SUPREME COURT OF NOVA SCOTIA

Citation: *Bethel Estate (Re)*, 2015 NSSC 216

Date: 20150724
Docket: Truro No. 430703
Registry: Truro

Between:

The remainder beneficiaries of the trusts established under the Last Will of Harold F. Bethel, namely the Rotary Club of Truro Charitable Trust; Acadia University; St. Andrew's United Church, Truro; Pine Hill Divinity Hall; and the Governing Council of the Salvation Army, Canada

Applicants

and

The Bank of Nova Scotia Trust Company, trustee of the Last Will of Harold F. Bethel

Respondent

and

The Attorney General of Nova Scotia, representing her Majesty the Queen in right of the Province of Nova Scotia

Respondent

Judge: The Honourable Justice Arthur W.D. Pickup

Heard: January 12, 2015 (Justice Elizabeth Van den Eynden) and June 10, 2015 (Justice Arthur W.D. Pickup), in Truro, Nova Scotia

Counsel: Dennis James, Q.C., and Alayna Kolodziechuk, for the Applicants
Richard Niedermayer and Elizabeth Brachaniec (articled clerk), for the Respondent, the Bank of Nova Scotia Trust Company

By the Court:

[1] This matter arises out of an application made pursuant to s. 3 of the *Variation of Trusts Act*, R.S.N.S. 1989, c. 486, as amended, to wind-up five trusts set out in the will of the late Harold F. Bethel and to distribute the balance between the beneficiaries.

[2] The applicants are the Rotary Club of Truro, Acadia University, St. Andrew's United Church, Truro, Pine Hill Divinity Hall and the Governing Counsel of the Salvation Army, Canada ("the Charitable Trust Beneficiaries").

[3] The respondent, the Bank of Nova Scotia Trust Company ("Scotia Trust"), is trustee under Mr. Bethel's will and has not consented to this application. It has raised several concerns including the applicability of the *Variation of Trusts Act*.

[4] The Attorney General of Nova Scotia was named as a respondent but took no part in the proceeding.

Background

[5] The testator, Harold F. Bethel, died on December 16, 1976, and provided for the disposition of his assets by way of will dated May 9, 1967 (the "Will").

[6] At the time of his death he was survived by his wife, Grace E. Bethel, and his daughter, Mildred J. Bethel.

[7] The Acadia Trust Company, a predecessor to Scotia Trust, Grace E. Bethel and Mildred J. Bethel, were jointly appointed as executors and trustees of the will and probate was granted to them on December 22, 1976.

[8] The will identified Grace and Mildred Bethel, Colchester Hospital Ladies Auxiliary (the "Ladies Auxiliary"), and the Charitable Trust Beneficiaries as beneficiaries under the will.

[9] Mildred Bethel died in 1979, Grace Bethel in 2013, and the Ladies Auxiliary were paid their bequest leaving the Charitable Trust Beneficiaries as the only remaining beneficiaries under the will and Scotia Trust as the sole remaining trustee.

[10] Mr. Bethel's will at s. 18(b) created trusts ("the Trusts") for the five Charitable Trust Beneficiaries providing for $5,000 to be paid out annually to each Charitable Trust Beneficiary until the trust property in each trust was exhausted.

[11] Section 18(b) of the will is as follows:

> 18 Any final residue remaining on the death of the survivor of my wife and daughter shall be divided into six equal parts to be dealt with as follows:
>
> a) One part shall be paid to the Colchester Hospital Ladies Auxiliary to be used for the purchase of special equipment as approved by the Hospital Ladies Auxiliary and the Medical staff.
>
> b) The remaining five parts shall be held by my Trustees as separate and individual Trust Funds for each of the following, namely:
>
> i. Pine Hill Divinity Hall, Halifax, N.S.
>
> ii. Acadia University, Wolfville, N.S.
>
> iii. St. Andrew's United Church, Truro, N.S.
>
> iv. The Salvation Army, Truro, N.S.
>
> v. The Rotary Club of Truro for welfare work.
>
> From the combined principal and income of the aforementioned Trust Funds my Trustee shall pay to each of the said organizations the sum of Five Thousand Dollars ($5,000) annually until the said Funds are exhausted.

[12] In 2005, Scotia Trust successfully applied to this court, with the consent of the other beneficiaries including the Charitable Trust Beneficiaries, to vary this trust.

[13] The effect of the 2005 variation was to allow for payment to the Charitable Trust Beneficiaries of either the net annual income for each Charitable Trust, or the amount required for each Charitable Trust to meet its annual disbursement quota as a registered charity under the *Income Tax Act* (Canada), whichever was the greater.

[14] With the amendments, the revised s. 18(b) of the will in effect now states as follows:

> b) The remaining five parts shall be held by my Trustees as separate and individual Trust Funds for each of the following, namely:
>
> i. Pine Hill Divinity Hall, Halifax, N.S.
>
> ii. Acadia University, Wolfville, N.S.

> ii. St. Andrew's United Church, Truro, N.S.
>
> iv. The Salvation Army, Truro, N.S.
>
> v. The Rotary Club of Truro for welfare work.
>
> From the combined principal and income of the aforementioned Trust Funds my Trustee shall pay to each of the said organizations the sum of Five Thousand Dollars ($5,000) annually until the said Funds are exhausted. My executors and trustees may pay at any time or times for each trust fund to its beneficiary the greater of:
>
> a) the net annual income of the trust fund, and
>
> b) any amount or amounts that may be required to meet annual disbursement quotas to which the trust fund may be subject under the *Income Tax Act* (Canada) as amended from time to time, payable out of the net income and capital in such proportions as they think fit.

[15] On December 10, 2013 Scotia Trust registered the Charitable Trust pursuant to the *Income Tax Act* as contemplated by the 2005 variation application.

[16] As at the end of 2013 the combined total of the Registered Charities was approximately $1,583,330. If the other estate assets, including the residence are considered, the total of Mr. Bethel's estate would have exceeded two million dollars.

[17] In this application, the Charitable Trust Beneficiaries seek:

1. That the Charitable Trusts established under s.18(b) of Mr. Bethel's will be amended so that the balance now remaining in the Charitable Trusts be distributed and paid amongst the Charitable Trust Beneficiaries, and the Charitable Trusts be wound up.

2. In the alternative, the Charitable Trusts Beneficiaries seek to have the Charitable Trusts set-up under s. 18(b) of Mr. Bethel's will amended so that each of the Charitable Trust Beneficiaries nominates a trustee to oversee administration of their respective Charitable Trusts.

The Application

[18] This application is brought pursuant to s. 3 of the *Variation of Trusts Act,* R.S.N.S., 1989, c. 486. The relevant provisions of the *Act* are:

2 In this Act,

(a) "arrangement" means a variation, resettlement or revocation of a trust in relation to property or a variation, deletion or termination of, or an addition to, the powers of a trustee in relation to the management or administration of the property subject to the trust;

…

3 **(1)** Where property is held on a trust arising before or after the coming into force of this Section under any will, settlement or other disposition, a person may apply to the court for an order confirming an arrangement with respect to the property.

(2) The court may issue an order confirming the arrangement if

(a) all the beneficiaries of the trust having vested or contingent interests are of full age and capacity and consent to the arrangement; and

(b) the court determines it is appropriate to do so.

…

(5) In determining whether it is appropriate to confirm the arrangement, the court shall have regard to

(a) the intention of the settlor of the trust, if the settlor's intention is objectively discernible;

(b) the positions of the trustees';

(c) the positions of the beneficiaries; and

(d) the position of any person appearing before the court on the application.

The Charitable Trust Beneficiaries' Position

[19] The Charitable Trust Beneficiaries say the legislation was amended to specifically permit an application where all beneficiaries consent, as here.

[20] They say the Charitable Trusts are testamentary trusts under Mr. Bethel's will, and that the proposed arrangement of the Charitable Trust falls squarely within the authority of s. 3(1) of the *Variation of Trusts Act.*

[21] Moreover, the Charitable Trust Beneficiaries submit that they meet the criteria in s. 3(2) of the *Variation of Trusts Act* as they are beneficiaries of the trust with vested or contingent interests, and that the arrangement should be considered appropriate by this court.

[22] The Charitable Trust Beneficiaries, in the alternative, seek to replace Scotia Trust with their own trustee of choice.

Scotia Trust's Position

[23] Scotia Trust argues that the amendments to the *Variation of Trusts Act* do not include Charitable Trusts and, therefore, there is no legislative basis upon which the Charitable Trust Beneficiaries can rely and their application should be dismissed.

[24] In the alternative the trustee says that it is not appropriate for the Charitable Trusts to be varied in the manner sought, as s. 3(2) of the *Variation of Trusts Act* is not activated because the Charitable Trust Beneficiaries (in the trustee's view) do not have a fully vested interest. Moreover, Scotia Trust submits the Charitable Trusts should not be varied because the variation requested completely contradicts what was intended by Mr. Bethel in his will, and this court ought not to allow the application on that basis.

[25] With respect to the Charitable Trust Beneficiaries' alternate request to replace Scotia Trust with trustees of their own choosing, the Trustee's position is that the *Variation of Trusts Act* is not an appropriate framework for trustee removal, and neither the *Trustee Act,* nor the common law regarding the court's inherent jurisdiction provides sufficient grounds to remove the Trustee as Trustee of the Charitable Trusts.

Issues:

Issue #1: Whether the Charitable Trusts established under Mr. Bethel's will should be varied so that that balance now remaining in the Charitable Trusts be distributed and paid amongst the Charitable Trust Beneficiaries, and the Charitable Trusts wound up.

[26] In making this determination the following issues are relevant:

i. Does s. 3(1) of the *Variation of Trusts Act* apply to Charitable Trusts?

ii. Have the Charitable Trusts Beneficiaries satisfied s. 3(2) of the *Variation of Trusts Act?*

iii. Have the Charitable Trusts Beneficiaries satisfied the court that it is appropriate to issue an order confirming the arrangement pursuant to s. 3(5)(a) of the *Variation of Trusts Act*?

Analysis:

i. Does s. 3(1) of the Variation of Trusts Act apply to Charitable Trusts?

[27] The *Variation of Trusts Act* permits the court to confirm an "arrangement", defined in s. 2(a) as:

> …a variation, resettlement or revocation of a trust in relation to property or a variation, deletion or termination of, or an addition to, the powers of a trustee in relation to the management or administration of the property subject to the trust…

[28] The initial question is whether the *Act* in its present wording applies to Charitable Trusts such as those provided for in Mr. Bethel's will.

[29] The current version of the *Act* is the product of amendments introduced in SNS 2011, c. 42, s. 6, in force 23 July 2013. Scotia Trust says the pre-amendment *Act* did not apply to charitable purpose trusts, but only to trusts for individuals. The pre-amendment *Act* provided, at ss. 2 and 3:

> **Variation or revocation of trust**
>
> 2 Where property, real or personal, is held on trusts arising before or after the coming into force of this Act under any will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of
>
> > (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who, by reason of infancy or other incapacity, is incapable of assenting;
> >
> > (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons;
> >
> > (c) any person unborn; or
> >
> > (d) any person in respect of any interest of his that may arise by reason of any discretionary power given to any one on the failure or determination of any existing interest that has not failed or determined,
>
> any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or

> revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property, subject to the trusts.
>
> **Condition for approval**
>
> 3 The Court shall not approve an arrangement on behalf of any person coming within clause (a), (b) or (c) of Section 2, unless the carrying out thereof appears to be for the benefit of that person.

[30] Scotia Trust says the purpose of variation of trusts legislation – or one of its purposes – is to allow the court to approve arrangements for the benefit of beneficiaries who are "adult and mentally competent" or "of full age and capacity." Scotia Trust cites A.J. McLean's 1965 article on "Variation of Trusts in England and Canada" (1965), 43 Can. Bar. Rev. 181, where the author states that "[i]t is clear that the *Act* does not cover the wholly charitable trust", although this is not expressly stated in the *Act*. Oosterhoff provides the following commentary in an annotation to Re *Bell* (1980), 7 E.T.R. 129, 1980 CarswellOnt 529 (Ont. S.C. (H. Ct. J.)):

> … It is doubtful … that the *Act* applies to charities. This is because by its terms, it applies (in the context of this question at least) only to a person who has an interest whether vested or contingent, but who by reason of infancy or other incapacity is incapable of assenting to a proposed variation, (s. 1(1)(a)).
>
> In the first place, a charity may or may not be incorporated. If it is not, it is not a person (cf. *The Interpretation Act*, R.S.O. 1970, c. 225, s. 30§28), and thus does not fall under the *Act*.
>
> Secondly, while a charity is under the supervision of the Public Trustee under various statutes, it cannot be said to be incapable of giving its assent to a variation, as required by the *Act*. If it is capable of giving its assent, however, the Court would appear to have no jurisdiction to approve a variation at least not where, as here, there are no incapacitated beneficiaries, and the charity has a present interest in the trust. The Court does have power to consent on behalf of capacitated beneficiaries in certain circumstances under other clauses of s. 1(1), which do not apply to the circumstances of this case.
>
> Finally, the *Act* appears to be drafted in such a way as to apply only to trusts for individuals and not to purpose trusts, whether charitable or non-charitable.

[31] It is worth noting that the old *Act* referred to Trusts simply as "Trusts" and did not contain a definition of "arrangement".

[32] There does not appear to be any Nova Scotia authority on the applicability of the pre-amendment language to Charitable Trusts. The amendments under the new *Act,* it should be noted, are substantial.

[33] The parties spent much time arguing whether the Charitable Trusts are "Charitable Purpose Trusts". Counsel for Scotia Trust states that the pre-amendment *Act* did not govern either Charitable Purpose Trusts or trusts with Charitable Beneficiaries.

[34] The Charitable Trust Beneficiaries say that, even if the pre-amendment *Act* does not apply to Charitable Trusts, it does not follow that the same interpretation governs under the amended *Act*. They say Scotia Trust's interpretation is too restrictive. Generally speaking, they submit that the authorities submitted by the trustee to support the argument that charitable trusts were not covered by the Variation Acts are concerned with earlier versions of the legislation based on the original English *Valuation of Trusts Act.*

[35] I agree with the Charitable Trust Beneficiaries that the authorities are of limited use in interpreting the amended version of the *Act.*

[36] The Charitable Trust Beneficiaries say there is nothing in the use of the word "trust" in the *Act* to indicate that charitable trusts are excluded. Subsection 3(1) refers simply to "a trust arising before or after the coming into force of this Section under any will, settlement or other disposition…" According to the Charitable Trust Beneficiaries, this encompasses all express trusts, but not trusts arising by operation of law – further indicating that the Legislature turned its mind to whether any particular types of trusts should be excluded.

[37] By comparison, the pre-amendment *Act* only permitted variation of a trust on behalf of "any person" who was within a category identified in s. 2. It did not provide a general power to vary where all beneficiaries agreed. The amended *Act* contemplates variation with consent of a beneficiary or on behalf of a "beneficiary", who cannot consent or where some beneficiaries refuse consent on its face a broader category than the circumscribed categories of "person" referenced at ss. 2(a)-(d) of the pre-amendment *Act*. As a matter of plain language, "beneficiary" could include a non-person, such as an unincorporated association. Moreover, s. 3(1) permits the application to be made by "a person", without any of the pre-amendment qualification of that term, which, in accordance with s. 7(1)(s) of the *Interpretation Act*, R.S.N.S. 1989, c. 235, includes a corporation.

[38] In conclusion, I am not satisfied that reference to age and capacity in the new *Act* could support the conclusion that the *Act* is limited to beneficiaries who are individuals.

[39] I am satisfied after considering and reviewing the *Act* as a whole, and, the overall scheme set out therein, that the Charitable Trusts Beneficiaries Trusts fall within the *Act.*

ii. Have the Charitable Trusts Beneficiaries satisfied s. 3(2) of the Variation of Trusts Act?

[40] Under s. 3(2) of the *Act*, this court can issue an order confirming an arrangement if all the beneficiaries having a vested or contingent interest consent and are of full age and capacity.

[41] There is no issue as to the consent to the arrangement as all beneficiaries have consented nor is there is any age or capacity issue as they are corporate beneficiaries.

[42] The Charitable Trust Beneficiaries say the gifts to them were vested as of Mr. Bethel's death.

[43] Scotia Trust takes the position that the Charitable Trust Beneficiaries do not have a fully vested or contingent interest in the capital of the income of the Charitable Trust.

[44] They say that the Charitable Trusts are established for an indefinite period and that there is no absolute right to capital. They state Mr. Bethel expressly stated that $5,000 should be paid annually until the funds are exhausted. Further he expressed a clear intention in s. 18(b) of the will that capital and income were to be disturbed only to the extent that it was required to meet the $5,000 threshold he set out.

[45] As a result, Scotia Trust say that the Charitable Trust Beneficiaries only have a vested interest in $5,000 per year from each of the Charitable Trusts. They do not have a vested interest in the capital of the annual income of the Charitable Trusts, not do they have a vested interest in the 3.5% disbursement quota for Canada Revenue purposes.

[46] Scotia Trust relies on *Halifax School for the Blind v. Chipman*, [1937] S.C.R. 196, for the proposition that "where a charitable institution is made a gift of income in perpetuity, the institution does not have the right to wind up the trust and have immediate access to the income-producing capital." In *Halifax School for the Blind,* Davis J said:

> Where, as here, a testator has clearly settled a fund for the benefit of a particular charitable institution, from which fund the annual income is to be paid over by the trustees of the will, whose perpetual succession is expressly provided for, that fund is a capital endowment, or in the nature of a capital endowment, created and settled for the benefit of the particular charity so long as it lasts, but no longer. It cannot, I think, be treated as an absolute and presently vested gift of the corpus of the fund which the beneficiary at any time may lawfully demand to be paid over to it and the trust in respect thereof arrested and extinguished without reference to the contrary intention of the settlor.
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> Similarly, Crocket J said:
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>> It seems to me, if there were nothing else in any of the other provisions to indicate the trust funds themselves claimed by the appellant were not intended to vest in it, that, having regard to the annual charge of 6% imposed on the entire income of all the trust moneys, the language of the two gifts of income itself cannot properly be held to import an intention to vest the whole of the first $20,000 fund or the entire half of the second $20,000 absolutely in the appellant. The gifts are not of the whole income but of "the whole of the net annual income" and are expressly directed to be paid annually. In the light of the 6% annual charge upon the whole income of all the trust moneys, in favour of the trustees, and the gift to the trustees as well of the annual interest and income of the residuary trust, how can it possibly be said that no one else than the appellant has any interest in either of the two funds claimed, and that the principle of *Saunders v. Vautier*, as confirmed by *Wharton v. Masterman*, is applicable to this case?
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> Kerwin J referred to the following passage from Tudor on Charities, 5th edn:
>
>> A charitable trust may be made to endure for any period which the author of the trust may desire. It may therefore be created for the application of the income in perpetuity to the charitable purpose, or it may be so framed as to require the immediate distribution of the capital, or the exhaustion of capital and income, during a limited or indefinite period.

[47] In argument it was unclear as to the degree to which the trustee believes the *Halifax School for the Blind* case governs.

[48] It is clear that the trusts in question are not limited to gifts of income in perpetuity, and that they contemplate encroachment on capital. It appears from the oral argument that Scotia Trust acknowledges the distinction, and, indeed has agreed that the case is not directly on point, but still maintains that the case is relevant, apparently in support of the argument that the indeterminate duration of the charitable trusts means that the interests in this case are not vested. In oral argument, counsel for the trustee summarized the position as follows: "a Charitable Trust that continues, that provides for exhaustion of capital income during limited or indefinite does not mean that the Charitable Beneficiary has a fully vested interest in the Capital."

[49] The trustee maintains that the beneficiaries have vested interests only in the $5,000 per year referenced in the will, not in the capital or annual income, or in CRA disbursement quotas.

[50] With respect, I am satisfied based on the language used to confer the trusts that they contemplate their eventual exhaustion, therefore, the Charitable Trusts Beneficiaries interests are vested. There is no contingency left for these beneficiaries to have to wait. The language is clear that these beneficiaries have a right to an equal share of the residue of the estate as it has been divided. It can be drawn by both income and capital and they have the right to their share until a point that those funds are exhausted. There are no further contingencies. There is nothing else that need happen for the Charitable Trust Beneficiaries to be entitled.

iii. Have the Charitable Trusts Beneficiaries satisfied the court that it is appropriate to issue an order confirming the arrangement pursuant to s. 3(5)(a) of the Variation of Trusts Act?

[51] One of the considerations relevant to variation is "the intention of the settlor of the trust, if the settlor's intention is objectively discernible": s. 3(5)(a). This is one of the factors which the court is directed to "have regard to" under s. 3(2)(a); it is, as Scotia Trust admits, not a determining factor.

[52] Scotia Trust says a reading of the will makes it clear that the variation being sought is contrary to the testator's intention. First, the disbursements to the beneficiaries are handled differently than the one-off gift to the Colchester Hospital ladies Auxiliary. Second, one of the trusts – to the Truro Rotary Club – is specifically designated for "welfare work." Third, the testator appointed a corporate trustee, which can endure indefinitely.

[53] The Charitable Trusts Beneficiaries argue that the settlor's intent was to provide the beneficiaries with the amount of money in the trusts until the funds were exhausted. They say that in its current terms, the funds will never be paid out; they also argue that the settlor's intention was to advance significant funds to the beneficiaries, but that the terms do not account for inflation, resulting in yearly disbursements that are relatively small compared to what the settlor intended. In effect, the Charitable Trust Beneficiaries submit, the limitation of the annual disbursements results in frustration of the testator's intention, both because the funds are unlikely to ever be exhausted and because the amounts being advanced are not consistent with the scale of payments contemplated by the will.

[54] Mr. Bethel's intent is but one factor to be considered in assessing whether an arrangement should be confirmed. Clearly the proposed variation results in the form of the disbursements from the trust being changed. However, the trustee intended (a) to provide relatively significant funds to the beneficiaries, which is not practically possible under the terms as they exist, and (b) he also intended that the funds would eventually be exhausted.

[55] I am not satisfied that to allow this application is a significant departure from Mr. Bethel's intentions, but that it is a factor to consider but not a strong argument against the proposed variation.

[56] The application is allowed, and the Charitable Trusts established under Mr. Bethel's will will be amended so that the balance now remaining in the Charitable Trusts be distributed and paid amongst the Charitable Trusts Beneficiaries and the Charitable Trusts wound up.

[57] Having so found it is not necessary to consider the Charitable Trusts Beneficiaries alternate argument.

[58] I will hear the parties as to costs and an appropriate form of order.

Pickup, J.