jury and in any event the evidence does not support its findings. Counsel argues the findings of the jury on mistake and misrepresentation should not be allowed to stand.

Equitable issues such as those that arise in the application of the doctrine of

undue influence are permitted to be placed before a jury in Nova Scotia (see **Judicature Act**, R.S.N.S. 1989, c. 240, s. 34). This jury was entitled to make findings of fact upon which Justice Edwards was in turn entitled to apply the law. Where there is evidence in support, the reasons and conclusions reached by a jury are to be given every reasonable breadth of interpretation and application. See **Vavaroutsos v. Jackson et al** (1988), 82 N.S.R. 30; **Cameron v. Excelsior Life Insurance Company** (1981), 44 N.S.R. (20) 91; **Wawanesa Mutual Insurance Company** (1984), 60 N.S.R. (20) 124.

There was evidence upon which the jury could reach its conclusions. It does not matter whether Justice Edwards or the justices of this Court agree with the jury. It was within their province to so find.

Justice Edwards properly instructed the jury that if their findings of fact created a foundation for the doctrine of undue influence, the burden of adducing evidence shifted to Michael to show otherwise by a preponderance. His instructions in that respect are entirely adequate. It is obvious from the response of the jurors that they did not find the weight of Michael's evidence sufficiently convincing to dispel the evidenciary burden cast upon him. The jury made its findings of fact based on "motivation" and "objective", using words to which Justice Wilson refers in **Geffen v. Goodman Estate**, [1991] 2 SCR 353 at 377. See also **Barclays Bank PLC v. O'Brien and Another**, [1994] 180 (H.L.) at 189-190, referring to Class 2(B).

In our opinion Justice Edwards committed no reversible errors in law, and the findings made by the jury are capable of interpretation and application. Accordingly the appeal is dismissed. As a result, the notice of contention filed by the respondent is moot and accordingly dismissed.

The respondent is awarded costs of $2,400.00, being 40% of the award at trial, plus his disbursements to be taxed.

C.J.N.S.

Concurred in:

Freeman, J.A.

Roscoe, J.A.

C.A. No. 102528

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

MICHAEL MELENCHUK

Appellant

- and -

STEPHEN BEHUNE

Respondent

ORDER FOR JUDGMENT

REASONS FOR JUDGMENT having been delivered by Clarke, C.J.N.S.; Freeman and Roscoe, JJ.A. concurring;

IT IS ORDERED THAT the appeal is dismissed from the order granted by Justice Edwards on March 1, 1994, whereby he set aside and declared invalid a deed, a copy of which was annexed to his order and marked Schedule "A";

IT IS FURTHER ORDERED THAT the respondent is awarded costs of $2,400.00 plus his disbursements to be taxed.

DATED at Halifax, Nova Scotia, this 16th day of September, 1994.

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Registrar