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1991 CarswellAlta 163, 82 Alta. L.R. (2d) 382, 83 D.L.R. (4th) 477, [1992] 1 W.W.R. 310, 122 A.R. 197

Bank of Nova Scotia v. Ukrainian Greek Orthodox Congregation of Holy Trinity

BANK OF NOVA SCOTIA v. UKRAINIAN GREEK ORTHODOX CONGREGATION OF HOLY TRINITY (carrying on business as HOLY TRINITY UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA, LETHBRIDGE, ALBERTA, and carrying on business as HOLY TRINITY UKRAINIAN GREEK ORTHODOX CHURCH OF CANADA) and said UKRAINIAN ORTHODOX CONGREGATION OF HOLY TRINITY

Alberta Court of Queen's Bench

Cooke J.

Judgment: August 28, 1991
Docket: Edmonton Doc. 8801-07455



Counsel: *P.S. Jull*, for plaintiff.

*R.A. **Low***, for defendant.

Subject: Churches and Religious Institutions

Churches and Religious Institutions --- Organization and government of churches — Property rights — Borrowing powers — Charges on church property

Churches and Religious Institutions --- Organization and government of churches — Property rights — Borrowing powers — Miscellaneous powers

Agency — Authority of agent — Actual authority — Congregation giving officers authority to proceed with land acquisition providing congregation property not put at risk — Officers signing promissory note securing loan from bank — Officers not informing bank of restriction on powers — Officers having actual authority — Congregation alternatively clothing officers in ostensible authority by reason of electing officers, giving officers possession of corporate seal and allowing execution and delivery of documentation bank relying on in making loan.

Churches and religious institutions — Property — Congregation giving mortgage and promissory note to secure loan — Mortgaging of congregation property falling within s. 18(1) of Religious Societies' Land Act but mere borrowing of money by promissory note not doing so — Execution of promissory note and enforcement of promissory note in action unassociated with mortgage by reason of mortgage's prior voluntary discharge not fall-

ing within s. 18(1) of Act.

Agency — Authority of agent — Apparent authority — Congregation giving officers authority to proceed with land acquisition providing congregation property not put at risk — Officers signing promissory note securing loan from bank — Officers not informing bank of restriction on powers — Officers having actual authority — Congregation alternatively clothing officers in ostensible authority by reason of electing officers, giving officers possession of corporate seal and allowing execution and delivery of documentation bank relying on in making loan.

Churches and religious institutions — Internal government — Congregation giving officers authority to proceed with land acquisition providing congregation property not put at risk — Officers signing promissory note securing loan from bank — Officers not informing bank of restriction on powers — Officers having actual authority — Congregation alternatively clothing officers in ostensible authority by reason of electing officers, giving officers possession of corporate seal and allowing execution and delivery of documentation bank relying on in making loan.

The defendant congregation's declaration of incorporation stated that all dealings with the defendant's real property were to be authorized by special resolution at a general meeting, while the defendant's personal property could be dealt with by the defendant's officers. Over the years, the defendant entity used a number of variations in name. The defendant gave its officers the authority to proceed with the acquisition of new land on its president's assurance that the defendant's property would not be put at risk. New land was purchased in the name of the defendant "congregation," and a portion of the purchase price was funded by a loan from the bank secured by a mortgage on the land and by a promissory note granted by the defendant "church." A number of corporate documents relating to the transaction were executed in the name of the defendant "church" and were forwarded to the bank. Six years later, when the defendant sold the land, the bank discharged the mortgage upon receipt of the net proceeds and then brought action on the promissory note for the balance owing.

**Held:**

Judgment for bank.

The defendant's officers had actual authority to proceed with land acquisition provided the defendant's property was not put at risk, but since the restriction was not communicated to the bank, the bank was not bound by it. If the officers did not have actual authority, they had ostensible authority because the defendant held them out as having such through their election, their possession of the corporate seal and the execution and delivery of the documentation the bank relied on in making the loan. Variations on the form of name and corresponding seals did not constitute a defence as there was only one Ukrainian Greek Orthodox congregation in the city, and it was the same legal entity which purchased the land and borrowed the money.

Non-compliance with s. 18(1) of the *Religious Societies' Land Act* renders an instrument dealing with the property of a congregation unenforceable. The mortgaging of congregation property falls within the meaning of the section, but the mere borrowing of money secured by promissory note does not. Here, the promissory note and the mortgage were for the same debt. However, the execution of the promissory note and its enforcement in an action unassociated with a mortgage by reason of the mortgage's prior voluntary discharge did not fall within s. 18 of the *Religious Societies' Land Act*.

**Cases considered:**

*Clayborn Investments Ltd. v. Wiegert* (1977), 3 Alta. L.R. (2d) 295, 77 D.L.R. (3d) 170, 5 A.R. 50 (C.A.) — *distinguished*

*Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 2 Q.B. 480, [1964] 1 All E.R. 630 (C.A.) — *referred to*

*Royal British Bank v. Turquand* (1856), 6 E. & B. 327, 119 E.R. 886 — *referred to*

**Statutes considered:**

Interpretation Act, R.S.A. 1980, c. I-7

s. 16*considered*

Judicature Act, R.S.A. 1970, c. 193

s. 34(17)*referred to*

s. 34(18)*referred to*

Land Titles Act, R.S.A. 1970, c. 198

s. 109*referred to*

Religious Societies' Land Act, R.S.A. 1980, c. R-14

s. 11(1)*referred to*

s. 11(2)(e)*referred to*

s. 11(2)(f)*referred to*

s. 14(1)*referred to*

s. 17(1)*referred to*

s. 18(1)*considered*

s. 19(1)*referred to*

s. 20*considered*

Action on promissory note given in conjunction with mortgage.

***Cooke J.*:**

1 This is an action on a promissory note against a church incorporated under the *Religious Societies' Land Act*, R.S.A. 1980, c. R-14. The declaration incorporating the entity, registered May 15, 1942, sets forth the entity's name as "The Ukrainian Greek Orthodox congregation of Holy Trinity, Lethbridge, Alberta." That entity remained valid and subsisting for all times material to this action. Over the years the entity has been described

by various names comprised in most instances of permutations of the words found in the name as registered. Not only was the entity described by different names at various times since 1942 but corporate seals were made with these different names. To add to the confusion the name that might be in vogue at a particular period would not necessarily be matched with the seal of the like name. This explains the style of cause and in part explains no less the four amendments to the original statement of claim.

2 In April 1981 property in the city of Lethbridge described as 433 - 24 Street North was purchased for $625,000. The offer to purchase was signed by John Phillip, John Novodvosky and Alex Sereda under the words "as per Ukrainian Greek Orthodox Church as purchasers." The congregation continued to own and occupy its existing church at 643 - 13 Street South in Lethbridge.

3 A portion of the purchase price of the 24th Street property was funded by a loan from the plaintiff.

4 On or about April 29, 1981 a demand note bearing that date payable to the plaintiff in the amount of $10,000 was signed by Alex Sereda and John Novodvosky beneath the name "Holy Trinity Ukrainian Greek Orthodox Church of Canada Lethbridge Alberta." On or about April 30, 1981 a demand note bearing that date payable to the plaintiff in the amount of $468,750 was signed by John Phillips and Alex Sereda beneath the name "Holy Trinity Ukrainian Greek Orthodox Church of Canada, Lethbridge, Alberta."

The following documents under the name Holy Trinity Ukrainian Greek Orthodox Church of Canada were signed by the following and were delivered to the Bank of Nova Scotia in support of the loan application on the date as set out in the documents:

(a) Certificate of Incumbency signed by William Zaychuk and John Novodvosky — April 29, 1981

(b) Resolution Respecting the Borrowing of Money signed by William Zaychuk and John Novodvosky — April 28, 1981 and Certificate of the said Resolution signed by William Zaychuk as President and John Novodvosky as Secretary — April 29, 1981

(c) Banking Resolution of directors signed by William Zaychuk as President and John Novodvosky as Secretary — April 29, 1981

(d) Agreement re: Operation of Account signed by William Zaychuk and John Novodvosky — April 29, 1981

(e) Certificate of a Resolution of Meeting of Directors dated April 22, 1981 entitled Ukrainian Greek Orthodox Church of Holy Trinity signed by John Novodvosky as Secretary — April 29, 1981

5 The proceeds of the mortgage together with other funds later referred to were used to purchase the aforesaid land.

6 From the notice to admit facts and response thereto the following facts are admitted:

The mortgage was registered against the title to the Lands on May 13, 1981. The Certificate of Title issued by the Registrar of the South Alberta Land Registration District, shows registration of the Transfer of the Lands in the name of The Ukrainian Greek Orthodox Congregation of Holy Trinity, with the Mortgage re-

gistered as an encumbrance.

An agreement of Purchase and Sale signed on the 1st of December 1987, was entered into to sell the Lands for the price of $300,000.

A Discharge of Mortgage dated March 30, 1988 was executed by the Plaintiff by which the Plaintiff's mortgage against the Lands was discharged. It was submitted to Huckvale and Company, the solicitors for the Congregation, by letter dated March 30, 1988.

A Transfer of the Lands dated March 18, 1988 was executed under the name "The Ukrainian Greek Orthodox Congregation of Holy Trinity" and signed by Mr. Chernezky, the then President, and Mrs. Emily Busowsky, the then Treasurer, respectively of the Congregation, and a seal reading "Ukrainian Greek Orthodox Congregation of Holy Trinity" was impressed over their signatures.

On April 7, 1988 the sum of $280,462.33 was delivered by Huckvale and Company to the Plaintiff and a letter dated April 15, 1988 was forwarded by the Plaintiff's solicitors to Huckvale and Company.

7 Paragraphs 6 and 7 of the declaration of incorporation read as follows:

6. The rules to be complied with before any of the Congregation shall be dealt with by the officers thereof are as follows:

(a) All dealings with the real property of the Congregation must be authorized by a special resolution passed at a general meeting duly called, and for the purposes herein, a special resolution shall mean a resolution which has been passed by a majority of not less than three-fourths of such members as being entitled so to do, vote in person (or by proxy) at a general meeting of which not less than 14 days notice specifying the intention to propose the resolution as a special resolution, has been duly given.

(b) All personal property of the Congregation shall be dealt with, disposed of, administered and managed by the officers thereof, for the benefit of the Congregation, as the said officers or a majority of them shall deem fit and proper.

7. The officers who shall exercise the powers of the body corporate in any dealing with the property of the said Congregation are the following: Chairman or Vice-Chairman, Secretary and Treasurer.

8 From the evidence in this unusual case I find that from the mid-seventies an ongoing issue before the congregation was the purchase of land to house a cultural centre and new church. I find also that the officers of the church believed that the long-term survival of the church depended upon attracting the younger people of the faith. This was difficult in the existing building both because of its size and the objection of the older members to the use of a church for social events with the related activity that that may entail.

9 Notwithstanding the ambivalence of the congregation to this proposed acquisition of land for a cultural centre and church the officers in the late seventies began operating bingo and Nevada games for that purpose with some considerable success. I am further satisfied that the congregation gave the officers the authority to continue with the gaming operations and the acquisition of the property on the president's stated assurance that the property of the church would not be put at risk. Mr. Zaychuk, the president from 1974 to May 1982, gave evidence that he told the members of the congregation that the only collateral to be given to the plaintiff was the

property to be acquired and that no risk to church property would be incurred.

10 The ultimate defence evolved through a number of statements of defence and bears only limited resemblance to the original. The defence is absence of authority to borrow and non-compliance with s. 18 of the *Religious Societies' Land Act*. The defendant's evidence was to the effect that the church was never involved in the bingo operation or the acquisition of the land.

11 It is argued by the defence that the money was borrowed by the "bingo committee," an unincorporated group made up of essentially the same persons who were the officers of the church but who were not acting in that capacity when running the bingo operation or when borrowing money.

12 I find that the officers had actual authority to proceed with the acquisition of land provided the property of the church was not put at risk. I believe Zaychuk's assurance to the congregation in this regard arose out of his erroneous understanding of mortgage law. This internal restriction was never communicated to the plaintiff's bank and so was not binding upon them: *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, 119 E.R. 886. When signing the promissory note they were acting in their capacity as officers of the corporate entity representing the congregation and pursuant to para. 6(b) of the declaration of incorporation.

13 Section 16 of the *Interpretation Act*, R.S.A. 1980, c. I-7, states:

> 16 Words in an enactment establishing a corporation
>
> (*a*) vests in the corporation power
>
> (ii) to contract and be contracted with by its corporate name,
>
> (v) to acquire and hold real property and personal property for the purposes for which the corporation is established and to dispose of the real property or personal property at pleasure, and
>
> (vi) to regulate its own procedure and business;
>
> (*b*) make the corporation liable to be sued in its corporate name ...

14 The *Interpretation Act* creates the power to borrow, and para. 6(b) of the declaration of incorporation provides that the corporate powers, as they relate to the personal property of the congregation, shall be exercised by the officers.

15 If the officers did not have actual authority they had ostensible authority by reason of the holding out of the officers by the entity as being persons empowered to borrow moneys.

16 The election of the officers, their possession of the corporate seal, the execution and delivery of borrowing resolutions complete with secretary's certification under seal and incumbency certificates under the seal as part of the loan documentation all constitute a holding out: *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 2 Q.B. 480, [1964] 1 All E.R. 630 (C.A.). Those documents together with the financial statements provided to the bank were clearly relied upon by the bank in approving and advancing the loan.

17 The variations on the form of the name and corresponding seals do not constitute a defence. There is only one Ukrainian Greek Orthodox congregation in Lethbridge and it was incorporated May 15, 1942 and bears

the corporate access number of 54000507 with the Alberta Department of Consumer and Corporate Affairs.

18 Although the earlier statement of defence relied on an allegation that the plaintiff contracted with the wrong legal entity that approach was abandoned at trial in favour of the position of lack of authority both actual and ostensible.

19 I find the defendant's evidence that the bank did not deal with the legal entity but rather with the "bingo committee" to be without credibility for the following reasons.

20 From 1981 till 1988 the officers of the church acted as though they were dealing on behalf of the congregation. The fact that the bingo and gambling proceeds were kept in a bank account separate from the church's general revenue fund is simply an Alberta Government Gaming Control condition to the granting of a gaming licence. The gaming licence itself was issued to the legal entity at the address of the congregation (Ex. 2-3). I believe I can take judicial notice that gaming licences in Alberta are restricted to recognized religious or charitable undertakings and that a licence would not be issued to four individuals representing an association or group without any written constitution or by-laws.

21 At the time of the acquisition of the 24th Street property the application for rezoning sought by the officers was for a cultural centre and church. The bingo committee dissolved in 1985 yet the same officers continued to deal with the land until its sale in March 1988. The sale of the land at that time complied with the provision of the *Religious Societies' Land Act* and that documentation acknowledged that the land belonged to the congregation.

22 From 1981 until at least 1988 no one ever came forward and told the bank that the congregation was not involved. This silence is particularly telling since months after the loan advance the law firm acting for both the church and the bank obtained a re-execution and sealing of the mortgage because the original name was incorrect. The lawyer responsible for the re-execution gave evidence and indicated that he fully explained the necessity for the re-execution of the mortgage, namely, the confusion in the various names used by the congregation, and yet not one of the officers mentioned that the bingo operation and land purchase were unconnected to the congregation. The confusion continued, however, for although the name on the signature page was changed and re-executed another one of the incorrect seals was affixed.

23 Why would four individuals unincorporated and without a constitution or by-laws refer to themselves as a church?

24 After Zaychuk ceased his term as president the new president Chernetski continued to deal with the bank as though the congregation was the debtor.

25 The address given by the officers who applied for the loan was 643 - 13th Street North, which is the address of the existing congregation. The three financial statements for the periods September 30, 1980, September 30, 1981 and September 30, 1982 show the bingo moneys as part of the assets of the congregation and subsequent to the land acquisition the land and associated debt as part of the assets and liabilities of the congregation.

26 Sereda, the treasurer, indicated in his discovery that these financial statements were approved by the congregation.

27 The first two statements were prepared by chartered accounting firms. I do not accept the evidence of Sereda that the bingo assets were not owned by the congregation and were entirely unconnected but were consolidated into one statement to save professional fees. To suggest a chartered accountant would prepare and certify financial statements consolidating the assets of two totally unconnected groups as being owned by one entity is simply not credible.

28 These financial statements showing the bingo moneys as part of the congregation assets were provided to and relied on by the plaintiff bank.

29 An analysis of the financial statements indicate that the difference between the purchase price of the land and the mortgage proceeds came from the bingo account. The defence argued that the legal entity was known as the Ukrainian Greek Orthodox congregation, "congregation" being the critical word, whereas the bingo committee called itself the Ukrainian Greek Orthodox Church with "church" being the critical word: Exs. 2-23 and 2-24 indicate that from time to time the cheques were printed with the exact opposite nomenclature in that the bingo account, kept separate in order to comply with the gaming commission, had printed cheques entitled Ukrainian Greek Orthodox congregation.

30 An examination of the numerous banking resolutions, correspondence and documentation making up the exhibits clearly establishes that it was the legal entity that carried on the bingo operation and the same entity that purchased the land and borrowed the money. That entity was the defendant in this case.

31 While it was open to the plaintiff to name the officers as defendants in an alternate claim for breach of warranty of authority it chose not to do so.

32 I turn now to the more difficult aspect of this case, the question of the applicability of the *Religious Societies' Land Act*. Part 2 of the Act relates to incorporated congregations. The difficulty arises out of the imprecision in the wording of the Act for the terms "property," "real and personal property" and "land or other property." In some of the sections of Pt. 2, namely, ss. 11(1), (2)(*e*), (*f*), 14(1), 17(1), 18(1), 19(1), a distinction in wording is made between real and personal property. Whereas other sections, notably s. 18, refer only to "property." Other sections such as s. 19(1) refer to "land or other property."

33 Section 18(1) reads as follows:

> 18(1) An instrument dealing with the property of an incorporated congregation
>
> (*a*) shall be executed under the corporate seal and attested by the signatures of not less that 2 officers of it, and
>
> (*b*) shall have endorsed on it or attached to it an affidavit by some other officer of the congregation capable of swearing positively to the fact that the execution of the instrument was authorized by the congregation at a meeting duly called for the purpose.

34 The defendants argue that this section was never complied with. I am satisfied that non-compliance with the Act would render an instrument dealing with the property of the congregation unenforceable. Section 20 provides penalties for matters unrelated to s. 18, so it cannot be argued that the consequences of non-compliance with s. 18 is simply a summary conviction.

35 I find that a promissory note is an "instrument" within the meaning of s. 18(1); however, the mere borrowing of money by such an instrument does not constitute "dealing with the property of the congregation." It may be that the incurring of debt by the congregation by way of simple unsecured debt may ultimately impact upon the "property" of the congregation by reason of enforcement of a judgment but at the time of the incurring of that debt it does not involve "dealing with the property of the congregation."

36 On the other hand the mortgaging of congregation property does fall within the meaning of "an" instrument dealing with the property of the congregation.

37 If the purchaser became the beneficial owner upon execution of the agreement to purchase or at the latest the removal of the rezoning condition, then the land would be the "property of the congregation" when the mortgage was executed. Alternatively, since the land title registration process requires that the transfer registration precede the mortgage registration the land is at least notionally the property of the congregation prior to the mortgage registration taking effect.

38 A further complication of this case arises by reason of the discharge of this mortgage prior to judicial proceeding. No foreclosure proceedings was ever commenced. The congregation found a buyer and the plaintiff agreed to discharge its mortgage against receipt of the sale proceeds. An action on the note was then instituted for the balance remaining. In my view s. 18 non-compliance would have barred a foreclosure action on the mortgage.

39 The defendants argue that the promissory note and the mortgage are inextricably bound into one transaction. The loan application form and approval establishes that the plaintiff bank was looking to the security of the land and the rental incomes generated from it plus the gambling revenue as the major part of their security. The annual revenue from the members in the form of tithes, collections and the sale of candles would barely equal one month's interest on the loan.

40 Clearly the promissory note and the mortgage are for the same debt and in the words of Clement J.A. in *Clayborn Investments Ltd. v. Wiegert* (1977), 3 Alta. L.R. (2d) 295 at 302, 77 D.L.R. (3d) 170, 5 A.R. 50 (C.A.):

> ... there are no circumstances, or evidence, from which it could be concluded that this obligation was intended to have a wider reach than that in the land mortgage which contains the same obligation. In my opinion the two obligations are not merely co-extensive in form: in substance they are the same, the obligation under the note being indistinguishable from that in the mortgage.

41 It must be borne in mind that Clement J.A. was considering an action on a promissory note to recover the deficiency remaining after foreclosure and specifically the provisions of s. 34(17) and (18) of the *Judicature Act*, R.S.A. 1970, c. 193, and s. 109 of the *Land Titles Act*, R.S.A. 1970, c. 198. The former statute provided that in an action brought upon a mortgage of land the right of the mortgagee *thereunder* is restricted to the land to which the mortgage relates and to the foreclosure of the mortgage. The latter statute provided that the effect of an order of foreclosure is to vest the title in the mortgagee and to fully satisfy the debt secured by the mortgage.

42 *Clayborn* dealt with the consequences arising from foreclosure orders on the debt secured by that mortgage and the restrictions on personal actions for the identical obligation contained in co-extensive security.

43 *Clayborn* does not resolve the issue because there is no restriction on the personal covenant where the

mortgagor is a corporation as in this case. Secondly, since there was no foreclosure order there is no satisfaction of the debt as was provided by s. 109 of the *Land Titles Act*.

44 Although it may well be argued that the intention of the Legislature was to protect congregations from the circumstances in this case, the ordinary meaning of the words of s. 18 do not allow such an extension. I find therefore that the execution of the promissory note and its enforcement in an action unassociated with a mortgage by reason of its prior voluntary discharge does not fall within s. 18 of the *Religious Societies' Land Act*.

45 The plaintiff shall recover a judgment in the sum of $293,540.28, being unpaid principal of $112,166.18 plus interest of $181,374.10. The plaintiff will have its costs but the limiting rule will apply.

*Judgment for plaintiff.*

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