

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Atlantic Jewish Foundation v. Leventhal Estate*, 2018 NSSC 297

**Date:** 20181123

**Docket:** Hfx No. 470775 (H-63083)

**Registry:** Halifax

**Between:**

Atlantic Jewish Foundation

Appellant

v.

The Estate of the late Abraham (Abe) Leventhal through its  
Executor and Trustee, Alan J. Stern

Respondent

**DECISION**

**Judge:** The Honourable Justice Jamie Campbell

**Heard:** November 15, 2018, in Halifax, Nova Scotia

**Counsel:** Timothy Matthews Q.C., for the Appellant  
Gavin Giles Q.C., for the Respondent

**By the Court:**

[1] Abraham (Abe) Leventhal died in March of 2016. He was the owner of the historic Waverley Inn on Barrington Street in Halifax. Mr. Leventhal left an estate that was originally valued at over \$15 million. During his life he was a philanthropist and his will reflected his interest in giving to his community and to his friends.

[2] Mr. Leventhal named his friend Alan Stern Q.C. as the executor of the estate. When the executor's accounts were passed, the Registrar of Probate, determined that Mr. Stern was entitled to a commission of \$896,658.60, which is 5% of the value of the estate at that time. The Atlantic Jewish Foundation (AJF) is the residual beneficiary in the will. The AJF has appealed the order of the Registrar of Probate claiming that the amount of commission awarded was excessive.

[3] The matter was before the court to deal with procedural issues relating to the nature of the appeal itself.<sup>1</sup> I found that the appeal should proceed as a hearing *de novo* in which evidence would be heard.

**Background**

[4] Abraham Leventhal was a successful businessman. At the time of his death his estate consisted of the following:

7091 Royal Pine Avenue, Halifax	\$521,000.00
Bank account, RBC	\$73,437.09
Household and personal effects	\$55,276.00
Shares, Stirling Hotel Limited	\$1,800,000.00
Shares, 3124521 Nova Scotia Limited	\$2,101,408.53
Investment Portfolio, BMO Wealth Management	\$10,612,147.23
Total:	\$15,163,268.85

[5] Mr. Leventhal appointed Alan Stern, a lawyer and William White, an accountant, as executors of his estate. They were both long-time friends and advisors of Mr. Leventhal. Mr. White renounced his executorship. That left Mr.

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<sup>1</sup> *Atlantic Jewish Foundation v. Leventhal Estate* 2018 NSSC 147

Stern to fill the role on his own. The will makes no reference to how the executor should be compensated.

[6] From the time the inventory of assets was filed, in June 2016 until the executor filed for the passing of the accounts in September 2017, the value of the estate had increased to \$17,933,172.72. The most significant change was an increase to account for the net sale proceeds from Stirling Hotel Limited. The estate earned income from investments during that period as well.

[7] Mr. Stern sought a commission of 5% of the gross adjusted value of the estate. That amounted to about \$896,000. Counsel for the AJF objected. The AJF maintained that the amount was grossly excessive and proposed a commission of \$300,000. The amount of the commission paid to the executor reduces the amount available for the residual beneficiary.

[8] Counsel for the AJF sent a letter to the Registrar on November 1, 2017 setting out the basis for the objection to the 5% commission. Counsel for Mr. Stern sent a letter on November 9, 2017 setting out why the amount requested was fair and appropriate.

[9] Counsel for the AJF attended at the Law Courts on November 14, 2017 at 2:00 pm assuming that there would be a hearing. He was told by the Registrar of Probate that the accounts had been passed without a hearing. The Registrar issued an Order Passing Accounts approving the commission of \$896,692.43.

### **Registrar's Decision**

[10] The Registrar, in her letter of November 14, 2017 addressed to both counsel, apologized for “the lack of communication” regarding the passing of the accounts and specifically “as to whether or not a hearing was scheduled”.

[11] The Registrar cited s. 62(3) of the Probate Regulations which sets out the basic considerations for the awarding of commission to personal representatives. In addressing the facts of this case, she said the following:

This was a substantial estate which was managed very well within a short period of time. The filing deadlines prescribed in the Probate Regulations were met. The estate was managed very well and profited by Mr. Stern's capable administration. The terms of the Last Will and Testament and Codicil of Mr. Leventhal were carried out efficiently and professionally.

I can find no justification to award less than the full commission as may be allowed pursuant to section 76 of the *Probate Act*. It is not an excessive award in this instance. It is fair compensation for a sole executor.

### ***De Novo Appeal***

[12] A *de novo* appeal is not a review. The issue is decided afresh. It is more like a first instance determination than appellate review. If the Registrar had heard evidence and the court had not, some deference would be given to the findings of the Registrar based on that evidence. In this case, the Registrar did not hear any evidence or oral argument.

### **Executor's Commission**

[13] The *Trustee Act*, RSNS 1989, c. 479 defines trustees as including executors of estates. Section 62(1) provides that trustees are entitled to such "fair and reasonable remuneration for their care, pains and trouble, and their time expended in and about the estate" as determined by the court. The *Probate Act*, SNS 2000, c. 31 also applies to executors and provides some direction regarding remuneration. Section 76 says that an executor may be allowed, over and above actual and necessary expenses "as appear just and reasonable", a commission not exceeding 5% of the value of the estate. The court may apportion the commission among personal representatives "as appears just and proper according to the labour bestowed or the responsibility incurred by them respectively." Section 76 sets a maximum percentage for the commission. The reference to "just and reasonable" is to expenses incurred. The reference to "just and proper" is to the apportionment of commission among executors.

[14] The regulations under the *Probate Act* at s. 62(3) set out the factors that may be considered when determining the amount of an executor's commission under s. 76. Those factors are the size of the estate, the care and responsibility involved in administering the estate, the time the executor was occupied in performing the duties, the skill and ability shown by the executor, and the success resulting from the personal representative's administration of the estate. The regulation codifies the common law principles that have applied since the early 1900's.

[15] Counsel have noted that there are not many cases that address the issue of executor's commission. In larger estates, testators have often made estate planning arrangements specifically to avoid disputes that have the potential to diminish the

amount available for distribution to the beneficiaries. In smaller estates agreements are often reached to avoid the costs of litigation.

### **Affidavit of Lawrence Graham Q.C.**

[16] The affidavit of Lawrence Graham Q.C. filed by the AJF was the source of considerable controversy. The motion made on behalf of Mr. Stern objecting to the filing of the affidavit was dismissed.

[17] Mr. Graham is a lawyer with considerable experience dealing with wills and estates. His affidavit includes copies of the commission fee agreements used by five trust companies. The agreements set out how fees for executor and trustee services are to be compensated. They are fees in a competitive market and reflect the amounts that people who are planning their estates are prepared to pay for that service. While they may reflect what the market will bear they do not establish a standard of what fair and reasonable compensation would be for an individual who has undertaken to perform those services.

[18] Mr. Graham says in his affidavit that for very large estates registrars have usually awarded a lesser percentage as a commission. Affidavits were filed on behalf of Mr. Stern containing information pertaining to several larger valued estates in Nova Scotia, in which commissions were awarded amounts between 4% and 5%. Neither that information nor Mr. Graham's information provides a review of the context for those larger estates.

[19] Mr. Graham did not offer any opinion with respect to the appropriate commission to be awarded to Mr. Stern. That is of course entirely proper.

[20] Mr. Graham's affidavit, to the extent that it offers an opinion, can be considered. While Mr. Graham is a respected and experienced lawyer practicing in the area of wills and estates, his opinion should be given limited weight. The amounts agreed by trust companies in a competitive market offer limited guidance in terms of the appropriate commission to be awarded to a non-corporate executor. Mr. Graham's observations about the fair market value of executor services generally do not relate to the circumstances of this case.

[21] The general practice observed by Mr. Graham that the maximum of 5% of the value of the estate is not always set as the amount of the commission, is evident from the case law. Without knowing the circumstances of the estates referred to by

both parties, that information only shows that sometimes larger estates do attract commissions of 5% and sometimes they don't.

### **Percentages Applied to Larger Estates**

[22] It is a penetrating insight into the arithmetically obvious to note that the same percentage commission applied to estates with higher values results in a higher commission. It is also generally recognized that the level of responsibility is often greater for higher value estates. That is true in strictly monetary terms. The executor of a large estate assumes a substantial responsibility, even when the only bequests made are to large charitable organizations. The executor of a more modest estate where the bequests are to the surviving children of the testator intended to provide their guardian with resources to pay for their upbringing and education also takes on a substantial responsibility. The numbers may be smaller, but the level of "responsibility" would be no less.

[23] The increasing level of responsibility does not necessarily rise in direct proportion to the size of the estate. An executor who is responsible for a \$200,000 estate may feel the heavy weight of responsibility in the circumstances. An executor of a \$20 million estate may not have 100 times more responsibility than the executor of the \$200,000 estate.

[24] The amount of effort required of the executor, does not correspond directly with the value of the estate. Some small estates are complex, and some larger estate are not. The executors of some smaller estates may be required to deal with frustrating beneficiaries and do tax returns and probate forms at the kitchen table. Executors of larger estates may or may not have to deal with interpersonal conflicts, and can retain legal, real estate and accounting professionals to handle the paperwork and assist in making decisions.

[25] The skill and ability shown by the executor and the success of the executor's administration of the estate do not relate at all to the size of the estate. An executor of a small estate can be called upon to exercise a great deal of skill and may successfully navigate a host of problems.

[26] The size of the estate is a factor that must be considered in setting the executor's commission. It is undoubtedly an important factor. It is not the only factor and it is not a factor that in some way subsumes the others. There is no

presumption that the executor's commission should be 5% unless reasons can be shown why it should not be. A presumption of that kind would privilege the size of the estate as a factor over all others.

[27] In *Rustig Estate*<sup>2</sup> Justice Goodfellow analyzed the factors to be considered. He noted that the settlement of the executor's commission is discretionary. Commission "may" be allowed over and above actual and necessary expenses. The commission must be just and reasonable up to a maximum of 5%. The direction to apportion a just and reasonable commission based upon "labour bestowed or responsibility incurred" by the respective executors adds further guidance that the commission as determined by judicial discretion has a direct relationship to the effort and responsibility of the executor.

[28] Justice Goodfellow referred to *Atkinson Estate*<sup>3</sup> in which the estate was valued at over \$12 million. The Surrogate Court Judge awarded a commission of \$375,000. The Ontario Court of Appeal reduced the commission to \$149,125. The court concluded that in some cases no fairer method can be used than applying a percentage to the value of the estate. In other cases, while a percentage may provide some guidance, it would be unreasonable to apply the percentage slavishly because to do so would violate the true principle upon which compensation is always to be estimated. The care, pains, trouble, and time expended by an executor may be disproportionate to the actual size of the estate. A small complex estate may have more demands on an executor than a much larger but more simple estate. The court noted, that "even in a large estate with many complex problems, assessment of the compensation by the adoption of what might be said to be 'the usual' percentages would result in a grossly excessive allowance."

[29] Justice Goodfellow also concluded that the size of the estate alone is not a determining factor. A larger estate with one valuable asset that required minimal time and effort on the part of the executor should not result in a larger commission than a smaller estate with significant complications.

[30] In *Jeffery Estate*<sup>4</sup> the estate was valued at \$16 million and had some notable complications. It was a complicated with six codicils which required a court application for interpretation. There were three special trusts. The executor had to

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<sup>2</sup> 2002 NSSC 210

<sup>3</sup> 1951 CanLII 101 (OntCA) appeal dismissed [1953] 2 SCR 41, 1953 CanLII 11 (SCC)

<sup>4</sup> 1990 CarswellOnt 503, [1990] O.J. No. 1852, 39 E.T.R. 173

collect a number of personal loans owed to the testator. There were issues about the sale of two radio stations and a publishing company. The executor had to deal with the sale to family members of an interest in commercial real estate holdings. After 14 months a commission of about \$310,000 was approved without objection from the beneficiaries. For the next 24 months, fees of slightly more than \$110,000 were approved. The Court noted that the executors had performed their task with skill, but that the strict application of percentages would lead to serious overcompensation.

[31] The determination of the amount of an executor's commission is an exercise in the application of judicial discretion not an exercise in arithmetic. That discretion is principled. It is guided by the factors set out in the Probate regulations but is not limited to the application of those factors. The 5% amount is a maximum allowable. It is not a tariff rate and it is not a presumptive rate. The size of the estate is a factor, but it is neither the only factor nor the factor that supersedes the others.

#### **Duties Performed by Alan Stern Q.C.**

[32] Alan Stern was Mr. Leventhal's long-time friend. He was not only a friend but a confidante and advisor. Mr. Leventhal would ask for Mr. Stern's advice on various matters, sometimes formally on legal matters as a client, and often informally, just as a friend.

[33] Mr. Stern confirmed that his friend Abe Leventhal was an astute businessman. He knew the value of his estate. He knew that executors in Nova Scotia were entitled to up to 5% of the value of the estate as a commission. He did not express any reservations about that. He named Mr. Stern as one of his executors. Mr. Stern did not, and would not have, asked Mr. Leventhal to make a bequest to him. Mr. Leventhal named Alan Stern as one of his two executors in a will drafted by Mr. Stern. The two friends never had any discussions about the amount of the commission that would be charged.

[34] Mr. Stern found out about Mr. Leventhal's death from a member of Mr. Leventhal's synagogue. Mr. Leventhal was 91 at the time but despite his advanced age, his death came unexpectedly. Mr. Stern returned home from Florida two days later. He was involved with the funeral arrangements which were complicated by the Purim holiday. Many of the arrangements were handled by telephone but Mr. Stern arranged and supervised the funeral and the burial of Mr. Leventhal's remains.

[35] Mr. Stern was the person who knew most about Abe Leventhal's wishes. He knew his friend's intentions from their various discussions. He knew the length and breadth and variety of the assets with which he would have to deal.

[36] Abe Leventhal's house was, to use Mr. Stern's term, "somewhat quirky". It was obviously to Abe Leventhal's taste. His renovations tended to be bright and eclectic. Mr. Stern knew the sale of the house was not going to be easy. There were various household goods and cash on hand. Mr. Stern acted promptly. He had some work done on the house and had it listed for sale with a real estate agent by the end of June 2016. The home was sold in February 2017, with a closing taking place in March. Real estate commission of \$29,000 was paid.

[37] The household goods were appraised and sold by an auction company over the course of three auctions. That company was also paid a commission.

[38] The money in Mr. Leventhal's bank account was already in the form of cash. Mr. Stern knew which banks Mr. Leventhal used.

[39] The investments at BMO were valued at about \$10 million. The investment portfolio consisted of stocks in four chartered banks. That portfolio was liquidated early on in the process and used to pay out bequests. That would have been done by September 2016.

[40] The numbered Nova Scotia company owned about \$2 million of marketable securities. Mr. Stern sought tax and accounting advice of Grant Thornton LLP with respect to the most advantageous way to move money out of that company. A plan was developed and implemented, with the assistance of the accountants at Grant Thornton and lawyers at McInnes Cooper.

[41] Mr. Leventhal owned the Stirling Hotel Limited, which operated as the Waverley Inn. The hotel was a special place for Mr. Leventhal. It was not a highly profitable business and perhaps not profitable at all. For Mr. Leventhal it seems to have been a bit of a labour of love that allowed him to provide meaningful employment to people and allowed him to have social interaction that was important to him. Mr. Stern knew that business in a way that a professional trustee would not.

[42] There were questions about how the hotel business should be valued. It had to keep running as a going concern, but Mr. Stern understood that the value of the land as prime commercial real estate would be greater than the value of the hotel

itself. Mr. Stern knew that the hotel was worth more than the amount set out in the original Grant Thornton appraisal.

[43] The Waverley Inn had staff that Mr. Stern described as knowledgeable and competent, including a long-standing General Manager, Calvin Blades. Mr. Leventhal had been a hands-on manager and Mr. Stern took over that role immediately. He was in daily contact with the staff and was involved directly in the day to day management of the hotel. The plan was not to run the hotel for an extended period of time. It was evident that the business would be highly sought after.

[44] Mr. Stern retained Tim Margolian, who is very experienced in dealing with the commercial real estate market in Halifax. Mr. Margolian put together a plan, with Mr. Stern's involvement, to offer the property to several potentially interested parties. Proposals were received in June, just a few months after Mr. Leventhal's death. Mr. Stern got advice from an accountant to sell shares rather than assets. There was an agreement for sale in place by July and the hotel was sold in October. Accountants, lawyers and real estate professionals were engaged throughout the process. That was all accomplished with remarkable efficiency.

[45] Part of the reason for the increase in value of the estate was the sale of the hotel over the valuation applied by Grant Thornton. That happened to some extent thanks to Mr. Stern's knowledge of commercial real estate, his knowledge of the re-development potential, his contacts in property development, and his own efforts in defining and administering a sale process that was designed to produce the best price. It also happened because he was wise enough to seek and accept good professional advice.

[46] Alan Stern Q.C. performed in his role as executor in a way that honoured his friendship with Abe Leventhal. He was what one would hope an executor would be. He was diligent, wise and prudent. He was faced with a large estate that required more than simply retaining lawyers and accountants and signing off on what they had done. Mr. Stern had to be a hands-on executor. The question is whether a commission of almost \$900,000 is fair and reasonable in having regard to the circumstances surrounding this estate.

### **Fair and Reasonable Amount of Commission**

[47] The executor's commission is a way to compensate the executor for the work that he or she has done and the responsibility that the executor has assumed.

It is not another form of bequest in an unspecified amount. Executor's duties performed by a loved and trusted friend should not result in a larger commission to reflect the friendship nor should they result in a lower commission on the assumption that some of the duties would be performed out of the bonds of friendship with no thought to compensation.

### Size of the Estate

[48] The Leventhal estate had a substantial value. Mr. Stern took on a large responsibility. He was dealing with millions of dollars. An error in judgement would have significant consequences. Delay would be costly. That should be reflected in the compensation paid. Large estates, whether they are complex or not, carry with them a high level of responsibility and in these circumstances potential personal financial risk. When commission is calculated as a percentage of the value of the estate the amount of the commission will reflect that level of responsibility and risk.

[49] The work and responsibility involved in managing an estate do not rise in strict correlation to the size of the estate. Applying a percentage as the presumptive commission in each estate assumes that work and responsibility rise in precise mathematical lockstep with the value of the estate. Clearly, they do not.

### Time Involved

[50] The time involved on the part of the executor in fulfilling the responsibilities of the role is a factor in determining the commission that should be paid. The time involved relates to the period of time for which the executor has held the role and the amount of time that the executor has spent in fulfilling the functions of the role. A diligent executor, like Alan Stern, should not be penalized for wrapping up the work on the estate promptly. But an estate that drags on through no fault of the executor can be a burden for a long time. This estate did not drag on. There was nothing about it that would make it drag on.

[51] Executors are not required to maintain records to account for each hour spent in dealing with the estate. Executors are not compensated on the basis of an hourly rate applied to time spent attending to the work of the estate.

[52] Mr. Stern tried to keep some record of the hours he spent working on and devoted to the estate. His record is not intended to be a precise accounting. It must mean something though. He did not simply keep random notes. He recorded

individual telephone calls and the receipt and review of correspondence and logged time in tenth of an hour, or 6-minute increments. Mr. Stern recorded 77 hours in total. One could assume that there were times when Mr. Stern worked for the estate and did not record his time. As Mr. Giles Q.C. for Mr. Stern noted, a meeting with accountants downtown required travel from home to downtown and the inevitable search for a parking spot. But even assuming that Mr. Stern spent 100 hours working on the estate, that would not amount to full time work over the course of a year or 18 months. Translating that time as an hourly rate is not the way to calculate an executor's commission. That would privilege the "time spent" factor over the others. Those other factors must be considered. If those hours were calculated as an hourly rate, assuming 100 hours rather than 77 hours, the hourly rate for an \$876,000 commission would amount to \$8,760 an hour. Again, using time spent as a predominant factor is no fairer than using the value of the estate as the predominant or overriding factor.

#### Skill, Ability and Success of the Executor

[53] There is no dispute that Mr. Stern admirably performed his duties as an executor. He made no mistakes. He was responsible for no delays. He filed everything on time. He took control of a large estate and applied his experience and good judgement to the management of the assets. He performed as a faithful steward of his friend's assets. While he took the effort to maximize the value of the estate for the benefit of the beneficiaries the increase could not be entirely attributable to his work. The investments in the estate earned income. The sale of the business resulted in a larger return than had been estimated. Partly, that was due to good advice received and Mr. Stern's good judgement in accepting it. But the increase was not a result of actions taken by Mr. Stern to change the business model for the hotel or to preserve it as a going concern for an extended time.

[54] A large part of the estate was made up of investments that were relatively easily converted into cash for distribution. Again, Mr. Stern sought and received advice and properly acted on that advice to the benefit of the estate. The hotel business, the house and the contents of the house were the only assets that were not easily converted into cash. When the investments were converted into cash that was done with skill and care, on the advice of professionals.

[55] Mr. Leventhal's estate was of a size that legal, accounting and real estate advice could be obtained. Mr. Stern did not serve as legal counsel to the estate. McInnes Cooper provided those services and billed the estate about \$74,000. Mr. Stern did not have to do his own accounting or tax services. Those services were

provided and were paid for out of the estate. While he became involved with the management of the Waverley Inn, Mr. Stern acknowledges the significant contributions made by the manager, Mr. Blades and the long serving staff. The sale of the hotel was handled with the assistance of Tim Margolian. A process was put in place to obtain offers for the property from real estate developers and the business was sold promptly. Mr. Stern was involved in that, but he did not do it without the direct assistance of professionals.

### Complexity of the Estate

[56] The Leventhal estate did not have some of the kinds of issues that feature in estates that are notoriously or even significantly complicated. There is only one brief codicil. The will itself is not complex. There are no trusts set up by the will. While the amounts involved are substantial, the will and codicil involve specific bequests to 17 individuals and organizations. There are no conditions attached to those bequests other than the requirement that for five of them, they must be employees of Stirling Hotel Limited/Waverley Inn at the time of Mr. Leventhal's death.

[57] The residue of the estate was to be paid to the AJF. Of that amount, 50% was to be invested and used for the construction of a Jewish Community Centre in Halifax. The remaining 50% was to be used to fund scholarships. As executor Mr. Stern was required to deliver the funds to the AJF and advise the organization of the terms of the bequest. He was not required to be involved in the investment or management of the money once it was provided to the organization. Mr. Leventhal's estate was large, but it involved substantial simple bequests to several people and organizations.

[58] The management of the estate was not drawn out by litigation among the beneficiaries or by others contesting the validity or the terms of the will. Estates often become the focus of intense family disputes. Mr. Leventhal's estate involved none of that.

[59] While the estate was large, it was larger than it was complex. Of the total value, about \$10,600,000 was in the form of an investment at BMO Wealth Management. Another \$73,500 was in a chequing account. Another \$500,000 was in the form of a residential property. Those assets were not complicated to manage, administer or liquidate. The hotel offered a level of direct involvement and complexity that should be reflected in the compensation paid to Mr. Stern. The hotel was however sold within a few months. It was not a long-term project.

### **Amount of Commission**

[60] Mr. Stern should be rewarded for his efforts and his skill. The factors that must be considered do not offer any way of performing a precise calculation. There is no proportion of the total commission attributable to each factor.

[61] A 5% commission of close to \$900,000 is not reasonable. It provides for a windfall. A 5% commission for a substantial estate like this one should be reserved for estates for which there have been complicating features that require more than wise and careful planning to maximize the value of the estate. Those features might include estate and tax litigation, the liquidation of unusual and valuable assets, the presence of complex trust arrangements or the presence of varied and substantial real estate and corporate holdings. The amount of time spent by Mr. Stern both in terms of hours working on the estate and the period of time during which he held the responsibility for a substantial estate would justify a substantial commission. The Leventhal estate however was not a long-term commitment. The work was done in about a year and a half. The actual time spent by Mr. Stern was conservatively recorded as being 77 hours. For some people, that's less than two weeks' work. The high level of success achieved by Mr. Stern should be recognized. That must also acknowledge that Mr. Stern was able to retain a high level of professional legal, accounting and real estate advice and assistance all paid for through the estate.

[62] A commission of \$450,000 is slightly more than 50% of the maximum amount that could be awarded. It is a very substantial amount that reflects fair compensation for the high level of responsibility, the time and effort spent, as well as the skill shown by the executor, while falling short of a windfall or a bequest. The commission is a form of compensation for work, responsibility and success. Mr. Stern earned that amount and is entitled to it. A larger amount would have the effect of reading into Mr. Leventhal's will a bequest to his friend that he did not make.

### **Costs**

If the parties are unable to agree upon costs within 60 days, I will hear them on that matter on motion of either of them.

Campbell, J.