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A Successor in Title to the Settlor of a Trust (a GRTA) Cannot Apply to Vary That Trust

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Decisions commented on: *Montreal Trust Company of Canada v Astl*, 2026 ABKB 255 (CanLII) and *Montreal Trust Company of Canada v Astl*, 2026 ABKB 510 (CanLII).

The principal decision at issue in this post, *Montreal Trust Company of Canada v Astl*, 2026 ABKB 255 (CanLII) (*Montreal Trust*), concerns what are known in Alberta as gross royalty trust agreements (GRTAs). GRTAs emerged in the 1950s as companies leased up privately held freehold oil and gas rights. It is convenient to follow Justice Jones' example in this case and to quote from the decision of Justice Mason in an earlier case (*Montreal Trust Company of Canada v Astl*, 1999 ABQB 872 (CanLII)) to describe the nature of GRTAs:

> [3] In the late 1940's and early 1950's, the oil and gas industry in Alberta was in a "frontier stage". Following the Leduc discovery in 1947, oil and gas companies actively began to lease freehold mineral lands in central Alberta. ….
>
> [4] In 1949 and following, various trust companies in Alberta set up large numbers of gross royalty trust agreements ("GRTs") (for example, in the early 1990's Security Trust Company had 206 producing GRTs and Central Guaranty had 843 producing GRTs). In some cases, independent land agents solicited mineral owners to enter into GRTs while in others mineral owners approached either a land agent or a representative of the trust company directly.
>
> [5] Often the mineral owner would first enter into a petroleum and natural gas lease with an oil company. Typically the lease granted the oil company the right to win oil and natural gas from the lands, in return for which the oil company would pay to the mineral titleholder a royalty, usually 12½ percent of the value of the production of the oil and gas obtained pursuant to the terms of the lease. Then the mineral owner would establish a GRT under which the lessee oil companies paid the royalties due to the mineral owner to a trust company to hold in trust pursuant to the terms of the GRT. The trustees received the royalties at the behest of the mineral owner who, as the settlor of the trust, required the trust company to issue unit certificates of ownership in the royalty funds paid to it. Unit certificates issued by the trust companies pursuant to GRTs were traded by way of sale or exchange in street form through endorsement of the transfer on the reverse side of the certificate. This permitted the gift, sale, trade or transfer of the units by certificate which entitled the unit holders to share, according to their

> prorated number of units, in the royalties payable under the petroleum and natural gas lease.
>
> [6] Freehold mineral owners generally set up GRTs to facilitate the distribution of oil and gas royalties to other persons by way of either sale, trade or gift. The GRTs enabled mineral owners to obtain an immediate cash payment through sale of all or some of their GRT certificates. By trading GRT certificates with their neighbors or others, mineral owners could potentially increase the opportunity of participating in successful oil and gas wells.
>
> [7] The trust company typically filed a caveat against the mineral title to warn lessees and future owners of the mineral title that the royalty payable under the petroleum and natural gas lease was payable to the trust company in accordance with the terms of the GRT.

There was a significant amount of litigation on GRTAs during the 1980s, principally concerning two questions. The first was whether a GRTA could survive the termination of the original lease. The second concerned the question of whether a GRTA created an interest in land that could support a caveat and run with the mineral title. The results were mixed, varying with the language of each specific agreement. In some cases, parties entered into so-called "patch" agreements to amend the initial GRTA to ensure that it would bind the land in perpetuity. The Auten lands at issue in this case were subject to those patch agreements. For earlier ABlawg commentary on some patch agreements see [here](#).

In more recent years we have not seen much in the form of reported cases on GRTAs, so this is a bit of novelty both in terms of timing and sheer selfish effrontery. The applicant in this case, 953342 Alberta Ltd (I have no idea why the style of cause refers to Astl) is the successor in title to the mineral estate of the settlor, Auten, the person who created the original GRTAs in 1953. The applicant sought an Order declaring five GRTAs partially terminated in respect of the interests of certain units in those trusts who could be located by the trustee and for whom a share of revenue paid to the GRTs had accumulated (at paras 26 – 27). The applicant, which did not own any certificates in the trust itself, argued that the termination of these units would cause the mineral interests represented by these units to revert to the settlor, or in this case the applicant as the successor in title to the mineral estate of the settlor (at para 37). The respondent to the application is the Computershare Trust Company of Canada, the current trustee for the GRTAs (again I have no idea why the official style of cause refers to the Montreal Trust Company of Canada).

In order to succeed with its brazen claim, the applicant would need to show that the GRTA allowed such a partial termination on the application of the settlor's successor in title, or alternatively that the applicant was eligible to make an application under s 67 of the *Trustee Act*, SA 2022, c T-8.1for a variation of the trust. Unfortunately for the applicant neither route was available.

Clause 22 of the GRTAs expressly addressed the power to terminate a GRTA either in whole or in part as follows:

> This Agreement may be terminated at any time on three months' written notice to the Trustee by the Owner herein with the consent in writing of all of the holders of Royalty

> Trust Certificates outstanding hereunder; and likewise this Agreement may be terminated as to the Royalty and Gross Royalty Units in respect of some only of the said lands and Lease insofar as it affects or relates to such Royalty and Gross Royalty Units provided that such partial termination does not prejudicially affect the holders of any other Gross Royalty Units. Such partial termination may be effected at any time on three months' written notice to the Trustee by the Owner herein with the consent in writing of all the holders of Royalty Trust Certificates issued and outstanding in respect of the Gross Royalty Units affected by such partial termination. In the event of such a partial termination the Trustee's Annual Holding Fee or Charge shall be reduced in the proportion that the same is chargeable to the Gross Royalty Units so affected by such partial termination. (*Montreal Trust* at para 17)

In sum, termination of the entire GRTA under the authority of clause 22 requires the written consent of all certificate holders; partial termination requires the written consent of those certificate holders who may be affected by such termination. No such written consents were forthcoming: see para 62.

That should have been the end of any suggestion that "the Owner" could terminate the GRTAs under the terms of clause 22 in part (i.e. not a judicial variation of the trust but simply an application of the terms of the trust deed).

However, for reasons that are not entirely clear, Justice Jones used his examination of clause 22 to answer the question of whether clause 22 would permit the applicant to make an application under s 67 of the *Trustee Act*. That, to me, is an entirely different question. Section 67 deals with the question of if, and when, a court has the power to vary a trust even when not all those beneficially interested have consented to the application (s 67(4)).

Section 67 provides in part that

> (1) Subject to any terms in a trust instrument reserving the power to any person or persons to terminate or vary a trust, and except as provided in this section, a variation requires approval of the court.
>
> (2) On application by a *trustee or beneficiary*, the court may approve a variation after taking into account the following factors:
>
> (a) the nature of all interests and objects and the effect any proposed variation may have on those interests and objects;
>
> (b) the benefit or detriment to any person that may result from the court approving or declining to approve any proposed variation;
>
> (c) the intentions of the settlor, to the extent they can be ascertained;
>
> (d) any other factors the court considers relevant. [emphasis added]
>
> (3) Subject to subsection (4), a trustee or beneficiary who makes an application under subsection (2) must have written consent to the application from all persons who are beneficially interested in the trust.

> (4) On an application under subsection (2), the court may approve a variation despite that one or more of the following persons who are beneficially interested in the trust have not consented to the application:
>
> ...
>
> (c) a person who after reasonable inquiry cannot be located;
>
> ...
>
> (e) a person who has the capacity to consent to a variation but refuses to consent to the variation;
>
> (6) The court may not approve a variation if the variation would reduce or remove any fixed indefeasible interest that has vested absolutely in a beneficiary.
>
> (*Montral Trust* at para 25, emphasis in original)

The principal difficulty facing the applicant in using this route was that the applicant was neither a trustee of the trust (that was Computershare) or a beneficiary (it had no certificate for a share of the units). Neither the settlor nor a successor in title to the settlor is a beneficiary of the GRTA, and the fact that clause 22 of the GRTA affords the owner/settlor the power to collapse the trust (in whole or in part) with the consent of the relevant beneficiaries does not give the owner/settlor a present, vested, contingent or reversionary interest in the trust:

> … it would seem clear that [the settlor] intended to and did irrevocably alienate to the Trustee whatever rights to the Royalty he had prior to the establishment of the GRT Agreements. I am unable to find support in the GRT Agreements and SAs for the Applicant's assertion that the Mineral Owner, and its successors, were always intended to retain a contingent interest in the Royalty. (at para 64; see also paras 74 & 75.)

While that was sufficient to dispose of the applicant's s 67 argument, Justice Jones also went on to consider whether s 67(6) would in any event preclude the Court from entertaining an application of this sort on the grounds that, if granted, such a variation would necessarily "reduce or remove any fixed indefeasible interest that has vested absolutely in a beneficiary" (at para 95). That of course begs the question of whether the interest of a certificate holder is a "fixed indefeasible interest that has vested absolutely in a beneficiary."

Following a review of the relevant case law, Justice Jones concluded that the certificate holders did indeed have a "fixed indefeasible interest that has vested absolutely in a beneficiary" (at para 21). The certificate holders were ascertainable within the meaning of the rules on vesting and their interests were vested in possession. And finally, under both the original GRTA and the patch agreements, the royalty interest that was the subject of the trust was transferred to the trustee for the benefit of the certificate holders "in perpetuity" or "forever" (at paras 120 – 125).

It bears mentioning that other parties also showed an interest in the merits of the applicant's case. One of the other unit holders had the equally selfish gall to support the partial collapse of the trust but contended that the beneficiaries of the collapse should be the other unit holders *pro rata* (at para 33). The public trustee indicated that it had the power to act on behalf of the lost unit holders but expressly declined to exercise that power (at para 34). And finally, the Attorney General made a claim to the funds under the terms of the *Unclaimed Personal Property and Vested Property Act*, SA 2007, c U-1.5 (at para 35). Since the Court concluded that an application to vary the trust under the terms of s 67 of the *Trustee Act* was not properly before the Court, Justice Jones declined to comment on any of these submissions.

The second decision listed above (*Montreal Trust Company of Canada v Astl*, 2026 ABKB 510 (CanLII)) (Costs Decision) is Justice Jones' decision on costs. And here the applicant became the victim of its own selfish appetite. This was because the relevant patch agreements in this case contained the following clause:

> The Mineral Owner shall indemnify and save the Trustee harmless from any and all charges, costs and expenses, including legal expenses on a full indemnity basis, in respect of claims, demands and actions of any person asserting through the Mineral Owner an interest in the Mineral Rights and Royalty Rights contrary to the Royalty Trust Agreement and this agreement. (Costs Decision at para 2)

Justice Jones held that all of the conditions contained in the clause had been met. The applicant, as mineral owner or person claiming through the mineral owner, had made a claim to the royalty interest that was contrary to the GRTAs and the patch agreements. The applicant was liable for full indemnity costs, subject to possible assessment by the Review Officer.

One hopes that the applicant was fully aware of this clause and its implications before embarking on its fishing expedition. And for another recent decision in which an indemnity clause (this time in a lease agreement) really came back to bite see Justice Paul Jeffrey's decision in *CNOOC Petroleum ULC v 801 Seventh Avenue Inc*, 2026 ABKB 357 (CanLII), a costs award of some $24,244,915.84 (subject to some adjustments). I don't suppose that that the costs in this case will be of anything like this magnitude, but counsel for the applicant does seem to have filed a large number of briefs (see listing at Appendix A of the *Montreal Trust* judgment), each of which must have occasioned a commensurate effort in reply from counsel for Computershare

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