Toronto Law Journal

The Competition Bureau's Interest in Patent Litigation Settlement Agreements

Michael Burgess, Bereskin & Parr LLP

The Competition Bureau published a white paper in Fall 2014 discussing how it intends to consider patent litigation settlements in the future, particularly in the pharmaceutical sector. Entitled *Patent Litigation Settlement Agreements: A Canadian Perspective*,[1] the white paper canvasses a variety of competition law issues that have arisen, notably, in the United States in the context of patent settlements, and discusses how the Competition Bureau may react to similar developments in Canada.

Generally, the United States Federal Trade Commission ("FTC") has taken the position that American antitrust laws are not violated by settlement agreements that merely set a date for a generic pharmaceutical manufacturer's market entry. Pay-for-delay agreements (where a brand pharmaceutical company pays the generic pharmaceutical company to delay market entry), on the other hand, can align the interests of brand and generic competitors, and can be seen to violate U.S. antitrust laws.

In Canada, under the Patented Medicine (Notice of Compliance) Regulations, a generic company can seek damages – referred to as section 8 damages – from a brand company for its losses resulting from being kept off the market by virtue of the 24 month stay provided under the regulatory framework. The situation with respect to settlements relating to section 8 damages has been less clear than the U.S. FTC's approach. Where a pay-for-delay agreement involves a payment that is greater in value than the generic's potential section 8 damages, it is likely that the Competition Bureau will now view the agreement as anti-competitive. However, where the payment has less value than the section 8 damages, a more detailed consideration of all of the circumstances will be required to determine the impact on competition.

Three *Competition Act* provisions will be relevant to the Competition Bureau's section 8 damages analysis. Section 45, the criminal provision, can apply to pay-for-delay agreements, and the Competition Bureau opines in its white paper that a "payment" can take many forms, including "cash, a promise not to launch an authorized generic, or provision of services". Sections 79 and 90.1 of the *Competition Act*, the civil abuse of dominance and competitor agreement prohibition provisions, may be triggered by intellectual property settlement agreements that substantially prevent or lessen competition. "If, but for the settlement, the parties would have been likely to compete, disciplining the exercise of market power and

[1] *Patent Litigation Settlement Agreements: A Canadian Perspective* (White Paper released at the Global Antitrust Institute, George Mason University School of Law Conference: Global Antitrust Challenges for the Pharmaceutical Industry, 23 September 2014), published online: Competition Bureau Technical Guidance Document <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03816.html>.

leading to lower cost alternatives for consumers, the settlement may be found to be causing" a substantial prevention or lessening of competition. Considering the civil provisions of the *Competition Act* in the context of PM(NOC) proceedings, the Competition Bureau suggests it is more likely to conclude that the agreement substantially prevents or lessens competition if the value of the brand's payment exceeds the total of the section 8 damages and the brand's actual litigation costs.[2]

The Competition Bureau has, it should be noted, already been monitoring the pharmaceutical industry for potential anticompetitive conduct. In 2012, for example, the Bureau began investigating Alcon Canada Inc. for abuse of dominance in an alleged product switching scheme. The Competition Bureau was concerned that Alcon may have intentionally disrupted the supply of Patanol, which is used to treat conjunctivitis, in order to force consumers to start using a newer Alcon drug that was protected under another patent. Ultimately, the Bureau dropped its inquiry in March of 2014, and no findings of wrongdoing were made. In a statement about the inquiry released after the investigation was dropped, the Bureau warned:

> Strategies that include supply disruptions for the purpose of forcibly switching demand, including terminating, repurchasing or recalling market supply or any other attempt to frustrate supply of a product under patent challenge by potential generic drug competitors, are likely to raise concerns of an abuse of dominance.[3]

Although anti-competitive settlement agreements seem to have been less prevalent in Canada than other jurisdictions, given the recent publication of the white paper, the Alcon investigation, and the Competition Bureau's "keen interest in patent litigation settlement agreements between brand and generic drug manufacturers", special consideration should be given to intellectual property litigation settlement agreements in the pharmaceutical sector to ensure they are compliant with Canadian competition law.

---

[2] This and the preceding paragraphs summarize the position advocated in the *Patent Litigation Settlement Agreements* white paper.

[3] Competition Bureau, Position Statement, "Competition Bureau Statement Regarding the Inquiry into Alleged Anti-Competitive Conduct by Alcon Canada Inc." (13 May 2014) online: Competition Bureau Media Centre <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03686.html>.

Toronto Law Journal

Have Bench, Will Travel...

The Ontario Court of Appeal affirms that Ontario judges can sit outside the province (in a manner of speaking) in certain narrowly prescribed circumstances.

Alex Zavaglia, Gowling Lafleur Henderson LLP

The prospect of an Ontario judge presiding over a motion in Alberta seems to run counter to our intuitive notions about jurisdiction. However, recent decisions of the Ontario Court of Appeal in *Parsons v. Ontario*, 2015 ONCA 158 ("***Parsons***") and the British Columbia Court of Appeal in *Endean v. British Columbia*, 2014 BCCA 61 ("***Endean***") have upended some well-entrenched assumptions around the territorial limits of judicial authority, at least in the context of pan-Canadian class actions.

In the 1990s, class action lawsuits emerged across Canada in the wake of a national tragedy involving the now infamous blood-tainting scandal. A global $1.1 billion settlement was reached between class counsel, the Red Cross Society, and the various federal, provincial and territorial governments across Canada. British Columbia and Quebec each assumed jurisdiction over class members in their respective provinces, while Ontario assumed jurisdiction over a national class comprised of victims from the remaining provinces and territories of Canada.

The Ontario, British Columbia and Quebec courts were asked to supervise the administration of this billion dollar settlement fund. This task has proven extremely complex due to a condition in the settlement agreement requiring the consensus of all three courts before any single order could be deemed effective. The result practically speaking was the merging of the three supervisory courts into a single administrative structure without any of the efficiencies that such a merging would necessitate.

And so in the years following the settlement the parties were forced to trudge from court to court to court in a process that would have made Sisyphus perk up from his own turmoil to give a sympathetic nod. For example, when the parties sought approval for an Administrator for the settlement fund, they successfully obtained approval in Ontario and then British Columbia. The parties then went to Quebec, where the court expressed concerns about the primary candidate and instead approved a different administrator. The parties were then forced to go back to Ontario and British Columbia and seek approval all over again. One can envision a scenario, where British Columbia chose a third administrator forcing the parties to go back to Quebec to start over again.

This is the backdrop for the events in 2012, when the parties first sought approval for a proposed protocol that would extend the deadline for claimants to file for benefits. Given past travails, class counsel proposed that all three supervisory judges sit together in a single

location (in this instance Alberta) for a single hearing with a view to increasing the chances that a consensus could be reached by the three supervisory judges without the need to argue the same motion three or more times. The provinces of Ontario, British Columbia and Quebec all objected, so class counsel brought motions before each of the supervisory judges - the central question being whether two or more of the judges would be permitted to sit outside their respective provinces to participate in a joint hearing.

At the motion level, all three supervisory judges agreed independently that a joint sitting outside their respective provinces was reasonable in the circumstances. In Ontario, former Chief Justice Winkler found that, in light of the procedural gaps left in the governing legislation regarding the efficient administration of a pan-Canadian class action settlement, the court's inherent jurisdiction afforded him the discretion to authorize the relief requested. Chief Justice Bauman in British Columbia and Chief Justice Rolland in Quebec agreed and authorized the joint sitting.

In British Columbia, the province successfully appealed Chief Justice Bauman's decision. In *Endean,* the BC Court of Appeal found that the court did not have jurisdiction to sit outside the territorial boundaries of the province. However, the Court went on to find that if the hearing occurring *outside* British Columbia was video-linked to a courtroom *inside* British Columbia, then that hearing would be deemed to take place *inside* of British Columbia. The notion that a video-linked hearing takes place *inside* a province when all the parties and judges are attending *outside* the province is a curious legal concept but practically speaking it meant that a joint sitting outside the province was permissible.

Last month, the Ontario Court of Appeal in *Parsons* weighed in with its view on whether an Ontario judge could sit outside Ontario for a joint hearing with judges from other provinces. The result - a complicated pastiche of overlapping concurrent and dissenting opinions that highlights just how difficult these issues are for the courts to navigate.

After disposing of a number of preliminary matters, the Court narrowed the scope of the appeal to whether Ontario judges had jurisdiction to sit outside Ontario for "paper" motions (i.e. no live witnesses) in the specific context of supervising settlements in a national class action. In a 2-1 decision, LaForme J.A. and Lauwers J.A. found the court did have the jurisdiction to sit outside the province to hear a joint motion in the narrowly prescribed circumstances described above. Juriansz J.A. dissented on this point.

The Court then considered whether the proposed joint hearing outside Ontario needed to be video-linked to an Ontario courtroom. Again, in a 2-1 decision (though with a different majority this time), the Court held that a video link was required. Juriansz J.A. ultimately agreed with the British Columbia Court of Appeal that while an Ontario judge did not have jurisdiction to sit outside the province, the hearing would be "deemed" to take place inside Ontario if a video link to an Ontario courtroom was in place. Lauwers J.A. concurred that a video-link was necessary, but not in support of the "deemed" location argument. Instead, Lauwers J.A. held that a video link was necessary to allow Ontario residents to attend the proceeding and thus satisfy the requirements of the open court principle. LaForme J.A.

dissented on this point finding that while a judge could order a video link, it was not necessary and should be left to the discretion of the supervisory judge in question.

So where does that leave us. For the moment at least, it appears that judges of the Ontario, British Columbia and Quebec courts are not restricted to sit within the physical boundaries of their respective provinces in appropriate circumstances, namely in the context of supervising pan-Canadian class action settlements. Whether this narrow scope broadens to encompass other circumstances with national dimensions remains to be seen. But it does bring into sharp relief how flexible our 19th century jurisdictional framework has proven to be in the face of 21st century demands.

Toronto Law Journal

Fault Exclusions in Course of Construction Policies: *Ledcor* and *Acciona Infrastructure*

Rory Barnable and Anthony H. Gatensby[1], McCague Borlack LLP

Course of construction policies ("COC"), also known as builders' risk or all-risks policies, underwrite specific risks that arise during the construction process. A significant amount of judicial ink continues to be spilled in Canada (and abroad) about the common exclusion clauses within such policies pertaining to faulty or improper workmanship, design, or materials.

This paper addresses some of the recent case law involving faulty design/faulty workmanship exclusions in the context of construction projects. We first comment on the current judicial approach to the more common exclusions and then address a new line of authority developing from the market's adoption of "LEG exclusions", which are described below.

Typical Canadian Policy Wording: Ledcor

The faulty design/faulty workmanship exclusion commonly found in Canadian insurance policies comes with a well-established line of cases. Most recently, a faulty workmanship exclusion was considered by the Court of Appeal of Alberta in its March 2015 decision of *Ledcor v. Northbridge*.[2]

Ledcor involved damage to a new building's windows, which was apparently caused during a "construction clean" nearing the end of the project. The trial court found that the exclusion did not extend to encapsulate the cost of replacing the windows, and so the replacement was a covered loss. The Court of Appeal of Alberta reversed the decision, and the cost of replacing the windows was excluded.

The exclusion at issue applied to:

> The cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage.[3]

The policy wording in *Ledcor*, and the ensuing judicial interpretation, highlights the importance of distinguishing between immediate damages, and consequential or "resultant" damages. The general notion is that while insurers are not willing to indemnify insureds for such things as the incompetence of their workers or for design flaw (such risk being properly within the contractor's commercial or entrepreneurial endeavour), insurers often accept

[1] Rory Barnable is a partner with McCague Borlack LLP. Anthony H. Gatensby is a student-at-law with McCague Borlack LLP (2014-15) and future clerk of the Saskatchewan Court of Appeal (2015-16).
[2] *Ledcor Construction Limited v Northbridge Indemnity Insurance Company*, 2015 ABCA 121.
[3] *Ledcor*, *supra* note 2 at para. 4.

(occasionally with judicial persuasion) that non-defective property which sustains damage as a result of defects can access coverage.[4]

While exclusions are traditionally interpreted narrowly,[5] this exclusion in this example has broad effect. Resultant damage has been interpreted to be damage to property *other than* to the product of the faulty or improper workmanship or design. As the Court of Appeal in *Ledcor* succinctly put it: “the exclusion is not limited to the cost of re-doing the faulty work, but also extends to the cost of repairing the thing actually being worked on”.[6] Further, distinguishing the faulty work from the resulting damages becomes: “ … a test of the connectedness between the work, the damage and the physical object or system being worked on”.[7]

Less familiar exclusions are arising with increasing frequency in Canadian COC policies. We refer specifically to the standard exclusions developed by the London Engineering Group, which has been widely used in the UK and more frequently in the US. These are known as “LEG 1/96”, “LEG 2/96”, and “LEG 3/06” - with LEG 2 being the most popular.[8] The LEG 2 exclusion is different in that it limits the exclusion of coverage to the cost that would have been incurred to rectify or replace the defect just prior to the damage occurring. In addition, we note that some parties are modifying and amending these LEG exclusions, which has much potential for further judicial direction (i.e. litigation) ahead.

The first time the standardized LEG wording was considered in Canada was in the Supreme Court of British Columbia’s 2014 decision in *Acciona v. Allianz*.[9] It is therefore important for industry stakeholders to be aware of the Court’s decision in *Acciona*, as it will have ramifications for insurers and insureds alike as use of this wording continues to increase.

Understanding the LEG Exclusions

As stated above, there are three standard LEG exclusions: LEG 1, which is the most expansive exclusion and therefore offers the narrowest coverage; LEG 3, which is the narrowest exclusion and therefore offers the widest coverage; and LEG 2, which is typically seen as a middle ground between LEG 1 and LEG 3. It states:

- **LEG 2/96**

  Model “Consequences” Defects Wording

  The Insurer(s) **shall not be liable** for

  All costs rendered necessary by defects of material workmanship design plan specification and should damage occur to any portion of the Insured

[4] Research Study Group 208B, *Construction Insurance* (London, UK: The Insurance Institute of London, 1999) at 158-65.
[5] *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada,* [2010] 2 SCR 245.
[6] *Ledcor*, *supra* note 2 at para. 46, citing several decisions, e.g. *Algonquin Power (Long Sault) Partnership v. Chubb Insurance Co. of Canada*, [2003] OTC 446, 50 CCLI (3d) 107; *Ontario Hydro v. Royal Insurance*, [1981] O.J. No. 215 (H Ct J); *British Columbia Rail Ltd. v. American Home Assurance Co.* (1991), 79 DLR (4th) 729 (BC CA).
[7] *Ledcor*, *supra* note 2 at para. 50.
[8] It is estimated that upwards of 85% of onshore construction projects in the UK are underwritten with a LEG2 exclusion. See Karina Whalley, *Faulty Towers* (Insider Quarterly), Spring 2015 - http://www.insiderquarterly.com/faulty-towers
[9] *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2014 BCSC 1568.

> Property containing any of the said defects **the cost of replacement or rectification which is hereby excluded** is that cost which **would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage**.
>
> For the purpose of this policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship design plan or specification.

The benefit of the wording in the LEG 2 exclusion, over the "resultant damage" wording referenced in *Ledcor*, is purported to be greater certainty and predictability. This point was highlighted by the defendant insurers in *Acciona*:

> The Insurers say that the LEG2/96 wording avoids the "metaphysical debates" that often arise in those cases about where defective property ends and other property, containing resultant damage, begins. **It does so by crystallizing the quantum of damage that is excluded at the moment just before any consequential damage resulting from defective work occurs**. The Insurers say further that the intent is made clear by distinguishing the costs of remedying any defects, which are excluded, from any actual damage.[10]

LEG 2 is considered: Acciona v. Allianz

In *Acciona*, ISL Health (Victoria) Partnership was contracted by the Vancouver Island Health Authority to finance, design, build, and operate a new 500-bed patient care facility at the Royal Jubilee Hospital in Victoria. ISL further contracted with Acciona Infrastructure Canada Inc. and Lark Projects (2004) Ltd. (who had formed a joint venture) as the design-build contractors.

The facility was to be an eight-storey building with four wings that were connected by a central core. Central to this case were the casted-on-site suspended concrete slabs. After several of the suspended concrete slabs were poured on site, the slabs were found to have over-deflected; which may be described as "rather than flattening out towards a level surface, the slabs were over deflecting resulting in a concave recession in the centre of the slab".[11] In addition to the over-deflection, the concrete slabs were cracking near the support walls and columns.

Repairing the slabs required them to be ground and scarified, resulting in approximately six months of repairs and cascading delays to the various subcontractors.

The COC insuring the construction of the facility was underwritten by four insurers. These insurers denied coverage for the expensive repairs to the slabs, citing the LEG 2 wording (included as clause 5(b)). The contractors then brought an action seeking a declaration that the insurers were to indemnify the plaintiffs for damages in the amount of $14,952,439.00.

---

[10] *Acciona*, *supra* note 9 at para. 170.
[11] *Acciona*, *supra* note 9 at para. 36.

The Court accepted that the root cause of the over-deflection and the cracking of the concrete slabs was caused by the way in which the formwork, shoring, and re-shoring was carried out by one of the subcontractors. These procedures did not fully consider the fact that the slabs were extremely thin, and too much weight had been placed on them during construction.

The Court considered the wording of the LEG 2 exclusion, and held that there are two components to the exclusion that must be read in conjunction with one another. Specifically, the exclusion first makes reference to all costs rendered necessary by defects of material workmanship, design, plan or specification. It then adds that should damage occur the excluded replacement or rectification costs are those costs that would have been incurred for remedying or rectifying said defect the moment before the damage occurs.

The analysis first identified the damage that was caused, and then identified the defect that caused the damage. The Court could then look to what replacement or rectification, if in the hands of the insured, would have avoided the damage. On that basis, Justice Skolrood held that the excluded costs were those of "implementing proper formwork and shoring/reshoring procedures".[12] No evidence was before the Court on this point, "except to say that they would have been minimal".[13]

Justice Skolrood's analysis is consistent with the wording of the exclusion. However, writers reviewing the case have suggested that the decision errs in its application of the LEG 2 exclusion, with the result being that it improperly broadens the scope of coverage underwritten by the insurers.

It is important to restate that within the LEG 2 exclusion, "the excluded costs crystallize immediately prior to the damage occurring and are thus limited to those costs that would have prevented the damage from happening".[14] However, Justice Skolrood qualified this comment by stating that "the exclusion does not extend to exclude the cost of rectifying or replacing the damaged property itself".[15] To support this proposition, Justice Skolrood referred to a paper issued by the International Association of Engineering Insurers, which states:

> LEG2 … does not specifically exclude damage to the defective property itself. The approach is to exclude the cost that would have been incurred to rectify the defect if that effort had been put in hand immediately prior to the damage. The advantage of this approach is that it avoids a need to distinguish between the "defective property" and "other property" - a consideration which … can become problematic.[16]

The IAEI highlighted the fact that the analytical approach to determining where coverage begins and ends should not involve a determination of what "defective" property is, versus what "other" property is.

---

[12] *Acciona*, *supra* note 9 at para. 223.
[13] *Acciona*, *supra* note 9 at para. 224.
[14] *Acciona*, *supra* note 9 at para. 221.
[15] *Acciona*, *supra* note 9 at para. 221.
[16] *Acciona*, *supra* note 9 at para. 222, referring to International Association of Engineering Insurers, "Design Exclusion Wordings (DE 1995/LEG 1996) and Physical Lesson Damage" (IMIA - WGP 44(05)).

The conclusion reached by the Court was as follows:

> Applying clause 5(b), the excluded costs are those that would have remedied or rectified the defect before the cracking and over deflections occurred i.e the costs of implementing proper formwork and shoring/reshoring procedures or incorporating additional camber into the formwork.[17]

Commentators have criticized the Court's analysis for excluding only the cost of avoiding the defect to begin with. According to some writers, the result in *Acciona* ought to have been very different. They note that once the defect had occurred, the only way to prevent the damage would have been to replace the slabs entirely. Therefore, the entirety of this cost ought to have fallen within the exclusion from the outset.

Conclusion

Acciona has been appealed to the Court of Appeal for British Columbia. That Court recently denied the insurers' request to have a stay of execution implemented pending the appeal of the decision.[18] At the time of writing it remains unknown to the authors whether the *Ledcor* decision is also under appeal. The impact of the decision by the Court of Appeal for British Columbia will have ramifications for the construction industry and perhaps also whether the language of the LEG exclusion continues to gain traction in the Canadian underwriting industry for construction policies. The outcome of any appeal will be keenly anticipated.

[17] *Acciona*, *supra* note 9 at para. 223.
[18] 2015 BCCA 6.

Toronto Law Journal

Case Commentary: *Spence v. BMO Trust Company* [2015 ONSC 615 (Ont. S.C.J.)]

Andrea Buncic, Hull & Hull LLP

The recent decision of *Spence v. BMO Trust Company* raised the issue of whether a Will should be held as unenforceable for public policy reasons due to the testator's motivations in disinheriting his daughter, Verolin Spence, and her 11-year old son.

The deceased, Rector Emanuel Spence, executed a Last Will and Testament on May 12, 2010. The Will provided:

> *I specifically bequeath nothing to my daughter, Verolin Spence, as she has had no communication with me for several years and has shown no interest in me as a father.*

The Will appointed BMO Trust Company as the executor and distributed the deceased's entire Estate to his other daughter, Donna Spence, and her two minor children. Verolin brought an Application to determine whether the Will was void.

In accepting a novel point, the Hon. Justice Gilmore found that the Will was indeed void for public policy reasons on the grounds that it discriminated between the deceased's children based on race. This was held despite that no words contained in the Will were explicitly racist.

Facts

It is important to note at the outset that the facts in this case were established only by the affidavit evidence put forward by Verolin: her own affidavit and a corroborating affidavit sworn by the deceased's closest friend at the time of his death, Imogene Parchment. Though properly served, Donna did not participate in the litigation and did not contest the facts sworn to by Verolin or Ms. Parchment. While BMO propounded the deceased's Will, it only submitted a factum and a six-paragraph affidavit, and it did not conduct any cross-examinations. The Office of the Children's Lawyer was also properly served but did not appear at the hearing due to concerns over increased costs and a duplication of efforts. That said, the facts in this case were properly found based on the evidence before the Court.

The deceased separated from the mother of Verolin and Donna in the United Kingdom when the girls were young. From that time on, Verolin resided with the deceased, while Donna resided with their mother. The two girls had no further communications with one another. After emigrating from the UK to Canada in 1984, Verolin lived with the deceased and/or was supported by the deceased for over a decade. During this period, and until 2002, Verolin and the deceased had an excellent relationship. In contrast, the deceased had little or no relationship with Donna, who still resides in the UK today.

In 2002, however, Verolin's relationship with her father came to a sudden end when she informed him of her pregnancy with a white man's baby. Upon receiving the news, the deceased, a black man, stated that he was ashamed of Verolin and cut all communications with her until he passed away.

Donna and the deceased did not have any semblance of a relationship at the date of the deceased's death. Regardless, Donna and her sons were not disinherited under the Will, while Verolin and her son were. The uncontested evidence established that the reason for Verolin's disinheritance was that the father of Verolin's son was white. In contrast, Donna and her two sons were not disinherited because the father of her sons was black. Based on these facts, Justice Gilmore held that the Will was void for public policy reasons on the grounds of racism and discrimination. Accordingly, the Estate passed on intestacy such that it is divided between Verolin and Donna equally.

Issues and Arguments

A number of controversial propositions of law were accepted in this case.

Admissibility of Direct Extrinsic Evidence

First, despite being held as void for public policy reasons on grounds of racism and discrimination, the Will itself does not contain any racist or discriminatory provisions on its face. Rather, the Will contains a non-offensive and unambiguous provision stating that Verolin is disinherited as result of an estranged father-daughter relationship.

Could evidence be adduced as to the testator's discriminatory testamentary intent and motivation? While the affidavits in this case were put forward for this purpose, the principles set out in *Rondel v. Robinson*, 2011 ONCA 493 (Ont. C.A.) mandate that such evidence should be excluded. The Court of Appeal in *Rondel v. Robinson* held that a testator's ultimate testamentary intentions must be determined on the basis of the words in the Will rather than direct extrinsic evidence of intent. Such evidence (for example, a lawyer's notes of the testator's instructions) is only admissible on an exceptional basis where the provisions of the Will must be interpreted to cure an ambiguity. The Court explained in *Rondel v. Robinson*, that to hold otherwise would create uncertainty and encourage estate litigation as disappointed beneficiaries could easily challenge a Will based on their evidence that the testator had intentions other than those set out in the instrument itself.

In *Spence v. BMO Trust Company*, it does not appear that this issue was considered, as the affidavits of Verolin and Ms. Parchment were found to be admissible and used as extrinsic evidence of the deceased's motivations and intentions. Consequently, Verolin had the opportunity to assert her public policy argument.

The Public Policy Argument

The decision of a Court to hold the provisions of a Will or a trust to be void or unenforceable on grounds of public policy is exceptional and usually very restricted.

The reason for this restriction is set out in the leading public policy case considered by the Court of Appeal, *Canada Trust Co. v. Ontario Human Rights Commission; Re Leonard Foundation Trust (1990)*,1990 CanLII 6849 (Ont. C.A.). In this case, it was

determined that discriminatory provisions of a charitable trust, which required trust scholarship recipients to be white, Christian, and of British nationality or parentage, were void on public policy grounds. The Court in *Re Leonard* noted that, while the freedom of an owner of property to dispose of his or her property as he or she chooses is an important social interest that has long been recognized in our society and is firmly rooted in the law, it is limited by public-policy considerations.

The analysis in *Re Leonard* was centered on the patently discriminatory provisions in the trust settlement. Through the words of the trust settlement, the Court held that it was able to determine that the paramount charitable intention of the settlor was to promote education and leadership. Consequently, the Court found that while the discriminatory trust provisions were unenforceable, the charitable trust as a whole did not fail.

A case discussed in the *Spence v. BMO Trust Company* judgment which held a provision of a Will void though it did not explicitly contain language offensive to public policy is *McCorkill v. McCorkill Estate*, 2014 NBBR 148 (N.B.Q.B.). In *McCorkill*, the testator gifted his entire estate to National Alliance, a Neo-Nazi white supremacist organization which promoted violence and the dissemination of hate propaganda. The Court in *McCorkill* held that this gift was void for public policy reasons despite the lack of explicitly racist or discriminatory language in the Will. Justice Gilmore accepted *McCorkill* as providing the Court with jurisdiction to look beyond the words of the deceased's Will to focus instead on the evidence of his bigoted motivation. Justice Gilmore held:

> *While it is true that the relevant paragraph in the deceased's Will does not, on its face, offend public policy I find that like* McCorkill*, the matter bears further scrutiny.*

The facts and analysis of the *McCorkill* case are very distinct from *Spence v. BMO Trust Company*. In *McCorkill*, the Court found that the nature of the beneficiary-organization was contrary to public policy since it would undoubtedly use the funds for violent and hateful purposes; as such, it was "incapable" of receiving the gift. Consequently, the gift was held void and the estate passed on intestacy. In contrast to *McCorkill*, BMO asserted that the residuary gift to Donna and her children in the present case poses no threat of harm to society.

Finding and Impact

Spence v. BMO Trust Company goes well beyond the use of direct evidence of testamentary intention approved by the Court of Appeal in *Rondel v. Robinson*. Instead, Justice Gilmore came to her decision by primarily focusing on the deceased's underlying motivation for disinheriting Verolin, adduced through extrinsic evidence, and not the explicit language contained in the Will. Justice Gilmore held:

> *Were it not for the unchallenged evidence of Ms. Parchment and Verolin, the court would have no alternative but to go no further than the wording in the Will. However, it is clear and uncontradicted, in my view, that the reason for disinheriting Verolin, as articulated by the deceased, was one based on a clearly stated racist principle.*

Protecting the interests of society and enforcing public policy is an important role of the Court. The extension of this role to judging the motivations of a testator using evidence that goes beyond the written words in the Will, however, has serious implications for testamentary freedom. Where would the Court's discretion to intervene in this regard end? Moreover, such a result arguably opens the doors to litigation a great deal more for unsatisfied beneficiaries.

For these reasons, it is not entirely unexpected that this judgment has already been appealed. It will be interesting to see how the appellate Court treats this case and the novel points accepted by the trial judge.