Understanding section 151 of the WESA: recent decisions provide clarity

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The *Wills, Estates and Succession Act* (WESA) came into force in British Columbia on March 31, 2014. This legislation brought about a significant reform of this province's wills and estate administration law. One of the most notable reforms introduced by the WESA is the ability of the court, under s. 151, to authorize a person other than the personal representative of the estate (*i.e*. the executor or administrator) to bring an action in the name of the estate, or defend an action on behalf of the estate. This provision is commonly understood as the functional equivalent of derivative actions in the corporate context whereby shareholders have a similar ability to litigate on behalf of the company. Section 151 removes barriers on standing that flow from the legal principle that the personal representative of the estate has the exclusive right to bring or defend claims on behalf of the estate. In situations whether the personal representative is unwilling or unable to make a claim, perhaps due to a conflict of interest, a beneficiary or other interested persons caught by s. 151, and termed "specified persons", can seek the leave of the court to take such steps. These cases often include claims of "missing assets" that must be recovered for the benefit of the estate.

A line of authority has developed on the proper interpretation and application of s. 151 (including its amendments). A leading case on the substantive test for leave had been *Bunn Estate*, 2016 BCSC 2146 in which the approach to derivative actions in the corporate context was explicitly adopted. Over the years, a measure of confusion has arisen about this provision of the WESA, particularly in regards to procedure. Two recent cases, however, have brought a welcome degree of clarity.

Broadening the substantive test for leave: *Hoggan v. Silvey*, 2022 BCCA 176

The decision of the Court of Appeal in *Hoggan v. Silvey,* 2022 BCCA 176 (24 May 2022, **Bennett**, Goepel and Grauer JJ.A.), rev'g 2021 BCSC 971 (20 May 2021, Murray J.) significantly broadens the substantive test for granting leave under s. 151. In this proceeding, two children of the Deceased sought leave to bring an action against the defendant executors for misappropriation of funds during the Deceased's lifetime, as well as seeking an order that some jointly-owned assets are held in trust for the estate. The chambers judge applied the factors from *Bunn Estate* on whether the proposed

proceeding would be necessary or expedient. Justice Murray was satisfied that the applicants were acting in good faith but denied leave under s. 151 on the basis that it was not in estate's best interests to bring the action. She held, after weighing the evidence, that there was no arguable case. Further, the size of the estate was modest and would be eaten up by legal costs.

The B.C. Court of Appeal set aside this decision, and granted leave to the applicants. Justice Bennett noted the similarities between a derivative action in company law and a proceeding under s. 151 of the WESA, but emphasized the differences as well. An estate is not in a comparable situation to an ongoing business. The Court of Appeal held that the requirement of an "arguable case" is not a high threshold, and the chambers judge erred by going beyond a limited weighing of the evidence. Further, the test applied by the chambers judge placed too much emphasis on the best interests of the estate, as opposed to the interests of a "specified person" (i.e. the applicants in this case). The language in s. 151(3)(*b*) is disjunctive, and it may not be necessary to consider the "best interests of the estate" or the inconvenience to the estate in a given leave application. The focus should have been on whether a s. 151 proceeding was in the best interests of *the applicants*. Further, the chambers judge failed to recognize that the estate may not be diminished by litigation costs, as a costs award may be ordered against one of the parties.

Clarifying the procedure to seek leave: *Chung v. Chung*, 2022 BCSC 1396

The more recent case of *Chung v. Chung*, 2022 BCSC 1396 (15 August 2022, Majawa J.) provides needed clarification on the procedure for seeking leave under s. 151 of the WESA. It has been noted in previous cases, such as the decision of Madam Justice Tucker in *Mortimer v. Bender*, 2020 BCSC 483, that the language in s. 151 is somewhat "circular" and confusing in this regard.

In *Chung*, two daughters of the Deceased sought leave to bring action on behalf of their father's estate against their brother Ken. They claimed that Ken held certain jointly-owned assets upon a resulting trust for the Deceased's estate. They also asserted that the proceeds of certain registered accounts, in which Ken was the designated beneficiary, were also held in trust for the estate. (On whether the presumption of resulting trust applies to beneficiary designations, see the discussion in "Does the "Presumption of Resulting Trust" Apply to Beneficiary Designations?"). The value of the assets in dispute was approximately $900,000. The personal representative of the Deceased's estate, CIBC Trust, had declined to pursue a claim against Ken.

The applicants filed a wills variation claim under the WESA relating to the Deceased's last Will. In 2020, they also filed a separate action concerning beneficial ownership of the disputed assets and, in Part 2 of the notice of civil claim, sought leave under s. 151 to maintain the action. They then formally applied for leave under s. 151 within the 2020 action.

The leave application was highly unusual in its length and complexity. The hearing of the application lasted 7 days, and the record before the chambers judge contained 25 affidavits. Justice Majawa commented that the Legislature could not possibly have contemplated such a lengthy hearing. The role of the court in a s. 151 leave application

is not to decide the action on its merits, as the parties seemed to want, but to conduct a limited weighing of evidence to determine whether leave should be granted. The Court's findings on whether an "arguable case" exists does not bind the trial judge.

The Court in *Chung* approved the procedure followed by the plaintiffs to obtain leave under s. 151 of the WESA. There was no dispute that the plaintiffs had standing under s. 151. Ken, however, argued that the plaintiffs should have applied by way of a petition or notice of application prior to commencing an action, and that the notice of civil claim filed in 2020 was therefore a nullity. Justice Majawa rejected this argument. He agreed with the comments of Justice Tucker in *Mortimer v. Bender* that the language in s. 151 is circular, but some meaning must be given to it. Majawa J. held that, upon a proper construction of this provision, a specified person is permitted by subsection (1.1) to bring an application for leave within an already-commenced action as long as the action is the type contemplated by subsection (1). The plaintiffs' claim for a declaration of resulting trust in this case is caught by s. 151(1) given that it is a proceeding to recover property or enforce an obligation could be recovered or enforced by the personal representative of the estate. Section 151 still requires the plaintiffs to obtain leave, and no steps may be taken in the litigation until leave is granted.

According to the Court in *Chung*, the appropriate approach is to file a notice of civil claim with the specified persons named as plaintiffs, and clearly indicate in Part 2 of the pleading that the plaintiffs are seeking leave under s. 151. At that stage, it would be inappropriate to name the estate as a plaintiff given that the specified persons have no authorization to do so. As part of the hearing of the leave application, the plaintiffs may provide a draft amended NOCC for the court to review.

The Court in *Chung* granted leave to the plaintiffs to pursue the claim. Applying the applicable test, as recently clarified in *Hoggan v. Silvey*, the plaintiffs had demonstrated that they made reasonable efforts to cause the executor to commence proceedings, were acting in good faith, had an arguable case, and the action was necessary or expedient for protection of their interests. Majawa J. rejected Ken's argument that the decision of independent executor (Canada Trust) to not make a claim against Ken was somehow decisive, and precluded a s. 151 claim.

Conclusions

The decisions in *Hoggan v, Silvey* and *Chung* provide needed clarity for practitioners when advising clients on the procedure for bringing a claim under s. 151 of the WESA, and the criteria for satisfying the Court that leave be granted. In particular, the *Hoggan* decision broadens and liberalizes the substantive test so that there is not an undue focus on the benefits for "the estate" from the proposed litigation, as opposed to the benefits to the claimant.

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