COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	1701-0221-AC
TRIAL COURT FILE NUMBER:	1701 02184
REGISTRY OFFICE:	CALGARY
PLAINTIFFS:	THE BANK OF NOVA SCOTIA and ALBERTA TREASURY BRANCHES
STATUS ON APPEAL:	RESPONDENTS
DEFENDANTS:	VIRGINIA HILLS OIL CORP. and DOLOMITE ENERGY INC.
	IN THE MATTER OF THE RECEIVERSHIP OF VIRGINIA HILLS OIL CORP. and DOLOMITE ENERGY INC.
STATUS ON APPEAL:	RESPONDENT
APPLICANT:	ALVAREZ & MARSAL CANADA INC. in its capacity as Court-appointed Receiver and Manager of the assets, undertakings and property of VIRGINIA HILLS OIL CORP. and DOLOMITE ENERGY INC.
STATUS ON APPEAL:	RESPONDENT
INTERESTED/AFFECTED PARTY:	NORTHERN SUNRISE COUNTY
STATUS ON APPEAL:	APPELLANT
INTERESTED/AFFECTED PARTIES:	MUNICIPAL DISTRICT OF OPPORTUNITY NO. 17 and LAMONT COUNTY
STATUS ON APPEAL:	APPELLANTS
DOCUMENT:	**MEMORANDUM OF ARGUMENT OF THE RESPONDENT ALVAREZ & MARSAL CANADA INC.**

Registrar's Stamp

FILED

JAN 22 2018

COURT OF APPEAL
CALGARY

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INTRODUCTION

1. Alvarez & Marsal Canada Inc. is the Court-appointed receiver and manager (the "**Receiver**") of the assets, undertakings and property of the debtors, Virginia Hills Oil Corp. and Dolomite Energy Inc. (together, the "**Debtors**"), and a respondent in appeal 1701-0221-AC (the "**Appeal**"). This memorandum of argument is submitted in support of the Receiver's Application to admit new evidence in the Appeal, namely the Fourth Report of the Receiver, dated January 22, 2018 (the "**Fourth Report**").

2. The Fourth Report outlines the steps that the Receiver has taken in the administration of the estate of the Debtors since the June 20, 2017 Order of Justice Yamauchi that is the subject of the Appeal. The Fourth Report outlines that the Receiver has distributed the funds that had been held back for the claims that are subject of the Appeal and that the Receiver continues to retain funds to allow it to finalize the administration of the estate and pay the costs incurred by the Receiver under the Receiver's Charge.

WHO SHOULD HEAR THIS APPLICATION AND WHEN SHOULD IT BE HEARD

3. The Receiver submits that this Application should heard by the panel for the Appeal and on the same day as the Appeal. The panel has the advantage of reviewing the entire Appeal record and can therefore assess whether the Fourth Report is probative in the context of the arguments and evidence on the record.

ARGUMENT FOR ADMISSION OF FOURTH REPORT

4. The facts outlined in the Fourth Report are paramount to the issue of whether the Appeal is moot, which is one of the arguments that will be raised by the Receiver in its Respondent's factum. In the Receiver's view, these facts are conclusive to this issue such that admission of the Fourth Report as new evidence in the Appeal is warranted.

5. The test to determine whether fresh evidence should be admitted on appeal is set out in this Court's decision in *Gorrie v Nielsen*. The test is whether:

   a. the evidence could not have been obtained for use at trial even with the exercise of reasonable diligence; and

   b. the evidence, if introduced, would be practically conclusive.

   Gorrie v Nielsen (No.1), 1988 ABCA 317 at para 3, 92 AR 164 (CA), [*Gorrie v Nielsen*] [**Authorities. Tab 1**]

6. In this instance, the Fourth Report could not have been obtained or admitted for use at the Court of Queen's Bench because the evidence therein relates to what has occurred since the Order of Justice Yamauchi. Therefore, part one of the test in *Gorrie v Nielsen* is satisfied.

7. In terms of the second part of the test, the Receiver submits that the Fourth Report is practically conclusive to the issue of whether the Appeal is moot. Specifically, this Court and the British Columbia Court of Appeal have held that a distribution being made after it has been ordered at first instance can render an appeal of the decision moot.

> *Lucid RV Parks Inc v Lucid Capital Fort McMurray Inc*, 2012 ABCA 317 at paras 5 and 6 [**Authorities, Tab 2**].
>
> *Galcor Hotel Managers Ltd v Imperial Financial Services Ltd*, 1993 CarswellBC 172 at paras 5 and 8, 81 BCLR (2d) 142 **[Authorities, Tab 3]**.

8. Generally, the "practically conclusive" part of the test in *Gorrie v Nielsen* relates to whether the evidence is conclusive as to the reversal of the original result at first instance. In the current instance the circumstances are slightly different in that the evidence is necessary to support an argument of mootness. However, this Court recognized in *Public School Boards* that the two part test in *Gorrie v Nielsen* is nothing more than a general rule and that on occasion this Court has seen fit to adopt a more flexible approach to the admission of fresh evidence, even if that evidence is not practically conclusive.

> *Public School Boards' Association of Alberta v Alberta (AG)*, 1998 ABCA 94 at para 34, 216 AR 201 [*Public School Boards*] [**Authorities. Tab 4**]

9. On this basis, the Receiver submits that even if this Court were to find that the evidence provided in the Fourth Report is not practically conclusive to reversing the Order of Justice Yamauchi, it should still be admitted because of its conclusiveness to the issue of whether the Appeal is moot.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on January 22, 2018 at Calgary, Alberta.

TORYS LLP

Per: Kyle Kashuba
counsel for Alvarez & Marsal Canada Inc. in its capacity as trustee in bankruptcy and Court-appointed receiver and manager of the assets, undertakings and property of Virginia Hills Oil Corp. and Dolomite Energy Inc.

TABLE OF AUTHORITIES

1. *Gorrie v Nielsen (No.1)* (1988), 1988 ABCA 317, 92 AR 164 (CA)

2. *Lucid RV Parks Inc v Lucid Capital Fort McMurray Inc*, 2012 ABCA 317

3. *Galcor Hotel Managers Ltd v Imperial Financial Services Ltd*, 1993 CarswellBC 172, 81 BCLR (2d) 142

4. *Public School Boards' Association of Alberta v Alberta (AG)*, 1998 ABCA 94, 216 AR 201

In the Court of Appeal of Alberta

Citation: Gorrie v. Nielsen, 1988 ABCA 317

Date: 19881005
Docket: 19160
Registry: Calgary

Between:

Joel Gorrie and Gail Gorrie

Plaintiffs
(Appellants/Respondents by Cross-Appeal)

- and -

Dennis Nielsen

Defendant
(Respondent/Appellant by Cross-Appeal)

The Court:

The Honourable Mr. Justice Harradence
The Honourable Mr. Justice Stratton
The Honourable Mr. Justice Virtue

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

Appellants/Respondents by Cross-Appeal, Appellants represented themselves

Ms. Gwen Randall, Q.C., for the Defendant (Respondent/Appellant by Cross-Appeal)

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

STRATTON, J.A. (for the Court):

[1] Prior to the hearing of this appeal, the Appellant argued before us three preliminary Notices of Motion. The first one is dated June 3, 1988 and it is that one with which I will now deal. That motion is under **Rule 518** of the **Rules of Court** and relates to two sub-sections of

that **Rule,** namely the sub-section allowing this Court to direct an amendment of the proceedings – in this case, the amendment of the Statement of Claim: and secondly, the request that this Court allow certain new evidence which I will outline.

[2] The Notice of Motion specifies three items which the Appellant wishes this Court to allow him to introduce at this stage as new evidence. The three items are as follows: firstly, a copy of a memorandum titled “Land Development Policy” dated August 19, 1985; secondly, a copy of an appraisal report prepared by Arnold B. Smith dated December 4, 1980; and thirdly, evidence in respect to additional legal costs allegedly incurred by the Appellants as a result of the negligence of the Respondent’s solicitor in the amount of $26,153.26.

[3] The test that should be applied to persuade an appeal court to allow new evidence has been well established by the cases. The tests are set out very well in Schiff in **Evidence in the Litigation Process** (2d) and I quote as follows:

> “According to the standard approved by the Supreme Court of Canada for civil cases, absent very unusual circumstances, Canadian appellate courts will grant the applicant’s request to present new evidence only if two conditions are satisfied: first, the applicant could not have obtained the evidence by reasonable diligence before the trial and, second, the evidence is of such nature that, if introduced before the appellate court and at a new trial, it would be practically conclusive to cause reversal of the original result.”

[4] It should be noted that the trial of this matter was held on March 11, 1987.

[5] We are all agreed that it is clear that the first two items of so-called new evidence, as set out in the Notice of Motion of the Appellant, could have been obtained before the trial by the exercise of reasonable diligence, thus failing to meet the first test.

[6] The second test with respect to those first two items also, in our view, has not been met - namely, even if that evidence were allowed, neither item would be conclusive nor “practically conclusive” within the wording of the second test to which I have referred.

[7] The third item relates to legal fees in the amount of $26,153.26. These are broken down in the material filed by this Appellant in support of the June 3 Notice of Motion. The accounts covering these fees were all dated prior to the trial of the action. Thus, with respect to this third item of allegedly new evidence, the first test I mentioned earlier has not been met. That evidence surely could have been available and presented with the trial by the exercise of reasonable diligence and it was not. This being so, it would follow in our view that we should not allow the Statement of Claim to be amended, which is the second feature of the Appellants’ application with respect to those legal fees.

[8] One further comment - this relates to the application of the Appellants to introduce the Arnold B. Smith appraisal of November of 1980. Both in the Notice of Motion of the Appellants and the Appellants' affidavit in support of that motion, it was strongly suggested that the learned Trial Judge relied on evidence not before him in raising a question identifying the Smith appraisal as being dated in November of 1980. In particular, the Appellants have referred to a question raised by the Trial Judge and set forth on p. 194 of the appeal book wherein he asked the following question of the witness Mr. Smith:

"Thank you. Were you asked to do an appraisal of this property in November of 1980?"

We are satisfied from our review of the evidence before the Trial Judge and in particular the question and answer set forth on p. 191 of the appeal book, being lines 41, 42 and 43, that there was ample evidence from which the Trial Judge could base his question and in particular his reference to the November, 1980 appraisal report.

[9] It must also be said that there was no evidence whatsoever to support the allegation that the Trial Judge relied on anything outside of that which was presented before him in arriving at the conclusions he did and in particular in asking the question that was brought to our attention by the Appellants in this application.

[10] Accordingly, we all agree that the application set forth in the June 3 Notice of Motion must be dismissed.

HARRADENCE, J.A.:

[11] We do not find it necessary to call upon you, Miss Randall, with respect to the Notice of Motion dated September 28, 1988 and the Affidavit in support in which two documents are involved. The master sale agreement and the management agreement are sought to be introduced as fresh evidence.

[12] On all of the material before us, and after listening carefully to the submissions of the Appellants, we are of the view that it does not meet either the test of due diligence or that it would be conclusive as to the matter of an increase in damages.

[13] Accordingly, the application for the introduction of those two documents is dismissed.

[14] The Appellants in their Notice of Motion dated September 30, 1988 are seeking to adduce as fresh evidence a public notice with respect to the transfer of shares from the Gorries to Pelorus Holdings. Mr. Gorrie has conceded that the relevance of this evidence was

dependent upon a favourable decision with respect to the application to adduce the so called "final version" of the master sale agreement. Since we have dismissed the motion to adduce that agreement as fresh evidence, Mr. Gorrie felt it appropriate to withdraw this motion. We agree and therefore this motion stands dismissed.

Variation of Judgment:

HARRADENCE, J.A.:

[15] Mr. Gorrie has brought it to our attention that their Notice of Motion dated September 30, 1988 also includes an application to amend their Statement of Claim. Since our earlier judgment dismissed the Notice of Motion without addressing that application, it will be vacated and the following judgment rendered in its place.

[16] The application to adduce as new evidence the public notice stands dismissed for the reasons given earlier. With respect to the application pursuant to **Rule 518(a)** to amend the Appellants' Statement of Claim, there are four categories of additional legal fees which the Gorries wish to add. The first of these amounts to $2,290.49 paid to the Respondent for his services in the sale of Meridian to Pelorus. These accounts dated August 31, 1981 and December 2, 1981 were paid by the Gorries prior to the trial of this action. The claim could have been made then and the evidence was available at that time. We are of the view that the application with respect to this amount should therefore be dismissed. This same reasoning applies to the second category of accounts from Mr. Klym dated May 13, 1986 and June 27, 1986 in the amount of $2,530.29. Therefore the application with respect to these fees is also dismissed.

[17] The third category involves $8,757.80 paid to Mr. Hess in the suit against the Respondent. These fees were the subject of a party and party costs determination made by the Trial Judge in this action and this Court cannot now allow an amendment to the Statement of Claim for solicitor and client costs. The application with respect to these fees is also dismissed.

[18] Finally, with respect to the fees of Mr. Gilbourne in the amount of $10,727.60 for his services in respect of this appeal, we have decided to reserve our judgment until after the hearing of the appeal.

In the Court of Appeal of Alberta

Citation: Lucid RV Parks Inc. v Lucid Capital Fort McMurray Inc., 2012 ABCA 317

Date: 20121102
Docket: 1203-0116-AC
Registry: Edmonton

Between:

Lucid RV Parks Inc.

Appellant
(Applicant)

- and -

Grant Thornton Alger Inc., Trustee In Bankruptcy of Lucid Capital Fort McMurray Inc.

Respondent
(Defendant)

- and -

Dale Lien Professional Corporation, Richard Mykituk, Barry Deveney, Susan Deveney, Jennifer Lynn Zilliox, Ken Walter Zilliox, Joanne N. Graham, Randy Molofy, Janice Nichols, Anders Molofy, Brock Molofy, Samantha Molofy, Vince Millan, Jeffrey James Larsen, Christine Dawn Larsen, 948521 Alberta Ltd., 1018715 Alberta Ltd. O/A Jenah Investments, Sheryl L. Golden, Ranjit Chahal, Jason Nelson, Crystal Nelson, Richard Ernest Phillips, Barbara Marie Phillips, Ernie Philliips, John Stephen Phillips, Mary Ann Phillips, John J. Keating, Mary Louise Keating, 1200909 Alberta Ltd., Judith Anne Bryan, Samina Ali, Tim Graham, Katrin Anne Lusignan, Denise A. Soroka, Knowledge Gate Consulting Inc., Adnan Maarouf, Khaled Maarouf, Nasrine El Hajj, Diane Stewart, Lou Meunier

Not Parties to the Appeal
(Plaintiffs)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice J.D. Bruce McDonald

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Mr. Justice R.P. Belzil
Dated the 25th day of April, 2012
Filed on the 30th day of April, 2012
(Docket: 1103-16813)

Memorandum of Judgment
Delivered from the Bench

Paperny J.A. (for the Court):

[1] This Part J appeal arises out of ongoing bankruptcy proceedings and applications under the *Business Corporations Act*, RSA 2000, c B-9. The proceedings have been brought by two groups of investors in Lucid Capital Fort McMurray Inc. The funds raised from those investors were loaned by Lucid Capital to a related company, Lucid Commercial Fort McMurray Inc., for the purchase of lands, secured by a mortgage. Lucid Commercial entered into a 10-year lease agreement with the appellant, Lucid RV Parks Inc., for the operation of an RV park on the lands. The respondent says that the investors were unaware of the lease agreement until recently, and further that the lease is contrary to the offering memorandum of Lucid Capital, which indicated that Lucid Commercial would receive directly all revenues from the rental of RV lots on the lands.

[2] In March 2012 a group of investors obtained default judgment against Lucid Capital, and also commenced proceedings under the *Business Corporations Act* to allow for the appointment of a receiver to receive all funds payable to Lucid Commercial, including rents from the lands. An order made on March 27, 2012 directed that all such rents for the month of April 2012 be paid into Court. The investors subsequently learned of the lease agreement between Lucid Commercial and the appellant Lucid RV, and on April 5, 2012, the March 27 Order was amended to require any person, including Lucid RV, who was in receipt of the April rents to pay them into Court. Those orders were not appealed.

[3] On April 3, 2012 another group of investors brought an application for a bankruptcy order for Lucid Capital. The application was granted and the respondent Trustee was appointed on April 25, 2012. At the same time, the case management judge made a further order directing that all persons (including the appellant) in receipt of rents for May 2012 pay those funds into Court (the April 25 Order). This is the order under appeal.

[4] After the appeal was filed, on May 31, 2012, the case management judge ordered that all of the funds paid into Court as of that date be released to the Trustee and that any future rents be paid directly to the Trustee. The May 31 Order also provides for the Trustee to pay the current expenses of operating the RV park, including salary and other expenses of the appellant, incurred in May 2012 and in the future. Any disputes between the Trustee and the appellant over the appropriateness of expenses are to be resolved by further application to the Court. The May 31 Order was not appealed.

[5] The appellant's appeal relates only to the April 25 Order, which required the payment into Court of the May 2012 rents. Pursuant to the subsequent May 31 Order, which has not been appealed, those funds have been released to the Trustee and used to pay expenses submitted by Lucid RV as well as the invoices of third party service providers. The Trustee says that this appeal is, therefore, moot.

[6] Insofar as the monies have already been disbursed, we agree. To the extent that there are additional funds remaining the order anticipates that it will be determined in the Court below.

[7] Accordingly, we are satisfied that the order was properly granted and the appeal is therefore dismissed.

Appeal heard on October 1, 2012

Memorandum filed at Edmonton, Alberta
this 2nd day of November, 2012

Paperny J.A.

Appearances:

N.D. Anderson and M. Morin
for the Appellant

D.S. Nishimura and C.J. Hunter
for the Respondent

CA014713 and CA014714
Vancouver Registry

Court of Appeal for British Columbia

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Taylor — May 31, 1993
The Honourable Mr. Justice Gibbs
The Honourable Madam Justice Rowles — Vancouver, B.C.

BETWEEN: **CA014713**

GALCOR HOTEL MANAGERS LTD., 130596 CANADA LIMITED

PETITIONERS
(RESPONDENTS)

AND:

IMPERIAL FINANCIAL SERVICES LTD., and others

RESPONDENTS
(RESPONDENTS)

AND:

PLAINTIFFS IN BRITISH COLUMBIA SUPREME COURT, VANCOUVER REGISTRY, ACTION NO. C912382

RESPONDENTS
(APPELLANTS)

BETWEEN: **CA014714**

RICHARD J. WATSON, and others

PETITIONERS
(APPELLANTS)

AND:

IMPERIAL FINANCIAL SERVICES LTD., and others

DEFENDANTS
(RESPONDENTS)

AND:

CERTAIN FULLY PAID LIMITED PARTNERS OF THE 845 BURRARD STREET HOTEL LIMITED PARTNERSHIP

RESPONDENTS
(RESPONDENTS)

J.F. Dixon and A.J. Perry	appearing for the Appellants
G. Phillips and J. McLean	appearing for the Respondent
A. Bensler W.S. Berardino, Q.C.	appearing for the Respondents, Imperial Finance

1 **GIBBS, J.A.:** This is an application for an order dismissing an appeal without hearing it on the ground that it is moot. Expressed in the words in which it is expressed in the case authorities, it is a motion to quash an appeal argued to be devoid of merit or substance: See ***Re Bank of Montreal and Singh*** (1979) 109 D.L.R. (3d) 117 (B.C.C.A.), and ***National Life Insurance Company v. McCowbrey*** (1926) 2 D.L.R. 550 (S.C.C.).

2 The appeal is against an order made by Mr. Justice Paris on October 18, 1991 in these words:

> THIS COURT ORDERS and declares that Galcor Hotel Manager Ltd. ("Galcor") be and is hereby authorized to distribute to the Limited Partners of the 845 Burrard Street Hotel Limited Partnership (the "Partnership") all or substantially all of the Partnership's assets notwithstanding the outstanding claim of the Plaintiffs in Action No. C912382 against, *inter alia*, Galcor and the Partnership."

3 The affidavit in support of the motion to quash narrates these events which occurred after Mr. Justice Paris made the order:

> That there was a subsequent application by the Appellants for a stay of proceedings and that application was dismissed by Macdonald J.A. on December 11, 1991.
>
> That the distribution of monies that was the subject matter of the application before Mr. Justice Paris has occurred.
>
> That a substantial portion of that distribution was paid to 130596 Canada Ltd., the General Partner of the 855 Partnerships.
>
> That the Appellants sought an injunction to restrain the distribution of monies by the 855 Partnerships which was refused by Oppal J. Leave to appeal that decision was refused by Wallace J.A. An application to review Wallace J.A.'s decision was dismissed by the Chief Justice and Taggart and Hutcheon J.J.A."

4 It is clear from that recitation that the authority granted by Mr. Justice Paris has been fully exercised, and that the efforts of the appellants to prevent the exercise of the authority have failed.

5 The relief requested by the appellants on the appeal is that "the Order of the Honourable Mr. Justice Paris pronounced October 18, 1991 be vacated." Given that the order has been fully performed, the obvious question is: what merit or substance is there in the appeal and what benefit will accrue to the appellants if they are successful? In my opinion there is no merit, no substance, and no prospective benefit. The appeal is moot.

6 However, relying upon ***Borowski v. Attorney General of Canada*** (1989) 57 D.L.R. (4th) 231 (S.C.C.), and particularly the discussion of criteria starting at p.243, counsel for the appellants submitted that even though moot his clients would obtain a collateral advantage if the appeal were heard and allowed. The advantage was said to be a foundation upon which the plaintiffs could then claim, in their ongoing action, a breach of fiduciary duty in distributing the assets on the part, not only of Galcor, but also of Deloitte & Touche Inc., court appointed receiver and trustee of the shares of Galcor.

7 I am unable to detect any merit in that proposition. I am satisfied that the complete answer would be that what was done was with the authority and imprimatur of the court. That answer must negate any grounds for an allegation of breach of fiduciary duty whether the order of Mr. Justice Paris was vacated or left in place, and even assuming there is a fiduciary relationship in these circumstances.

8 None of the other criteria in ***Borowski*** are of assistance to the appellants, although one, the rationing of scarce judicial resources, is of importance and concern to the court. This case is set for two days. It would not, in my opinion, be a prudent use of two days of judicial time to hear this moot case. There is no issue of public importance; the order has no precedent value in

respect of other cases; and, as I view the matter, no realistic collateral benefit can accrue to the appellants.

9 For these reasons I would allow the application and dismiss the appeal.

TAYLOR, J.A.: I agree.

ROWLES, J.A.: I agree.

TAYLOR, J.A.: The preliminary objection taken by the respondents, Galcor Hotel Management Limited and others, is upheld and the appeal is dismissed as moot, thank you.

"The Honourable Mr. Justice Gibbs"

Public School Boards' Association of Alberta v. Alberta (A.G.), 1998 ABCA 94

Date: 19980331
Docket Nos: 9603-0013-AC & 9603-0441-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MADAM JUSTICE PICARD
THE HONOURABLE MR. JUSTICE BERGER

IN THE MATTER OF THE SCHOOL AMENDMENT ACT, 1994 BEING BILL 19;
AND IN THE MATTER OF THE SCHOOL ACT, S.A. 1988, c. S-3.1, AS AMENDED;

BETWEEN:

THE PUBLIC SCHOOL BOARDS' ASSOCIATION OF ALBERTA,
THE BOARD OF TRUSTEES OF THE EDMONTON SCHOOL DISTRICT NO. 7
AND CATHRYN STARING PARRISH

Appellants (Respondents On Cross-Appeal) (Plaintiffs)

- and -

THE ATTORNEY GENERAL OF ALBERTA, THE GOVERNMENT OF ALBERTA
and THE MINISTER OF EDUCATION

Respondents (Cross-Appellants) (Defendants)

AND BETWEEN:

PUBLIC SCHOOL BOARDS' ASSOCIATION OF ALBERTA,

Appellants (Respondents On Cross-Appeal) (Plaintiffs)

- and -

ALBERTA SCHOOL BOARDS' ASSOCIATION OF ALBERTA,
THE BOARD OF TRUSTEES OF CALGARY BOARD OF EDUCATION NO. 19
MARGARET WARD LOUNDS.

Cross-Appellants (Plaintiffs)

- and -

ALBERTA CATHOLIC SCHOOL TRUSTEES' ASSOCIATION, THE BOARD OF TRUSTEES OF LETHBRIDGE ROMAN CATHOLIC SEPARATE SCHOOL DISTRICT NO. 9 and DWAYNE BERLANDO,

Respondents (Plaintiffs)

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA,
and THE MINISTER OF EDUCATION

Cross-Appellants (Respondents) (Defendants)

APPEAL FROM THE HONOURABLE MR. JUSTICE V.W. SMITH

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE RUSSELL
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE PICARD
REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE BERGER
CONCURRING IN THE RESULT

COUNSEL:

R.D. Gibson, Esq.
Ms. R. Khullar
for the Appellants (Respondents On Cross-Appeal)(Plaintiffs)

J.E. Redmond, Q.C.
K.P. Feehan, Esq.
for the Respondents (Plaintiffs)

C.S. Struthers, Esq.
for the Cross-Appellants (Plaintiffs)

R.C. Maybank, Esq.
Ms. M.A. Unsworth
for the Cross-Appellants (Respondents) (Defendants)

[Note: An Erratum was filed on May 27 and 29, 1998; the corrections have been made to the text and the erratum is appended to this judgment.]

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE RUSSELL

[1] The central issue in this consolidated appeal is the constitutional validity of certain provisions found under the *School Act,* S.A. 1988, c. S-3.1, as amended by the *School Amendment Act, 1994,* S.A. 1994, c. 29, and the *Government Organization Act,* S.A. 1994, c. G-8.5. The allegations are that the provisions contravene the right of local school boards to reasonable autonomy, discriminate between public and separate schools, and violate a principle of mirror equality that is said to exist between public and separate schools.

BACKGROUND

[2] In May 1994, the province proclaimed amendments to the *School Act*. The amendments have the effect of centralizing control and decision-making in various areas relating to elementary and secondary education. Perhaps the most contentious change was the creation of a new scheme for funding school boards.

[3] By restructuring the way education was funded, the Government sought to remove fiscal inequity in the school system. The former funding scheme was characterized by school requisition mill rates that varied dramatically across the province, and fiscal disparity between school boards. Separate school boards were particularly disadvantaged. While changes to the *School Act* in 1988 addressed fiscal disparity at the local district level, the Government sought to address the disparity on a regional level with the introduction of the 1994 amendments.

[4] The Government chose to inject more equality into the education system through the creation of a full provincial funding scheme. While there were other options that the Government might have considered to remedy the inequities of the former funding system, it is not for this Court to decide whether there is a better option. The issue is whether the option chosen is constitutionally valid.

[5] Under the new scheme, with the exception of a special plebiscite levy, school boards can no longer raise money through direct taxation. Instead, revenues from property assessment base are now pooled into a government fund called the Alberta School Foundation Fund ("the ASFF"). The monies in that fund are then disbursed to school boards on an equal amount per student basis. However, separate boards are not compelled

to participate fully in the ASFF. Because of their special constitutional status, separate school boards are permitted to opt out and requisition taxes directly from ratepayers. Opted out boards only receive revenue from the ASFF as a top-up payment in the event that their local requisition amounts to less than the amount received by other boards through the ASFF. But, the Government maintains there is no financial benefit achieved by opting out because pursuant to s. 159.1(4) of the *School Act*, should an opted out board receive requisition amounts greater than the per student amount received by other boards, the excess must be paid to the ASFF. This requirement is, however, expressly made subject to the rights of separate schools electors under the Constitution.

[6] In addition to funds derived from property assessment base, the new funding scheme continues to provide monies in support of education through a system of grants from the province's General Revenue Fund. However, under the new scheme, school boards receive grant payments in accordance with a government policy document called *Framework for Funding School Boards in the 1995-96 School Year* ("the *Framework*"). It allocates funds to school boards using three blocks: the instruction block, the support block and the capital block. The instruction block provides for the cost of instructional programs and services such as basic instruction, special instruction for students with severe disabilities, home education and early childhood services. The support block provides for the cost of operating and maintaining schools, board governance, central office administration and student transportation. The capital block provides for the cost of school building projects including current school building projects and the debt owing on school buildings.

[7] All school boards receive the same amount per student for basic instruction. The amount of additional funding depends on several factors such as the number of severely disabled students, transportation needs and the sparsity of the student population. School boards can calculate their total funding allocation by using the rates prescribed at the end of the *Framework*. The amount available by way of grants from the General Revenue Fund is determined by subtracting the amount available from property assessments (whether from the ASFF or from a combination of the ASFF and opted out local requisition) from the amount of the total funding allocation.

[8] However, in addition to allocating funds, the *Framework* also places restrictions on a board's use of funds. Those restrictions include the following:

1. The transfer of funds from the instruction block to plant operations and maintenance and student transportation is permitted, but cannot exceed two percent of the instruction block.

2. A board may transfer from the instruction block to the support block an

amount for system based instructional support services (*e.g.*, curriculum development). However, that amount cannot exceed 1.6 percent of the instruction block, plant operations and maintenance, and student transportation funding for the 1995-96 year. The limit is 1.2 percent for the 1996-97 year, and 0.8 percent for the 1997-98 year.

3. Under the support block, expenditures on board governance and system administration are limited to a percentage of the total funding that is allocated to transportation, plant operations and maintenance, and the instruction block. The percentage varies between 4 and 6 percent, depending on the number of students.

4. No transfer is permitted to or from the capital block.

[9] For the purposes of this appeal, it is important to note that the *Framework* contains no provision spelling out the consequences of non-compliance and it does not specify whether its restrictions on spending apply to the tax monies collected by opted out boards. Nonetheless, the Government maintains that the *Framework's* restrictions apply not only to the spending of grant money and ASFF revenues, but also to property assessment monies collected by opted out boards. It also claims that failure to comply with the spending restrictions will result in penalties being levied against future grants from the province. Therefore, according to the Government, the *Framework's* restrictions attach directly to the receipt of provincial grant monies and indirectly to the use of board revenues generally.

[10] A new method of funding education was not the only change brought about by the amendments. Other changes include the addition of provisions compelling boards to meet certain Ministerial standards and increasing the Minister's control over board senior staff.

[11] Not surprisingly, the erosion of local control over schooling was not welcomed by all. The Public School Boards' Association of Alberta ("PSBAA"), the Alberta School Boards' Association ("ASBA") and others challenged the constitutionality of some of the amendments, and parts of the *Government Organization Act.* PSBAA is an

association comprised of public school boards. ASBA represents all school boards in the province. It is worth noting here that PSBAA and ASBA have not challenged the province's laudable goal of achieving educational equity. They simply object to the means the Government has used to achieve it.

[12] At trial, PSBAA challenged the provisions on three bases. The first was that school boards were guaranteed reasonable autonomy under the *Constitution Act, 1867* through law or convention, or under ss. 2(b) and 7 of the *Charter*. It was alleged that this autonomy had been violated by the erosion of local control over the recruitment and direction of senior staff, the selection of political representatives, program and management, and fiscal matters. The second line of attack was that the impugned provisions, by allowing only separate boards to opt out of the centralized funding system, discriminated against public schools in violation of s. 17(2) of the *Alberta Act, 1905* (Can.), c. 3. This constitutional provision was also used to challenge the potentially wide discretion that can be given to the Minister of Education to make grants under the *Government Organization Act.* The last argument was that the provisions violated a principle of mirror equality implicit in s. 17(1) of the *Alberta Act.* ASBA took no part in the reasonable autonomy issue, arguing only the discrimination and mirror equality issues.

[13] The Alberta Catholic School Trustees' Association, the Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9 and Dwayne Berlando, a separate school supporter, (collectively referred to as "ACSTA") became involved in the litigation only to ensure that the action did not adversely affect the existing rights and privileges constitutionally guaranteed in respect of separate schools under s. 17(1) of the *Alberta Act*. However, the significance of ACSTA's role in the trial should not be underestimated. Although it did not itself challenge the new legislative scheme, it asked the trial court not to discuss the nature and extent of separate school rights guaranteed by s. 17(1) of the *Alberta Act.* It also submitted that if the new legislative scheme were found to contravene mirror equality rights or s. 17(2) of the *Alberta Act*, any remedy given should expand the rights currently granted to public schools, rather than abridge the rights accorded in respect of separate schools. ACSTA took no position at trial on the reasonable autonomy issue.

[14] After considering the issues before him, Smith J. rejected the reasonable autonomy and discrimination arguments, but accepted the mirror equality argument. He held the legislation to be invalid to the extent that it did not allow public boards to opt out of the ASFF funding scheme. Notably, the trial judge found it unnecessary to decide whether the *Framework's* conditions applied equally to all school boards. He also did not discuss the nature and extent of the rights and privileges with respect to separate schools contained under s. 17(1). In his formal judgment, he suspended the declaration of

invalidity until June 15, 1996. In February 1996, a stay of the trial judge's judgment was granted pending this appeal. The order granting the stay contemplated an additional stay of six months should the Government's appeal on the mirror equality issue be unsuccessful.

[15] PSBAA appeals the trial judge's rejection of the reasonable autonomy and discrimination arguments. It also objects to the stay that was granted. ASBA appeals only on the discrimination issue, and the Government appeals the decision on mirror equality. Although the Government initially urged this Court to refuse to hear part of PSBAA's reasonable autonomy argument because of non-compliance with s. 25 of the *Judicature Act*, R.S.A. 1980, c. J-1, it has since abandoned this jurisdictional challenge.

[16] ACSTA maintains the position it held at trial. Accordingly, it made submissions only on the discrimination and mirror equality issues, and urged this Court not to define the nature and extent of the rights which might accrue to separate school supporters under s. 17(1) of the *Alberta Act.*

[17] After submissions for this appeal were finished, and while this decision was under reserve, another panel of this Court issued a memorandum of judgment in *Edmonton Roman Catholic Separate School District No. 7 v. Alberta (Minister of Education)* (1997), 47 Alta. L.R. (3d) 82 ("*Capital Reserves*"). That appeal dealt with whether the government had the authority to impose, by way of letter, a condition requiring that school boards apply their capital reserves to their outstanding unsupported capital debts for the 1993-1994 and 1994-1995 school years before the province would assume indebtedness for their unsupported capital debt in the 1995-1996 school year. The chambers judge and Court of Appeal held that there was statutory authority for the imposition of the condition and dismissed the Edmonton Separate School Board's case.

[18] We invited counsel to make submissions regarding the impact, if any, of the *Capital Reserves* decision on the current appeal. Having regard to the parties' submissions and the decision in *Capital Reserves*, we are of the view that the case has some impact on the matters now under appeal. It signals the extent to which and the way in which government may control capital spending under the current legislation and is relevant to both the discrimination and reasonable autonomy issues.

ISSUES

[19] The issues in this appeal can be briefly stated as follows:

1. Should the Government be allowed to introduce fresh evidence in this appeal?

2. Did the trial judge err in deciding that school boards do not have a constitutionally guaranteed right to reasonable autonomy either as a matter of law or convention?

3. Did the trial judge err in finding that the impugned provisions do not discriminate against public schools?

4. Did the trial judge err in finding that the impugned provisions violate mirror equality rights?

5. If the trial judge did not err in finding a violation of mirror equality, should the stay of his judgment be set aside?

ANALYSIS

Issue 1: Should the Government be allowed to introduce fresh evidence in this appeal?

[20] The Government brings two applications to adduce fresh evidence.

(a) First Application

[21] In response to PSBAA and ASBA's assertions that the funding scheme discriminates under s. 17(2) of the *Alberta Act*, the Government has consistently maintained that the *Framework's* funding restrictions apply equally to all school boards, including those that have opted out of the ASFF. It has further insisted that the failure of any board to comply with the restrictions contained in the *Framework* will result in a reduction in grant money available from the General Revenue Fund. At trial, Government witnesses testified that this was the intended application and effect of the *Framework*. The Government also attempted to introduce a letter from the Deputy Minister of Education describing a non-compliance provision respecting the use of the funds received under the *Framework*. However, the letter was ruled inadmissible and no attempt was made by counsel for the Government to call its author.

[22] As stated above, the *Framework* itself does not distinguish between separate, public and opted out boards. Nor does it indicate that non-compliance with its terms will result in a reduction of grant money. Consequently, ASBA and PSBAA argue that the *Framework* and the non-compliance provision do not apply to the locally requisitioned monies raised by opted out boards. This forms the basis of their discrimination argument under s. 17(2) of the *Alberta Act*.

[23] The fact that separate school boards campaigned so vigorously for the right to opt out of the ASFF is said to provide further support for PSBAA and ASBA's interpretation of the *Framework's* application. If the *Framework* was intended to apply to revenues requisitioned directly by opted out boards, why seek the right to opt out?

[24] Although we fail to see how it advances the discrimination argument, ASBA also seems to go so far as to say that the Government's non-compliance policy does not apply to any board because it was not formally articulated in a regulation. Whether in the form of a policy or regulation, the issue to be determined is whether the Government has discriminated in an unacceptable manner.

[25] As to the evidence the Government adduced at trial pertaining to the *Framework's* application, ASBA claims that the evidence of Gary Zatko, the Assistant Deputy Minister of the Planning, Information and Financial Services Divisions of Alberta Education, confirms that the *Framework* does not apply to the local requisition monies of opted out boards. ACSTA argues that his testimony was equivocal on the issue. While Mr. Zatko initially suggested that separate boards could opt out of the *Framework* and while he acknowledged that the *Framework* did not specifically say that its provisions applied to an opted out board's declared ratepayer assessment base, his subsequent testimony clarified his position on the issue. On re-examination, he referred to a hypothetical analysis that he had prepared to show the *Framework's* operation (see, Exhibit "H for Identification"). That exhibit coupled with Mr. Zatko's testimony demonstrate that the Government's intent was that the *Framework's* terms would apply to the property assessment monies and grant revenues received by all boards. The evidence also shows how the non-compliance policy would work. According to Mr. Zatko's evidence, neither the *Framework's* conditions nor the penalties distinguish between public, separate and opted out boards. [See, A.B. Vol. 5, at 1098-1113.] In our view, his testimony is not equivocal. However, we agree that, aside from the hypothetical analysis, there was no documentary evidence presented at trial to show that the *Framework's* conditions apply to an opted out board's declared ratepayer assessment base.

[26] The Government now seeks to introduce fresh evidence to provide documentary proof that the *Framework* is intended to apply equally to all boards and to demonstrate that a written penalty for non-compliance exists. The two documents at issue in this application are:

1. *Funding for School Authorities in the 1995-96 School Yea*r (Exhibit "A"), and

2. an excerpt from *Funding for School Authorities in the 1996-97 School Year* (Exhibit "B").

[27] The first document was released by Alberta Education on September 1, 1995, before judgment was entered at trial. The second was released in April 1996. These documents explain what funding is available to school authorities and how it can be obtained. They expressly state that the *Framework* applies to all public and separate school boards in the province. Thus, they would address the argument that there is no indication in the *Framework* of any intent to apply the restrictions to funds requisitioned by opted out boards**.** In addition, these exhibits make it clear that when a board fails to meet certain conditions prescribed under the *Framework*, the board's grant payment out of the province's general revenues will be adjusted accordingly.

[28] The test that is generally applied to determine whether fresh evidence should be admitted on appeal is whether:

1. the evidence could not have been obtained for use at trial even with the exercise of reasonable diligence; and

2. the evidence, if introduced, would be practically conclusive.

Gorrie v. Nielsen (No. 1) (1988), 92 A.R. 164 (C.A.).

[29] The strict application of this test in the case at bar raises some difficulties for the applicant. In its affidavit, the Government admits that Exhibit "A" was released on September 1, 1995. Although the trial of this action was completed at the end of June 1995, the trial judge did not issue his Reasons for Judgment until November 28, 1995, and Formal Judgment was not entered until January 1996. Accordingly, the evidence came into existence at a time when the trial judge was still seized with the action. We reject the Government's contention that once final submissions were completed and the case had been adjourned for judgment, it had no obligation to apply to re-open the case and introduce the evidence. On applications to admit fresh evidence on appeal, this Court will look at whether or not the evidence could have been obtained and might have been introduced by reasonable diligence at any time prior to the final judgment. The approach suggested by the Government would allow a litigant who is dissatisfied with a judgment to seek to vary it by introducing evidence they had chosen not to present at trial. (See, *Becker Milk Co. Ltd. et al v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554 (C.A.).) As a result, we are unable to conclude that the first branch of the fresh evidence test has been satisfied for Exhibit "A".

[30] In no way do we intend to suggest that the Government acted in bad faith by failing to bring the new policy to the trial court's attention. The Government did bring an application in December 1995 which, *inter alia*, asked the trial judge to reconsider his reasons and decide whether the *Framework's* restrictions applied to taxes requisitioned by

school boards. In its Notice of Motion, the Government claimed that all the evidence necessary to decide the issue was before the court. It is puzzling why the Government chose not to present Exhibit "A" to the court at that time.

[31] No similar problem arises with respect to Exhibit "B". It was released in April 1996 and is essentially an incomplete duplicate of Exhibit "A".

[32] As to the second part of the test, both exhibits show that the *Framework's* restrictions apply to all school boards with the same consequences for non-compliance. To some extent, this is also evident from the decision of this Court in the *Capital Reserves* case, *supra*. The facts of that case demonstrate that at least some of the Government's funding conditions were intended to apply equally to *all* boards. However, neither that case nor the fresh evidence are necessarily enough to lay the discrimination argument to rest. There remains the issue of the constitutionality of the *Framework* under s. 17(1) of the *Alberta Act.* The *Framework* may be unconstitutional in so far as it purports to impose restrictions on separate school board spending. On this basis, we must conclude that, if admitted, Exhibits "A" and "B" would not be practically conclusive of an issue on appeal.

[33] Accordingly, based on the strict application of the test for fresh evidence, the Government's first application should fail for both exhibits.

[34] However, the two part test is nothing more than a general rule. On occasion, this Court has seen fit to adopt a more flexible approach to the admission of fresh evidence, even if that evidence is not practically conclusive. A case in point is *Black & Company v. Law Society of Alberta* (1985), 67 A.R. 244 (C.A.). At issue in that case was the constitutionality of Law Society rules restricting the mobility rights of lawyers involved in interprovincial law firms. The fresh evidence consisted of proof of publication of rules issued by the Law Society of Upper Canada and a copy of a report relating to interprovincial law firms. The documents were not available at the time of trial and were submitted on appeal in relation to the analysis under s. 1 of the *Charter*. The court admitted the evidence, saying that it was appropriate to relieve the applicant of the second arm of the fresh evidence rule in constitutional cases "in order to permit reception of up-to-the-minute social facts." (At 245.)

[35] Even though the fresh evidence under the first Notice of Motion does not satisfy the traditional rule for the admission of new evidence on appeal, based on the particular circumstances before us, we are prepared to admit both exhibits. Underpinning the s. 17(2) argument (*i.e.*, the discrimination issue) is the claim that, because of the *Framework's* silence on the issue, locally requisitioned funds collected by opted out separate school boards are not subject to the *Framework's* restrictions. The new evidence

is tendered to show that this view may be unfounded. The application of the *Framework* to separate school boards is central to the discrimination issue, and the fresh evidence may be determinative of that issue to the extent that the *Framework's* provisions are constitutional as against separate schools. Therefore, because of the potentially determinative effect of the evidence on this appeal, we admit the new evidence. And in so doing, we are mindful of our subsequent unwillingness (set out later in these Reasons) to determine the constitutional validity of the *Framework's* restrictions vis-à-vis separate boards, despite the fresh evidence. Regrettably, we later recognize that the constitutional validity of the *Framework's* application may have to be relitigated in the future.

(b) Second Application

[36] The second motion is made in respect of three charts that were recently prepared by the Government. The evidence is said to be relevant to the consideration of the s. 17(2) issue. Specifically, the Government maintains that the charts demonstrate that the impugned funding scheme does not prejudicially affect the rights of separate school ratepayers within the meaning of s. 17(1) of the *Alberta Act*. On this basis, it is argued that the *Framework's* provisions apply equally to all boards. The charts compare:

1. the enrollment of separate and public school students from the 1993/94 school year to enrollment in the 1995/96 and 1996/97 school years;

2. the fiscal inequities for separate school boards in the 1993 tax year to fiscal inequities in the 1996 tax year; and

3. the administrative costs for Edmonton and Calgary separate school boards in the 1993/94, 1995/96 and 1996/97 school years.

[37] It is not clear to us whether this evidence was available at the time of trial. However, without deciding that issue, we are not satisfied that this evidence would be practically conclusive of an issue on appeal. The mere fact that the new scheme may reduce the fiscal inequities previously experienced by separate school boards does not necessarily mean that there is no prejudicial effect on the rights guaranteed by s. 17(1) of the *Alberta Act*. Because this evidence does little to resolve the discrimination issue, we are not prepared to admit it.

Issue 2: Did the trial judge err in deciding that school boards do not have a constitutionally guaranteed right to reasonable autonomy either as a matter of law or convention?

[38] PSBAA claims that the Constitution implicitly guarantees reasonable autonomy to