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No one wins when relatives fight over an estate, lawyers behave with incivility, and judges are asked but refuse to recuse themselves

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Cases Considered:

Nazarewycz v. Dool, 2009 ABCA 70.

There is little in this case that shows estate work in a good light. It involves relatives accused of a multitude of sins in their fight over a deceased aunt's property, lawyers accused of being uncivil, and judges accused of bias. All were vindicated in one way or another by the judgment of the Court of Appeal, but no one won. There was too much strife among relatives; too much manoeuvring for a piece of someone else's pie. And when counsel and the presiding judge became embroiled in the dispute and appeared to take it personally, the legal system was also diminished.

The Estate Fight

Katherine Dool died in November 2001. Her will, made in 1998, named her nephew by blood, Jerezy Nazarewycz, as executor. The will also gave the homestead land near Thorsby to Nazarewycz. An earlier will, executed in 1992 while Katherine Dool's husband was still alive, had left the lands to the respondents, Lawrence William Dool and Cyril Fred Dool, who were her husband's nephews by blood. At that time the Dool brothers were leasing the homestead lands from their uncle. The Dool brothers swore that prior to their uncle's death in 1993, they had witnessed him eliciting a promise from his wife that the homestead would remain with his blood relatives.

There was a variety of medical evidence, from shortly before and after the time that Katherine Dool executed her 1998 will, that suggested she was suffering senile dementia. There was evidence that Katherine Dool had withdrawn from socializing with her late husband's family and seemingly become dependent on Nazarewycz and his wife. There was also evidence of numerous other events which caused the Dool brothers to be suspicious of Nazarewycz's meddling in Katherine Dool's personal and financial affairs.

As a result of those suspicions and Nazarewycz's unwillingness to provide information about Katherine Dool's estate, the Dool brothers felt they had no choice but to file a caveat in relation to that estate shortly after her death: see the *Administration of Estates Act*, R.S.A. 2000, c. A-2,

section 11 and *Surrogate Rules*, Alta.Reg. 130/95, section 71(1). They also filed a Notice of Objection to informal grant of probate under section 73(1) of the Surrogate Rules. Finally, in September 2002, the Dool brothers filed a Notice of Motion seeking a direction that the will be proved in solemn form, that a personal representative be appointed to administer the estate and propound the will, and that an accounting be directed.

The vast majority of wills are proved informally, under Part 1 of the Surrogate Rules, which apply to non-contentious matters. Informal proof does not require a court action. Formal proof of a will (or proof of a will in solemn form) is made by commencing an action under Part 2 of the Surrogate Rules, which govern contentious matters. As was the case here, it is fairly common for a relative or friend to file a caveat or otherwise make known to the executor named in the will that they take issue with the validity of the will and will require the executor to prove the will formally. The usual grounds for invalidating a will are invalid execution, lack of knowledge and approval, testamentary incapacity and undue influence and fraud. The latter two grounds - testamentary incapacity and undue influence - were suggested by the Dool brothers' complaints.

Nazarewycz filed an affidavit in opposition to the Dool brothers' application. However, when Justice Mason heard the application of the Dool brothers in October 2002, he denied Nazarewycz's request to informally probate the 1998 will and granted their request that the will be formally proven. Justice Mason named the Canada Trust Company as Administrator with Will Annexed of the Estate of Katherine Dool and directed Canada Trust to prove the will in solemn form. Justice Mason also directed Nazarewycz to account for his handling of Katherine Dool's assets both before and after her death. In other words, Justice Mason's order gave the Dool brothers all that they had asked for.

Nazarewycz did not appeal Justice Mason's 2002 order. Neither did he comply with it over the three years following Justice Mason's order. Nazarewycz's accounting for the handling of Katherine Dool's assets both before and after her death was considered incomplete and inadequate by both Canada Trust and the Dool brothers.

However, the health and financial circumstances of the Dool brothers deteriorated over those three years. Their situations became so difficult that, in September 2005, they filed an application seeking to discontinue, without costs, their application for formal proof of the 1998 will. The next three-and-one-half years of litigation - up to the date of the Court of Appeal order granted in March 2009 - would be taken up with the simple question of whether or not the Dool brothers could stop contesting the 1998 will without paying costs.

From the evidence before the court, getting out of the court action was necessary for Lawrence Dool's health. In his affidavit, Lawrence Dool outlined the serious medical conditions he had suffered from in the three years after the order of Justice Mason: knee replacement surgery, serious bowel problems requiring numerous surgeries, a blood disorder, severe back problems requiring pain management including morphine, high blood pressure and attacks of angina. The last straw appeared to follow a July 2004 meeting with his lawyers to discuss the litigation, when he experienced chest discomfort and shortness of breath and was hospitalized for emergency

treatment. His physician told him “to remove himself from the Court proceedings.” Cyril Dool also gave evidence of his own unsatisfactory medical condition. Because both Dool brothers were required to be witnesses in the formal proof proceedings, they had decided to discontinue the litigation rather than further jeopardize their health.

It was not going to be that easy, however. Nazarewycz responded by seeking costs from the Dool brothers - costs incurred by Canada Trust in administering the estate since 2002 and his own solicitor and client costs. Even though he had lost before Justice Mason and even though the delay from 2002 to 2005 was mainly caused by his failure to properly account for his handling of Katherine Dool’s estate, he wanted the Dool brothers to pay. If they did, Katherine Dool’s estate, which Nazarewycz would inherit, would not have to do so. As it turned out, however, Nazarewycz’s decision to fight the Dool brothers on the cost issue was one he would pay dearly for.

Aside from the costs issue, the lawyers for the parties managed to agree on the rest of the matters. They consented to an order, granted by Justice Bensler in March 2006. The 2006 order varied the 2002 order of Justice Mason and provided that, because the Dool brothers had withdrawn their objection, the 1998 will could be proven informally under Part 1 of the Surrogate Rules. Canada Trust’s accounting for its handling of Katherine Dool’s estate, and their fee for doing so was approved. The assets were to be turned over to Nazarewycz, who could apply for proof of the 1998 will as a non-contentious matter.

The Fight between the Lawyer and the Judge

The controversial issue of costs was orally argued before Justice P.M. Clark in chambers in March 2006. This is the hearing in which the friction between counsel for Nazarewycz and Justice Clark first arises. According to the Court of Appeal judgment (at para. 24), there were “some sharp exchanges between the chambers judge and counsel for Nazarewycz. It is clear that the court was offended at what it perceived to be the harsh position taken by Nazarewycz . . .”. Justice Clark characterized Nazarewycz’s lack of cooperation in making timely accounting and disclosures as “stonewalling.” Justice Clark was also obviously provoked by Nazarewycz’s counsel repeatedly insisting there was not a “scrap of evidence” to support the Dool brothers’ challenge, when it was plain that Justice Mason had concluded there were genuine issues for trial based on the evidence presented to him by the Dool brothers. At the conclusion of the March 2006 oral argument, Justice Clark indicated he would review the file and provide a written decision.

In November 2006, Justice Clark advised counsel that he had decided to give an oral decision to be followed by a written judgment. The written judgment, once it was delivered, would prevail over his oral decision. In his oral judgment, Justice Clark decided that the Dool brothers were entitled to discontinue their action without costs and were entitled to recover their own solicitor and client costs against the estate. He then stated that these costs would also be borne by each of Nazarewycz and his solicitor on a joint and several basis. Why this cost penalty imposed on

counsel personally? The Court of Appeal summarized (at para. 29) Justice Clark's reasons as follows:

> The chambers judge commented that counsel for Nazarewycz had been "ill-prepared for the application", and then turned his attention to his lack of civility. He stated that he had found that counsel to be "over aggressive, impolite to counsel opposite and to the court" and that it was not pleasant having that counsel appear before him. He continued by stating that counsel for Nazarewycz was "disdainful of the Court process and his behaviour borders on contempt". He later added that almost every time that counsel appeared before him, he had the impression that that counsel had disdain for the court. The chambers judge then advised that the counsel's conduct generally, and in this case specifically, should be the subject of review. He added that he had been in contact with the Law Society and would be providing it with a transcript of the proceedings. He stated that he was directing that copies of the correspondence between counsel with respect to the application for proof in solemn form also be provided to the Law Society, together with other related materials "to permit the Law Society conduct committee to properly assess the handling and carriage of the file".

As for Nazarewycz, Justice Clark found him in contempt of court for his failure to provide the accounting directed by the Mason order. Justice Clark next directed that the 1998 will be propounded and proven in solemn form and that Nazarewycz provide the accounting. Justice Clark had earlier, and erroneously, observed that Justice Mason's order remained outstanding and was unaffected by the Dool brothers' discontinuance. It appears that he somehow overlooked the order of Justice Bensler which had expressly varied the order of Justice Mason.

At the conclusion of Justice Clark's oral decision, counsel for Nazarewycz stated that he was surprised that the chambers judge had found him disdainful because he held the court in the highest regard and surmised that it was his personality that must offend the court. Apparently, Justice Clark replied that that was "exactly the point."

I should pause here and note that these types of exchanges, and the oral hearing which gave rise to them, are almost impossible to understand in written form. Without hearing the tone of voice and without seeing the body language and facial expressions, it is extremely difficult, if not impossible, to know what happened and why.

Finally, Justice Clark told counsel for Nazarewycz that he had the option to return with his own lawyer to argue the award of costs against him personally. He also indicated that Nazarewycz could return with counsel and argue the contempt citations.

In January 2007, Justice Clark delivered his written reasons: *Re Dool (Estate of)*, 2007 ABQB 12. The written reasons confirmed that they superseded the oral reasons. They varied Justice Clark's oral decision of November 2006 by withdrawing the award of costs against Nazarewycz and his counsel. However, before he concluded, Justice Clark addressed the question of why

counsel for Nazarewycz would not be anxious to prove the will in solemn form and refute the allegations of the Dool brothers. The Court of Appeal quoted Justice Clark as follows (at para. 43):

> Despite my questioning him about it in Court, I have been unable to determine whether counsel for the Respondent was acting on instructions from his client or simply chose to take an obstructionist position of his own initiative. In either event, I am of the view that the Respondent should consult with new counsel as to whether his interests have been properly served in this case.

A further hearing was held before Justice Clark in June 2007 in response to Canada Trust's request for advice and direction because Nazarewycz had not complied with the directions Justice Clark had made in his oral decision of November 2006. Mr. Halt appeared for counsel for Nazarewycz because counsel was not available on the short notice given for the application. Mr. Halt suggested that Justice Clark should recuse (disqualify) himself because there was a reasonable apprehension of bias against counsel for Nazarewycz. But Justice Clark did not accept that he could be perceived to be predisposed to decide the application in a certain way.

As a result, later in June 2007, Nazarewycz filed an application formally seeking the recusal of Justice Clark and a stay of enforcement of his orders of January 10 and June 15, 2007. Justice Clark again refused to recuse himself from hearing this application, suggesting instead that the matter be appealed. It was at the beginning of this hearing that Justice Clark had also indicated that it was the first time he had seen the consent order granted by Justice Bensler.

The Court of Appeal Decision on Bias

On the appeal, Nazarewycz sought to set aside all three orders made by Justice Clark, arguing that the record demonstrated a reasonable apprehension of bias prior to the first order on January 10, 2007. The Dool brothers only defended Justice Clark's orders as to costs. They argued that Justice Clark had exercised his discretion as to costs in accordance with judicial principles. Canada Trust also argued in favour of only the costs orders.

The Court of Appeal first dealt with the issue of whether Justice Clark should have recused himself before he made any of his three orders. If he should have, those orders would all have to be set aside. As has been said by the Supreme Court of Canada in a number of cases, including *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 100, "[i]f a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision."

Bias is "a leaning, inclination, bent or predisposition towards one side or another or a particular result" that "renders a judicial officer unable to exercise his or her functions impartially in a particular case": *R. v. S.(R.D.)* at para. 106. As the Court of Appeal noted at para. 64:

> The apprehension of bias must be reasonable and held by reasonable and informed persons. The accepted test was set out by Grandpré J. in dissent in

> Committee for Justice and *Liberty v. Canada (Natural Energy Board)*, [1978] 1 S.C.R. 369 at 394: "[W]hat would an informed person, viewing the matter realistically and practically - and having thought of the matter through - conclude?" An informed person is one with knowledge of all of the relevant circumstances, including an appreciation of the court's traditions of integrity and impartiality, which duties are undertaken by the judges of the courts. Accordingly, the threshold for a finding of real or perceived bias is high.

The Alberta Court of Appeal had previously considered the apprehension of bias in the context of recusal. In *Point on the Bow Developments Ltd. v. William Kelly & Sons Plumbing Contractors Ltd.*, 2005 ABCA 310, they had - quite logically - decided that if there is a reasonable apprehension of bias, the decision maker should recuse him or herself.

Of course, as the Alberta Court of Appeal noted, less than courteous interactions between a judge and counsel, or criticism of counsel by a judge, do not constitute a reasonable apprehension of bias. Thus, in this case, the Court found (at para. 67) that Justice Clark's criticism that counsel was ill prepared and uncivil, and his reporting counsel's conduct to the Law Society, "did not of itself give rise to a reasonable apprehension of bias." Judges are entitled to criticize counsel's conduct and entitled to make complaints about lawyers to their governing professional body.

Nevertheless, the Court of Appeal concluded that the orders of Justice Clark had to be set aside on the ground that the appellant had demonstrated a reasonable apprehension of bias. They found (at para. 74) that, before he granted his first order, Justice Clark "had made remarks such as to give rise to the appearance both of a loss of impartiality between the parties and prejudgment of issues." The heart of the problem was the remarks Justice Clark made orally on November 17, 2006 and repeated in his January 2007 written judgment:

> [T]he chambers judge's criticisms of counsel's behaviour and comment that it was not pleasant having counsel appear before him were not limited to the present proceedings, but included counsel's previous appearances before the chambers judge. His suggestion to the appellant that he consult with new counsel undermined confidence that any further representations made by that counsel in the further course of the proceedings would be fairly heard and dealt with. Further, the court's determination to cite the appellant for contempt and to award costs jointly against him and his counsel, all without notice or argument and initiated by the chambers judge, added to the perception of prejudgment and unfairness. This is especially so as during the November proceedings when counsel for the appellant attempted to challenge and to question the appellant's alleged noncompliance with a court order, the chambers judge cut short any explanation and advised he would respond on behalf of respondent's counsel (para. 76)

In addition, some of Justice Clark's criticism of counsel for Nazarewycz appeared to be based on the fact he overlooked the Bensler order, which had varied the Mason order. "As a result," the

Court held (at para. 76), "some of the comments were unfair, and directions were made that were inappropriate." Overlooking the Bensler order compounded the apprehension of bias.

The Court of Appeal therefore decided that Justice Clark should have recused himself. His orders about the Dool brother's discontinuing without costs were therefore set aside. Normally the Court of Appeal would tell the parties to return to the Court of Queen's Bench for a new hearing before a different judge. However, a lot of time and money had already been spent on the application to discontinue and all parties asked the Court of Appeal to decide the costs issue. The Court agreed it was practicable that they do so.

The Court of Appeal Decision on Costs

The core of Nazarewycz's argument was that the Dool brothers had alleged wrongful conduct on his part - undue influence and possibly fraud.

However, the Court of Appeal decided the costs issue the same way that Justice Clark decided it. They found (at para. 80) that there were "special circumstances" which provided a "proper basis" for permitting the Dool brothers not only to discontinue their action without costs, but also to recover their own legal costs of participating in the litigation. The "proper basis" was established by four aspects of the case.

First, and probably most importantly, the Mason order demonstrated that the Dool brothers had satisfied the court that there was a reasonable evidentiary basis for directing that the issues of testamentary capacity, undue influence and suspicious circumstances be tried. The Dool brothers' desire to discontinue their attack on the 1998 will did not arise from orders that went against them. There was no finding that cast doubt upon the credibility or the reasonableness of the Dool brothers' allegations. Nazarewycz was not a successful litigant; the issues of testamentary capacity, undue influence and suspicious circumstances had not been decided in his favour. These facts alone would appear to amount to "special circumstances" entitling the Dool brothers' to be relieved of the need to pay costs to the estate to be inherited by Nazarewycz.

Second, health and other personal issues can constitute special circumstances and relieve a plaintiff from paying costs on a discontinuance: see, e.g., *Donlevy v. Donlevy*, 1999 SKQB 154. In this case, the evidence of the Dool brothers about their deteriorating health was not disputed.

Third, costs in estate matters have always been treated differently than costs in other civil matters. The Court quoted (at para. 89) the explanation for this difference that was given in *Popke v. Bolt*, 2005 ABQB 861:

> First, where the conduct of the deceased whose will is in dispute (the "testator") necessitates the litigation, it is reasonable to require the testator, through his estate, to pay. However, a substantial link must exist between the testator's actions and the actual need for litigation: *Holzel v. Mjeda* (2000), 269 A.R. 30, 2000 ABQB 549 (Alta. Q.B.) at para. 31. Second, society has an interest in ensuring that only valid wills are probated, and that property is distributed in

> accordance with their terms. Parties who seek the court's assistance in these matters should not be deterred by the cost of litigation: Brian A. Schnurr, *Estate Litigation*, 2d ed. vol. 2 (Scarborough, Ont.: Thomson Carswell, 1994) at 19-2.

Finally, there was the problematic nature of Nazarewycz's conduct. The Court of Appeal laid the blame for the protracted and expensive nature of the proceedings at his feet (at para. 92):

> [T]he accounting and other disclosures had to be pried out of the appellant. His position was uncompromising and forced Canada Trust and the Dools to labour in their efforts to gather relevant information.

Therefore, the Court of Appeal concluded (at para. 94) that the Dool brothers were entitled to discontinue their application without the payment of costs and were entitled to be indemnified by the estate for their costs from the date of the Mason order up to and including the date of the last chambers order, on a solicitor and client basis.

Canada Trust was also, of course, entitled to its costs, including legal expenses, on a solicitor and client basis. They had been acting pursuant to court orders throughout.

As for the costs of the appeal itself, the Court held (at para. 100) the Dool brothers and Canada Trust were "entitled to recover their solicitor and client costs of the appeal, on a full indemnity basis, from the estate in amounts as agreed or taxed." That order was made despite the fact that Nazarewycz technically "won" on the appeal.

Who won?

Nazarewycz did succeed on his claim of reasonable apprehension of bias and the three orders of Justice Clark were set aside. It wasn't much of a "win," however. The estate of Katherine Dool is considerably poorer after all of the costs orders. Nazarewycz may inherit the homestead quarter, but the estate owes a hefty amount of costs and those costs, in effect, come out of Nazarewycz's pocket. Nazarewycz's counsel seems to have done his client no great service in the end. Counsel was vindicated in that the Court of Appeal found his apprehension of bias on the part of Justice Clark was reasonable, but it was at his own client's expense. All of the Dool brothers' legal costs and Canada Trust's legal costs come out of Nazarewycz's inheritance.

The Dool brothers were also partially vindicated and recovered most, if not all, of their legal costs. They seem to have convinced all six of the judges who heard the matter that they were right to be suspicious and they were right to try to honour their uncle's wish that the homestead quarter stay on that side of the family. However, the cost to their health and peace of mind was significant.

Finally, while the Court of Appeal reluctantly concluded that Nazarewycz had demonstrated a reasonable apprehension of bias, their disposition of the substantive costs issue that had occupied so many for so long was the same as Justice Clark's. His award was one an impartial decision-maker agreed with. Still, he too paid for the fact that he was, in his own words (at para. 62,

Re Dool (Estate of)), "provoked into responding in kind" to "the lack of civility between counsel and the comportment of counsel in addressing the Court." Lord Hewart's famous dictum in *R v Sussex Justices, ex parte McCarthy*, [1924] KB 256, 259 is that 'justice should not only be done but should manifestly and undoubtedly be seen to be done'. There is no need to show actual bias on the part of a judge. Nor is it a defence for a judge to be able to demonstrate his actual impartiality.