COURT OF APPEAL FOR ONTARIO

CITATION: Herold Estate v. Curve Lake First Nation, 2024 ONCA 299
DATE: 20240423
DOCKET: M54885 (C68393 & C68467)

Fairburn A.C.J.O., Miller and Zarnett JJ.A.

BETWEEN

The Estate of William Albin Herold, deceased

Applicant
(Respondent/Responding Party)

and

Curve Lake First Nation, Hiawatha First Nation and Mississaugas of Scugog Island First Nation

Respondents
(Appellants/Moving Parties)

Candice S. Metallic and Niki Bains, for the moving parties

D. Jared Brown and Lauren Findlay, for the responding parties, the Estate of William Albin Herold and Jeffrey S. Herold

Daniel Luxat, for the Attorney General of Canada

Heard: April 4, 2024

REASONS FOR DECISION

INTRODUCTION

[1] The responding party, the Estate of William Albin Herold (the "Estate"), commenced a Superior Court application asserting that it owned certain islands in the Trent-Severn Waterway (the "Islands"). It succeeded in the Superior Court, but

the moving parties (the "First Nations") successfully appealed that decision to this court: *Herold Estate v. Canada (Attorney General)*, 2021 ONCA 579, 157 O.R. (3d) 561. The Estate was ordered to pay costs, totalling over $190,000, to the First Nations[1]: *Herold Estate v. Canada (Attorney General)*, 2021 ONCA 883 (the "Costs Decision"). This court's costs awards were reflected in a formal order dated August 24, 2021 which was entered on January 26, 2022.

[2] The Estate unsuccessfully sought leave to appeal to the Supreme Court of Canada and was ordered by that court to pay costs of the leave application to the First Nations: *Estate of William Albin Herold, deceased v. Attorney General of Canada, et. al.*, 2022 CanLII 28616 (SCC).

[3] The First Nations have been unable to recover their costs. The Estate is without the means to pay them.

[4] The First Nations now move to vary the costs awards to provide that Jeffery S. Herold be jointly and severally liable to pay the costs awarded against the Estate. Their central assertion is that they discovered, after the costs orders were made, that Mr. Herold (who is the Estate Trustee) received, in his personal capacity, a transfer of property the Estate owned ("Lot 35") shortly after the Estate's application was commenced. The ownership of Lot 35 formed the basis

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[1] There was a companion appeal by the Attorney General of Canada, who also opposed the Estate's ownership claim. The Attorney General did not seek, nor was it awarded, costs. It takes no position on this motion.

of the Estate's claim to ownership of the Islands. The transfer of ownership was never disclosed by the Estate in the litigation, with the result that the First Nations and the courts proceeded on the basis that the Estate's ownership of Lot 35 continued.

[5] The First Nations rely on r. 59.06(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which allows the court to vary an order "on the ground of fraud or of facts arising or discovered after [the order] was made". The governing principle under that rule is that the moving party must show circumstances that warrant a deviation from the fundamental principle that a final order, unless appealed, is the end of the litigation line: *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377, 131 O.R. (3d) 511, at para. 59.

[6] We dismiss the motion in so far as it pertains to the costs awarded by the Supreme Court of Canada. In our view this court has no authority to vary an order made by the Supreme Court.

[7] We agree with the First Nations, however, that this court's costs awards should be varied as requested. The Estate was under a duty to disclose the transmission of Lot 35 because of the strong relationship between the ownership of Lot 35 and the Estate's claim to the Islands. Mr. Herold was, as Estate Trustee, in charge of the litigation for the Estate. But he was, in his personal capacity, the real, and only permissible, litigant for the claim to the Islands based on his

ownership of Lot 35 from and after the transfer. It would be contrary to the interests of justice to allow Mr. Herold to use the principle of finality to escape the costs consequences of the litigation because he carried it on in the name of the Estate, of which he was the sole representative, without disclosing the transfer of ownership that meant he personally was the real litigant. This unusual circumstance warrants a departure from the principle of finality.

FACTUAL AND PROCEDURAL CONTEXT

(1) The Basis of the Estate's Claim to the Islands

[8] On July 10, 2014, the Estate[2] commenced an application seeking various orders that would confirm its ownership of the Islands. The theory of the Estate's claim was set out in an affidavit of Mr. Herold sworn July 10, 2014. He stated that the Estate was the registered owner of property described in the proceedings as Lot 35. He gave information about the original conveyance, in 1868, of Lot 35 by Crown grant to the Estate's predecessor in title. He expressed the view that the Islands were part of Lot 35 when conveyed by the Crown, and that title to the Islands could not be affected by subsequent resolutions of the Crown purporting to reserve the Islands for the First Nations.

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[2] The application should have been commenced naming Mr. Herold as Estate Trustee in the title of proceedings, rather than simply the Estate. However this was an irregularity only, which does not affect the substance of who the original applicant was: rr. 9.01-9.03.

[9] Although the Islands now had separate Property Identification Numbers from the rest of Lot 35, Mr. Herold stated that the Islands' "location [is] within the borders of [Lot 35]" and "it is the position of the Estate that title to the Islands ought to be vested in the registered owner of [Lot 35], being the Estate" (emphasis added).

[10] The evidence on this motion discloses that the Estate ceased to be the registered owner of Lot 35 on May 5, 2015. At that time, Mr. Herold as Estate Trustee of the Estate transferred Lot 35 to himself in his personal capacity.

[11] It is common ground that the transfer was never disclosed in the litigation, which continued for years after the transfer. Nor was it ever made clear in the litigation that the basis of the Estate's assertion of ownership of the Islands flowed from anything other than its continuing ownership of Lot 35, of which it claimed the Islands were part.

[12] The application judge's decision was rendered on February 28, 2020, more than four years after the transfer. In the dark about the transfer, the application judge began his reasons as follows:

> The applicant estate is the owner of certain lands described as Lot 35…. The applicant seeks a vesting order to quiet title to those lands … [and] also seeks an order exempting and discharging those lands from certain resolutions … in favour of the First Nation[s].

[13] The application judge characterized the dispute as turning on the question of whether the Islands are part of Lot 35: "The title to [Lot 35] has been plagued

since 1868 by uncertainty about whether [the Islands] … are properly part of [Lot 35]". He concluded that they are.

[14] When the matter reached this court, the Estate's position was similarly presented: the application judge had concluded that the Estate owned the Islands based on its continuing ownership of Lot 35, that ownership still subsisted, and the application judge's conclusion should be upheld. Paragraphs 2 and 3 of the Estate's factum on the appeal stated:

> The Order [of the application judge] vested title to [the Islands] … in the Estate.
>
> [The application judge] concluded that the Islands were in fact part of Lot 35 … <u>of which the Estate is the registered owner</u>. [Emphasis added.]

[15] The reasons deciding the merits of the appeal show that this court also understood that the basis of the Estate's successful claim on the application was its current ownership of Lot 35. Those reasons began, at para. 2: "In the decision under appeal, the application judge held that [the Estate] … owns the Islands by virtue of its ownership of Lot 35".

[16] The First Nations did not contest, in the application or on appeal, the Estate's contention that it owned Lot 35. They argued that ownership of Lot 35 did not have the consequence the Estate claimed – it did not include ownership of the Islands. As summarized in paras. 5-6 of the reasons for allowing the appeal, the First Nations succeeded on the basis that the application judge had erred in concluding

that the Islands were conveyed by the Crown as part of the conveyance of Lot 35 in 1868. Therefore, neither the Estate's predecessor in title, who received the conveyance of Lot 35 from the Crown, nor the Estate as a subsequent owner of Lot 35 had acquired ownership of the Islands.

(2) The Costs Orders

[17] This court ordered that the Estate pay costs to the First Nations in the sum of $154,530.76 for the application and $43,000 for the appeal: Costs Decision, at paras. 4-5.

[18] A request by the Estate for leave to appeal to the Supreme Court of Canada was dismissed on April 14, 2022. Costs in favour of the First Nations, payable by the Estate, were taxed and allowed in the sum of $1,147.09 on November 15, 2022.

(3) The First Nations Discover the Transfer

[19] The costs awards were not satisfied. In lieu of an examination in aid of execution of Mr. Herold as Estate Trustee, he provided an affidavit in September 2023 with the accounts of the Estate. The First Nations learned of the transfer of ownership of Lot 35 from the Estate to Mr. Herold after that. It is common ground that the Estate now has insufficient funds to satisfy the costs awards.

ANALYSIS

[20] Under r. 59.06 a party may seek, by motion, to "have an order set aside or varied on the ground of fraud or of facts arising or discovered after [the order] was made".

[21] In our view, the 2015 transfer of Lot 35 to Mr. Herold is a fact that was discovered after the order for costs was made and is a sufficient ground in the circumstances to vary this court's order.

[22] As the outline above shows, the Estate's evidence in 2014 was that it was the registered owner of Lot 35. Although true when stated, the fact was no longer true from the time in 2015 when the Estate transferred ownership to Mr. Herold. This was more than four years before the application was decided. But the factual assertion of current registered ownership of Lot 35 was never updated, even though the Estate was making the claim that it currently owned the Islands. The failure to update led to the application judge being under the misapprehension, in 2020 when he made his decision, that the Estate was still the registered owner. The failure to update, and the statement in the Estate's factum that it "is the registered owner" of Lot 35, led this court to be under the same misapprehension in 2021 when this court's order was made.

[23] Counsel for the responding parties fairly conceded in oral argument that the transfer of ownership ought to have been disclosed but argued that the failure to do so was a mere irregularity without consequence. We disagree.

[24] The continuing and current ownership of Lot 35 by the Estate was the basis for its claim to current ownership of the Islands. Counsel for the responding parties argues that it was simply the acquisition of ownership of Lot 35 at a historical point in time that gave the Estate the right to claim ownership of the Islands, unaffected by any subsequent transfer of Lot 35. But there is a short answer to this argument. The Estate's case was never put or addressed that way, because on the facts it put before the courts it was the current registered owner of Lot 35, which implied that there had been no transfer.[3]

[25] Because ownership of Lot 35 was the basis of the claim to ownership of the Islands, the transfer of ownership engaged r. 11.01, which provides:

> Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted until an order to continue the proceeding by or against the other person has been obtained.

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[3] It is one thing to argue that X currently owns parcel A and therefore currently owns parcel B which is within parcel A's boundaries. It would be quite another to argue that X currently owns parcel B because it once owned parcel A although it no longer does.

[26] The application ought not to have continued in the name of the Estate after the transfer. If the claim to ownership of the Islands because they were part of Lot 35 was to be continued, it ought to have been continued by Mr. Herold solely in his own name and on his own behalf. Had he done so, he would have been responsible for costs.

[27] In our view Mr. Herold cannot avoid personal costs exposure because he instead continued the litigation in the name of the Estate, something he was able to do because he was Estate Trustee. An Estate litigates through its estate trustee: rr. 9.01-9.03. Although Mr. Herold did not name himself as a party, he alone commenced and prosecuted the application, even after the transfer. Had the true facts been known before the costs orders, costs could have been ordered against Mr. Herold. He was never truly a “non-party” to the litigation.

[28] Even if Mr. Herold could be called a “non-party”, it would still be appropriate to order that he be liable for costs. Our law generally disapproves of the real litigant being insulated from costs exposure by litigating through nominees: see *Sturmer v. Beaverton (Town) (Re)* (1911), 25 O.L.R. 190 (H.C.J.). Courts have statutory jurisdiction to determine “by whom” the “costs of and incidental to a proceeding” shall be paid under s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This includes jurisdiction to order a non-party to pay costs, provided that the “person of straw” test is met: *1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, 134 O.R. (3d) 641, at paras. 22-23, 59. That test is satisfied

where: (i) the non-party had status to bring the action; (ii) the named party was not the true litigant; and (iii) the named party was a “person of straw” put forward to protect the true litigant from liability for costs: *1318847 Ontario*, at para. 60.

[29] These elements are present in this case. First, as already noted, Mr. Herold had status – and was in fact required – to continue the application in his own name and on his own behalf after he obtained the transfer of Lot 35 from the Estate. Second, the Estate was no longer the true litigant, in any sense, from and after the transfer; only Mr. Herold had the entitlement to make a claim as current owner of Lot 35 and he alone stood to benefit from the application and any success on the appeal. Third, the position now taken by the responding parties is that the effect of continuing the application and responding to the appeal putatively on behalf of the Estate – which now lacks the ability to pay any costs – insulates Mr. Herold, the true litigant, from costs.

[30] Because of Mr. Herold’s close connection to the Estate, the litigation, and the transfer, it would be unjust for him to be free of the costs consequences of the litigation. He was the sole Estate Trustee and a beneficiary of the Estate, in a position to direct the litigation and benefit from success. He effected the transfer. We accept his evidence that the timing of the transfer was motivated by insurance considerations, and there were, at the time, still assets in the Estate (since depleted). Nevertheless, the claim continued, improperly, to be litigated on behalf

of the Estate after the transfer. From the time of the transfer, the claim asserted was really Mr. Herold's and could only have been litigated by and for him.

[31] We reject, for several reasons, the argument that it was the First Nations' responsibility to verify the Estate's continuing representation that it owned Lot 35, and since they failed to do so before the costs orders were made they should be denied the requested variation. First, the obligation to comply with r. 11 lies upon the parties to the transfer of interest. Second, we were not made aware of anything that put the First Nations on notice that the Estate's representations about ownership of Lot 35 – which were reflected, for example, in the application judge's decision that the Estate sought to defend, and in its factum on the appeal in this court – might be incorrect.[4]

[32] We are satisfied that if the First Nations were aware of the transfer, they would have requested, and this court would have made, its costs awards against Mr. Herold. It is in the interest of justice that they be made now.

DISPOSITION

[33] Accordingly, we vary our order dated August 24, 2021 as follows. Paragraph 4 of the order shall read: "THIS COURT ORDERS that the Appellant

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[4] We accept Mr. Brown's statement during oral argument of the motion that he was not aware of the 2015 transfer when he filed the Estate's factum on the appeal to this court stating that the Estate is the registered owner of Lot 35. But that only underscores the problem with the submission that the First Nations should have been aware of the transfer.

First Nations are awarded costs on the application below in the amount of $154,530.76, payable by the Estate and Jeffrey S. Herold, jointly and severally." Paragraph 6 of the order shall read: "THIS COURT ORDERS that the Appellant First Nations are awarded costs on the appeal in the amount of $43,000 inclusive of disbursements and applicable taxes, payable by the Estate and Jeffrey S. Herold, jointly and severally".

[34] Rule 59.06 clothes this court with the authority to vary its own order, not an order of the Supreme Court of Canada. The First Nations' motion in so far as it relates to the costs order and Certificate of Taxation of the Supreme Court of Canada is dismissed.

[35] The First Nations are entitled to costs of this motion against the responding parties in the sum of $20,000, all-inclusive.

"Fairburn A.C.J.O."
"B.W. Miller J.A."
"B. Zarnett J.A."