COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chinn v. Hanrieder,*
2013 BCCA 310

Date: 20130627
Docket: CA037237

Between:

Bette Chinn and Dennis Hanrieder

Respondents
(Plaintiffs)

And

Ingrid Hedwig Hanrieder

Appellant
(Defendant)

And

Roderick E. Mont and Allin, Anderson, Mont & Walker and Heath and Company

Respondents
(Third Parties)

Corrected Judgment: Where appropriate, the word "will" is lower case.

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman

On Appeal from a decision from the Supreme Court of British Columbia, dated May 12, 2009, (*Chinn v. Hanrieder*, 2009 BCSC 635, Chilliwack Registry, Docket S13195)

Counsel for the Appellant: J.A.S. Legh

Counsel for the Respondents: M. Martin

Counsel for the Third Party, Roderick E. Mont and Allin, Anderson, Mont & Walker: A.A. MacDonald

2013 BCCA 310 (CanLII)

Counsel for the Third Party, Heath and Company	C.J. Bolan
Place and Date of Hearing:	Victoria, British Columbia February 24, 2012
Place and Date of Judgment:	Vancouver, British Columbia June 27, 2013

Written Reasons by:
The Honourable Madam Justice Ryan

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Groberman

2013 BCCA 310 (CanLII)

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] Hugo Hanrieder was a trustee and a beneficiary of a family trust ("the Family Trust") which held the mineral rights to certain lands in Saskatchewan in trust for Mr. Hanrieder and his sisters. A paragraph in the trust agreement provided that on the death of a beneficiary his or her interest would "be delivered to his or her surviving spouse". As a result, on the death of Hugo Hanrieder in December 1997 his wife, the appellant Ingrid Hanrieder, obtained a beneficial interest in the Family Trust.

[2] Ingrid Hanrieder appeals the May 12, 2009 Supreme Court order of Madam Justice Loo, which declared that Ms. Hanrieder held her interest in the Family Trust for the benefit of Hugo Hanrieder's two children, the respondents Dennis Hanrieder and Bette Chinn.

[3] The order provides:

> THIS COURT ORDERS AND DECLARES THAT:
>
> 1. Ingrid Hanrieder holds all the right, title and interest of Hugo Hanrieder, deceased, in and pursuant to that certain trust agreement made July 26, 1973 ("the Family Trust") made between Katharina Roth and Rita Mazer, Hugo F. Hanrieder, Katherine Marie Moessler, Rose Turner and Helen Marle Hanrieder, (confirmed by the Surrogate Court for Saskatchewan on October 10, 1973), in trust for the Plaintiffs.
> 2. Ingrid Hanrieder shall account for all monies received from the Family Trust, including loss of interest, and there be a reference to the Registrar, if necessary, for such accounting.
> 3. The Plaintiffs recover damages against Ingrid Hanrieder in the amount determined by the accounting, including loss of interest.
> 4. The proceedings against the third parties are hereby dismissed.
> 5. The Plaintiffs are entitled to tracing; and
> 6. The Plaintiffs and Third Parties recover their costs from the Defendant, Ingrid Hanrieder.

2013 BCCA 310 (CanLII)

[4] Madam Justice Loo's order was founded on alternative bases, which she stated as follows:

> [113] I conclude as follows:
>
> > (1) Hugo and Ingrid Hanrieder agreed [by way of a secret trust] that on his death she would hold the mineral rights in trust for Bette Chinn and Dennis Hanrieder; and
> >
> > (2) Ingrid Hanrieder breached an agreement made on May 29, 1998 that she would transfer the mineral rights to Bette Chinn and Dennis Hanrieder in return for them delivering executed releases [in respect of claims against their father's estate].

2013 BCCA 310 (CanLII)

[5] Thus, the trial judge found that Ms. Hanrieder, who was Hugo Hanrieder's second wife, held her interest in the Family Trust pursuant to a secret trust in favour of her husband's two children. The trial judge also held, as an alternative basis for the order, that Ms. Hanrieder had breached a contract made May 29, 1998 to transfer her interest in the trust to the two children. The finding of the creation of a secret trust made it unnecessary for the trial judge to determine third party claims arising from the contract issue. The appellant submits that there was no legal basis for either finding. She seeks an order setting aside Justice Loo's order. If the breach of contract claim is maintained against her, Ms. Hanrieder seeks a new trial with respect to her third party claims.

[6] For reasons that follow I am of the view that the evidence supports the finding of the trial judge that Ms. Hanrieder contracted with the respondents to transfer her interest to them in the family trust and that she breached her contract with them by failing to do so. However, I am of the view that the trial judge erred in law in finding that Ms. Hanrieder's interest in the family trust was the subject of a secret trust. As a result, the declaration that Ms. Hanrieder holds her interest in the Family Trust in trust for the respondents will stand, the date of the accounting will change to reflect the commencement date of the contract, and the contract issues for which Ms. Hanrieder claims third party liability must be the subject of a new but limited trial.

[7] The appellant also raised a ground of appeal relating to the question of whether the trial judge ought to have recused herself from the trial. In my view there

is nothing to this ground of appeal. I will mention it briefly when I deal with the grounds of appeal later in these reasons.

Factual Background

2013 BCCA 310 (CanLII)

[8] The facts giving rise to the lawsuit arose against a lengthy historical background. Much of the history was undisputed. Commendably the parties prepared an agreed statement of facts for the trial judge and filed a number of uncontested documents as exhibits at trial. The parties limited their witness lists primarily to those whose testimony was seriously disputed.

The Creation of the Family Trust

[9] Hugo Hanrieder's parents, Anton and Katharina Hanrieder, owned mine and mineral rights (the "Mineral Rights") to land in Saskatchewan which contains oil reserves.

[10] Katharina Hanrieder was the executor of her husband's will. On July 26, 1973, after Anton Hanrieder died, Katharina Hanrieder, on her own behalf and as executor of her husband's will, entered into a trust agreement with her five children. The trust agreement designated her son Hugo Hanrieder and her daughter Helen Hanrieder as trustees. The Mineral Rights were transferred by Katharina Hanrieder to the trustees for the benefit of her children Hugo Hanrieder, Rita Mazer, Katherine Moessler, Rose Turner and Helen Hanrieder. As the trust's only property is the Mineral Rights, I will refer to the interest as being in the Mineral Rights (as the parties usually did in their communications). The provisions of the trust agreement relevant to this appeal provide:

> 4. All income derived from the trust properties shall be divided equally amongst all Beneficiaries hereinbefore named and such income shall be divided equally on a yearly basis or shall be divided at whatever time the Trustees may deem fit and necessary.
>
> …
>
> 8. Should either of the Trustees named herein die or become incapacitated to act as Trustee during the lifetime of any of the Beneficiaries of this trust estate <u>the surviving Trustee shall immediately appoint another Trustee</u> to act with the surviving Trustee and all terms and conditions and provisions of this agreement shall apply to such Trustee and he or she shall be bound by all

> the terms, conditions and provisions of this agreement upon acceptance of appointment as Trustee. It is agreed between all Parties that the Trustee appointed shall be one of the surviving Beneficiaries named herein or alternatively, an immediate member of the family of one of the surviving Beneficiaries.
>
> 9. The Parties hereto agree that should one of the Beneficiaries named herein die, his or her share shall be delivered to his or her surviving spouse, or if no surviving spouse to his or her surviving children equally. It is agreed that if there is no surviving spouse or no surviving children, then the deceased Beneficiary's share shall be divided equally amongst the other Beneficiaries. [Emphasis added.]

2013 BCCA 310 (CanLII)

[11] Hugo Hanrieder confirmed the Family Trust with the Surrogate Court for Saskatchewan on October 10, 1973.

[12] Over the years the trust provided minimal income to the beneficiaries. At one point Hugo Hanrieder told his son that it barely produced enough money to pay for the stamps used to send the cheques to the other siblings. That was all to change in 1998.

Hugo Hanrieder's Attempts to Pass his Interest in the Trust to his Children

[13] On March 24, 1984, close to eleven years after the creation of the trust, Hugo Hanrieder married Ingrid Hanrieder. Hugo Hanrieder had been married before and had two children by that marriage, the respondents Dennis Hanrieder and Bette Chinn. Ingrid Hanrieder came to the marriage with grown children as well. At the time he remarried, Hugo Hanrieder was 62 years of age. Ingrid Hanrieder was 48.

[14] On Hugo Hanrieder's retirement in 1987, he and the appellant moved from Prince George to Nanaimo where they purchased property, a house on Michigan Avenue which they registered in joint tenancy.

[15] Sometime before April of 1989 Hugo Hanrieder decided to do something about leaving his interest in the Mineral Rights to his now adult children. Accordingly, he gave handwritten instructions to his solicitor, Mr. Shabbits (later Shabbits J., now retired) at Heath and Co. in Nanaimo. The instructions recorded that Mr. Hanrieder wished to revoke all previous wills. He said he wanted to:

> Bequeath as follows:
>
> All my interest in [the Mineral Rights] to be shared equally by my son Dennis Allen Hanrieder and my daughter Bette Lynn Chinn. My son Dennis Allen Hanrieder shall administer the foregoing rights and shall succeed me as Trustee of the relevant Trust Agreement.

2013 BCCA 310 (CanLII)

[16] In a memorandum to his file dated April 3, 1989, Mr. Shabbits wrote:

> The instructions from Mr. Hanrieder in respect of the Wills include the following:
>
> Each of Mr. and Mrs. Hanrieder wish to leave their household effects and personal vehicle to the other. In respect of Mr. Hanrieder's estate, he has life insurance of which his wife is [the] beneficiary, the house is owned by them jointly, as joint tenants, and he has [RRSPs] in which his wife is named as [the] beneficiary. He wishes to leave his wife with the income from his estate, with a provision that upon her death or upon her remarriage, the [residue] will be divided one-third to his son, Dennis, and one-third to his daughter, Bette.

[17] Mr. Shabbits sent a letter dated the same day to Mr. Hanrieder explaining why his interest in the trust could not be passed to his children through a will. After reviewing the trust documents Mr. Shabbits summed it up this way:

> The effect of all this is as follows. As things now stand, you do not have the authority to appoint your son, Dennis, to succeed you as trustee of the Trust Agreement. Further, you do not have the right to bequeath these mineral rights to your children. Both of these matters are determined by the Trust Agreements. Accordingly, I would not recommend that you include in your Will provisions which are in conflict with the Trust Agreements.

[18] A week later, on April 11, 1989, Mr. Hanrieder signed a will which passed a life interest in his estate for the benefit of Ingrid Hanrieder. On her death or remarriage, two-thirds of the estate was to pass to Dennis Hanrieder and Bette Chinn in equal parts, or to the children who might survive them. No mention was made in the will of the interest in the Mineral Rights.

[19] Two years later Mr. Hanrieder attempted once again to direct what would be done on his death with his interest in the Mineral Rights. Mr. Hanrieder wrote to a lawyer in Estevan, Saskatchewan. The letter stated:

Dear Sir,

Re: Hanrieder Estate

Your file 714258

According to my file the last communication from your office is dated August 29, 1974. As a lot of water has passed under the bridge since then I hope you are well and functioning as before.

I have a concern regarding clause nine (9) of [the] agreement dated July 26, 1973 pertaining to the transfer of the property. That clause provides [that] the beneficiary's share at death shall be delivered to the surviving spouse.

The facts in my instance are that I divorced my first wife. I re-married in 1984. My current wife and I both have adult children. In my last will and testament she is the main beneficiary. If she survives me, which is highly probably because she is younger and females live longer, the "mines and minerals" would pass to her. Subsequently, at her death, those rights would pass to her beneficiaries, probably her children. Should that come to pass my children would be very unhappy and it would most certainly negate the intentions of my parents, who bought and developed the property, as well as mine.

My wife and I have discussed this matter thoroughly and we both agree that on my death my portion of the "mines and minerals" rights should be delivered equally to my two children, namely:

Mr. Dennis A. Hanrieder

…

Mrs. Bette L. Chinn

…

Would it be possible to attach and/or register (if it is necessary) a codicil or other legally acceptable amending document to achieve the aforementioned objective? If so, I hope it can be done without subjecting all the other family members to a great deal of inconvenience. My oldest sister Kay will be 82 this year and Rose 77. My sister Rita and her husband both died which could mean further complications. I am retired at age 69 so can be reached almost any time at home … to discuss any suitable proposal. [Please] note new address below.

I trust to hear from you in due course.

Yours truly

"HFH"

[20] The law firm replied by letter dated April 22, 1991:

This is in response to your letters to our office, setting out your enquiries concerning paragraph 9 of the subject Agreement.

As I explained in our telephone conversation, it is my personal view that the reference in paragraph 9 to "... his or her surviving children ..." is intended to

2013 BCCA 310 (CanLII)

> be a reference to your children. I do not believe this would be construed as a reference to the children of your present wife. However, of course, there is no certainty that a Queen's Bench Judge would concur in my interpretation.
>
> <u>I think it is advisable that both you and your present wife draft your Wills to confirm the intention of both of you, which is that only your children will benefit. I understand that you have already attended to this</u>. [Emphasis added]
>
> I think that the only option available to you if you wish to ensure there is no possibility of the adverse interpretation would be to amend the Agreement. This would involve inconvenience and expense. The lawful heirs of the family members who have passed away would, I think, be legally entitled to execute an amending Agreement. If you wish to further consider this option, I would be pleased to discuss the matter with you.
>
> I trust that the foregoing will be of some assistance to you. I am very sorry for my oversight in failing to respond to you promptly. Please accept my apologies …

2013 BCCA 310 (CanLII)

[21] The letter does not address Mr. Hanrieder's desire that on his death his interest in the Mineral Rights be delivered to his children. Rather, it seems designed to reassure Mr. Hanrieder that if his wife obtained the interest in the trust by his death, that on her death the interest in the trust would go to his children and not hers. My views are of no moment on this point as nothing turns on it, but this interpretation seems wrong because there is no provision in the trust document for what happens on the death of subsequent beneficiaries. The lawyer does go on to say that Mr. Hanrieder's wife's will could make it clear that Mr. Hanrieder's children should inherit from her, or the trust document could be amended. Neither of those steps was taken.

[22] After receipt of that letter Mr. Hanrieder wrote to his children in a letter dated May 13, 1991:

> Dear Dennis & Bette,
>
> Re: 5½ Sec 27 Tsp 5 Rge 5 W 2nd
> <u>Province of Sask.</u>
>
> My parents owned the "mines and mineral" rights of the above 320 acres of land. As my mother got older she wanted to sell the land so as to be free of any obligations and concerns about it. As potential heirs all the children had to agree to this transaction. Being aware that the title carried the aforementioned rights I said I would agree to the sale of the land but that the "mines and mineral" rights should be retained by the five children. As all

> agreed a family trust was established to hold those rights. The agreement spells out that when a beneficiary dies, "his or her share shall be delivered to his or her surviving spouse, or if no surviving spouse to his or her surviving children to be divided amongst all of the surviving children equally."
>
> The agreement is dated July 26, 1973. <u>I had some concern the wording could be construed to mean my spouse of that date. Or, it could be the spouse on the date of my death. The former would not be acceptable and the latter agrees that she has not any right to inherit those rights because they should pass to direct descendants of Anton Hanrieder (my father).</u> [Emphasis added.]
>
> Being concerned I wrote the lawyers regarding this matter and I'm enclosing a copy of their reply which states their opinion. I hope you are satisfied that I have done the best for both of you. My file on this subject goes back to 1952. You are welcome to see it anytime.
>
> All my love,
>
> "Dad"

2013 BCCA 310 (CanLII)

[23] Both Dennis Hanrieder and Bette Chinn testified that their father spoke to them individually about what would happen to the Mineral Rights on his death. Dennis Hanrieder said that his father visited him in Manitoba before he received the April 22, 1991 letter. He said that his father, in the presence of Ingrid Hanrieder, told him he had written his will so that "Ingrid is going to get everything I own except the mineral rights, which belong to you and Bette because that's … Hanrieder property." Dennis Hanrieder went on to say that Ingrid Hanrieder had said at this time that she had no interest in mineral rights as she had money of her own.

[24] Bette Chinn testified that in the summer of 1990 or 1991 she had been house-sitting for her father for a couple of weeks. She said that on his return he spoke to her about the Mineral Rights in Ingrid Hanrieder's presence. She said it was the first that she had heard of them. Her father told her that the Mineral Rights were to go to Dennis and herself. Ingrid was to get everything else. Bette Chinn testified that when asked, Ingrid Hanrieder indicated that it was all right with her.

The Townsite Road Property

[25] In May of 1993 Hugo and Ingrid Hanrieder sold their home on Michigan Avenue and purchased a condominium on Townsite Road in Nanaimo. Heath and Co. did the conveyance for them. The Hanrieders had instructed them to register

the property in joint tenancy. In an admitted error Heath and Co. registered the owners of the property as tenants in common. This error only came to the attention of Ingrid Hanrieder after the death of her husband.

The Events Following Hugo Hanrieder's Death

2013 BCCA 310 (CanLII)

[26] Hugo Hanrieder died on December 8, 1997. Shortly before that time Dennis Hanrieder travelled from Manitoba to Nanaimo to be at his bedside. After his father's death Dennis Hanrieder stayed in his father's home for about a week. During that time Ingrid Hanrieder gave him a pouch, saying, "This is what your Dad wanted you and Bette to have." Dennis Hanrieder testified she said "Put it in your pocket and now you own the mineral rights." According to Dennis Hanrieder the pouch contained, "[A]ll the mineral rights history and a few family heirlooms like a ten Deutsch note from Germany, little things, but the bulk of it was the first article my saw [sic] about the mineral rights up to I presume the last time he paid out whatever was divided out among his siblings."

[27] Soon after her husband's death Ingrid Hanrieder visited a Notary Public with the intention of registering herself as the sole owner of the Townsite Road property. It was then that she learned that she was registered on title not as a joint tenant, but as a tenant in common. She visited Heath and Co. where she was told that the error was theirs and that she should visit another lawyer to see about rectifying the mistake.

Lawyers Become Involved

[28] Mr. Giovando from Heath and Co. provided Ingrid Hanrieder with a list of lawyers she might consult. It is unclear if Ms. Hanrieder chose the firm or Mr. Giovando referred the file to the firm of Allin Anderson McLeod, but in any event Ms. Hanrieder found herself in the office of Roderick Mont, an associate of the firm, on January 30, 1998.

[29] Before speaking with Ms. Hanrieder, Mr. Mont was given details about the file by a senior lawyer in his firm. The lawyer told him that the ownership of the

Townsite Road property had been registered incorrectly as tenants in common. He said the value of the condominium was $130,000, that the deceased’s half interest would be probated now under the will, and Mr. Mont calculated that the fees would amount to $560. Mr. Mont then spoke to Mr. Giovando who told him that Ms. Hanrieder’s “two step children” might have a possible claim to the estate.

2013 BCCA 310 (CanLII)

[30] When Mr. Mont then spoke with Ms. Hanrieder, she told him that all of the other assets with the exception of the condominium and a car were held in joint tenancy. She also provided him with the names and addresses of Dennis Hanrieder and Bette Chinn.

[31] Mr. Mont testified that he spoke with Bette Chinn on February 26, 1998. He told her about the problem with the title to the condominium. At this point he was seeking a release from her with respect to her father’s will as he thought that that would be the simplest way of dealing with the ownership problem with the condominium given the possible claim she might make on the estate. He said Ms. Chinn said that she did not have a copy of her father’s will. She wondered if the title had been deliberately registered as tenants in common. Mr. Mont said that he told Ms. Chinn that he would look to see how the Michigan Avenue property had been registered.

[32] Mr. Mont said that Ms. Hanrieder telephoned him on March 4, 1998 and told him that she did not think that Bette would “sign off”. She said that Bette had received a lot of things from the old house such as furniture and appliances. Ms. Hanrieder told Mr. Mont that she was willing to give Bette Chinn a photograph of her father in which Ms. Chinn had earlier expressed interest.

[33] The next day Mr. Mont sent letters to both Dennis Hanrieder and Bette Chinn enclosing copies of their father’s will, copies of title to both the Townsite Road and the Michigan Avenue properties, Mr. Hanrieder’s instructions to Heath and Co. to register the Townsite Road property in joint tenancy, and releases for both of them to sign with respect to their father’s estate. The release sent to Bette Chinn stated:

> RELEASE AND DISCHARGE
>
> IN THE MATTER OF Hugo Ferdinand Hanrieder, also known as Hugh Ferdinand Hanrieder, deceased.
>
> I, Bette Chinn, [address], one of the children and residual beneficiaries of the above estate, hereby acknowledge that I have received from the law office of Allin, Anderson & MacNeil, the solicitors for Ingrid Hanrieder a copy of the Last Will and Testament for the deceased as well as copies of land title searches for [the Townsite Road and Michigan Avenue properties] both in Nanaimo B.C. In consideration of the sum of TEN ($10.00) DOLLARS, I hereby absolutely release and forever discharge the executor of the estate, Ingrid Hedwig Hanrieder, her heirs, executors, administrators, successors and assigns of and from all claims and demands whatsoever in respect of the administration of the estate as the estate relates to [the Townsite Road property]
>
> [Legal description omitted.]
>
> I HEREBY CONSENT to the transfer of the [Townsite Road property] to Ingrid Hedwig Hanrieder.

[34] Dennis Hanrieder received the same form of release.

[35] Mr. Mont then received a letter dated March 31, 1998 from Gordon Taylor, who had been retained by Bette Chinn. The letter requested the disclosure document required for the probate of Hugo Hanrieder's estate and to provide him with "the general nature of any assets" passing to Ingrid Hanrieder, which he wanted listed whether they were in joint tenancy or not. Mr. Mont also received a fax from Mr. McCullough, whom Dennis Hanrieder had retained. The fax stated that Dennis Hanrieder was not prepared to sign a release until he had an opportunity to discuss the matter with his sister.

[36] Mr. Taylor testified that he had written the March 31 letter because Ms. Chinn had brought him a copy of Mr. Hanrieder's will. He saw that it provided Ms. Hanrieder with a life estate. He said that he wanted to know what assets were in the estate as opposed to those jointly held so that he could give Bette Chinn advice with respect to the will and the life estate, the *Wills Variation Act*, R.S.B.C. 1996, c. 490, and generally on matters such as the May 13, 1991 letter Mr. Hanrieder had sent to his children.

2013 BCCA 310 (CanLII)

[37] On April 15, Ms. Hanrieder, responding to a message for her to do so, contacted Mr. Mont. During that conversation Ms. Hanrieder provided Mr. Mont with a list of assets which included GICs, RRIFs, etc. Mr. Mont included all of this information in a letter written to Mr. Taylor the next day. There was no reference to the Mineral Rights.

2013 BCCA 310 (CanLII)

[38] Mr. Taylor responded to the April 16 letter by way of letter to Mr. Mont dated April 17, 1998. In the letter Mr. Taylor said:

> Thank you for your letter of April 16, 1998. You have not mentioned the interest in Mines and Minerals, outlined on the attached correspondence. Were you aware of that property and what is Ms. Hanrieder's position with respect to it?

[39] Mr. Mont said that he next called Ms. Hanrieder. He testified:

> A: So I phone Mrs. Hanrieder May 7th and she advised that -- that she knew, obviously, of the mines and mineral interest, that Mr. Hanrieder - Hugh Hanrieder and Hugh Hanrieder's brother's widow are the trustees of a trust and she advises me that she makes no claim with respect to the mines and minerals trust. This is the first time I had spoken to her about it and she -- she advised me that she makes no claim with respect to the trust. She also advises me that -- that there is information, a letter in Peter Giovando's file written by Mr. Shabbits regarding the trust. [Emphasis added.]

[40] Mr. Mont said that Ms. Hanrieder called him again on the same day saying that she had found Mr. Shabbits' opinion letter dated April 3, 1989. Mr. Mont testified:

> A ... I just -- I would just be writing it as she's telling me. At this point, I have not seen the letter or anything. She's just telling me information. She told me that the surviving trustee appoints another trustee. That Hugh, that's her husband, could not appoint Dennis as trustee. And she advises me that there's two -- two agreements, one is dated October 10, 1973, one is dated July 26, 1973. She advises me that she gets income pursuant to the trust and that after her death that income goes to Dennis and Bette. She also advises me the income is minimal but to help settle issues she will assign it to Dennis and Bette. [Emphasis added.]

[41] As a result of this conversation Mr. Mont telephoned Mr. Giovando to obtain copies of the trust agreements. On May 13, Mr. Giovando sent Mr. Mont the April 3, 1989 notes in Mr. Shabbits' file with respect to his instructions from Mr. Hanrieder,

copies of the trust documents and Mr. Shabbits' April 3 opinion letter. Mr. Mont reviewed the documents After that review Mr. Mont sent a letter to Mr. Taylor, the material parts of which read:

> Further to your letter dated April 17, 1998, we advise that our office was unaware of the Mines and Minerals interest. We have discussed the Mines and Minerals interest with our client and can advise that she is willing to sign any interest she has in the Mines and Minerals to Dennis Hanrieder and Bette Chinn. The writer has also been in contact with Peter Giovando of Heath Giovando Hansen, the law firm which acted for Mr. Hanrieder in the preparation of his Will. Mr. Giovando has provided to our office an undated hand written note which appears to be written by Mr. Hanrieder in which Mr. Hanrieder indicates that all his interest in the Mines and Minerals shall be shared equally between Dennis Hanrieder and Bette Chinn.
>
> We also enclose for your review an Agreement executed by Hugo Hanrieder regarding the estate of Anton Hanrieder dated October 10, 1973, and [an] Agreement dated July 26, 1973, between Katharina Roth, Rita Mazer, Hugo Hanrieder, Katherine Moessler, Rose Turner, and Helen Hanrieder. [Emphasis added.]

[42] Mr. Mont sent a copy of this letter to Ms. Hanrieder.

[43] Mr. Taylor testified that after he received this letter he had Ms. Chinn come into his office on May 29. He said that he discussed with her the value of the estate and the fact that she and her brother had a contingent right to an interest in the non-jointure assets. They discussed an application under the *Wills Variation Act* and Mr. Taylor noted that if rectification was made of the title to the Townsite condominium "The effect of the rectification would have been that the -- that asset would have fallen into the jointure category and left not much … against which any *Wills Variation* claim could have been brought." He said that he told Ms. Chinn that, in the circumstances, probably the best thing to do would be to accept the offer of the mines and mineral rights. He said that she agreed with him and instructed him to call Mr. Mont to tell him that she would accept his offer in his letter of May 29th. They did so by way of a conference call that day.

[44] Mr. Mont said that he had a telephone conversation with Mr. Taylor on May 29, 1998. He recollected that Bette Chinn was in Mr. Taylor's office at the same

2013 BCCA 310 (CanLII)

time. Mr. Mont had no other recollection of the telephone call, but his notes to the file record: "He has instructions to sign the release and will be sending it."

[45] Mr. Taylor testified that during that telephone conversation Mr. Mont, "… [U]nequivocally said to me, "Yes, we agree to transfer those mine and mineral rights."

2013 BCCA 310 (CanLII)

[46] Ms. Chinn's testimony was to the same effect.

[47] Mr. Taylor wrote to Mr. Mont on June 1, 1998. His letter said:

> Dear Sir:
>
> Re: Estate of Hugo Ferdinand Hanrieder, deceased ...
>
> We confirm having discussed this matter with you by telephone on May 29, 1998. You confirmed that there are no assets registered in the name of Hugo Ferdinand Hanrieder alone, other than the one half interest in the Townsite Road property and the other assets set out in paragraph 1 of your letter of April 16, 1998.
>
> You confirmed that all other assets were either registered jointly with Ingrid or she became entitled to them as the beneficiary thereof upon the death of the deceased.
>
> Upon the receipt of the above information, our client has instructed us to return the Release and Discharge which is attached.

[48] The release signed by Ms. Chinn was the one which had been forwarded earlier to her by Mr. Mont in his letter of March 8, 1998. Mr. Taylor testified that he did not know why his letter did not refer to the Mineral Rights. He said that he must have felt that the agreement that they had made on the telephone was sufficient. Mr. Taylor also said that he thought that Ms. Chinn's interest in the trust would somehow be dealt with under the *Estate Administration Act*, R.S.B.C. 1996, c. 122.

[49] Bette Chinn testified about the conversation with Mr. Mont on May 29. I will not repeat it here. Her recollection is much the same as Mr. Taylor's.

[50] On June 23 Mr. Mont forwarded a copy of Ms. Chinn's release to Mr. McCullough and requested Dennis Hanrieder's release. On July 22 Mr. McCullough advised Mr. Mont that Dennis Hanrieder's release would be

forthcoming. That release was eventually forwarded to Mr. Mont by letter on August 17, 1998.

The Mineral Rights Begin to Yield Returns

[51] Meanwhile, on June 29, a courier delivered a letter from Chevron Canada to Ms. Hanrieder's home addressed to her late husband. In the letter Chevron stated that it would be forwarding to Mr. Hanrieder a cheque in the amount of $43,582.89 "representing payment of back royalty payments [arising from the Mineral Rights] from the date May 1, 1998 to June 30, 1998."

[52] Ms. Hanrieder took the letter from Chevron to the offices of Heath and Co. to obtain some advice. She spoke to Mr. Giovando who referred the matter to a Ms. Cook, a solicitor.

[53] Ms. Cook prepared a memorandum dated July 27, 1998, which outlined the terms of the trust agreement, the terms of Chevron's lease of the Mineral Rights, and some estimate of the value of those rights.

[54] On July 28, 1998, Ms. Hanrieder telephoned Mr. Mont. During the conversation Mr. Mont told Ms. Hanrieder that Dennis Hanrieder had signed a release. Mr. Mont testified that Ms. Hanrieder told him that at this point "a new trustee had been appointed and that the money goes to her." He testified: "And she says to me at this point she doesn't want to give any money to Bette and Dennis." Mr. Mont recalled telling her that "the deal was that she was to assign her mines and minerals interest, but did not have to pay them any money."

[55] When Mr. Mont received Dennis Hanrieder's release in August, he forwarded it along with Bette Chinn's release to Mr. Giovando. He said that once he received the releases he thought that was the end of the retainer. Mr. Mont had done nothing about assigning the interest in the Mineral Rights to Dennis Hanrieder and Bette Chinn. He said he included in his letter to Mr. Giovando copies of the letters of May 27 and June 1 which dealt with the interest in the Mineral Rights. He said he sent

2013 BCCA 310 (CanLII)

those letters to show Mr. Giovando that there remained an outstanding issue on the file.

[56] Nothing too much happened after August of 1998. Ms. Hanrieder received whatever royalties were distributed on account of the trust. Dennis Hanrieder and Bette Chinn did nothing about the interest in the Mineral Rights until 2001 when Ms. Chinn had a conversation with a cousin and learned that money had been paid out by the trust. Ms. Chinn returned to Mr. Taylor's office in May to discuss why no money had come to her brother and herself.

[57] On May 25, 2001, Mr. Taylor wrote to Mr. Mont enclosing a request that Ms. Hanrieder sign a release of interest in the mineral rights. The release stated "my late husband's share in the said mineral rights have devolved unto his two children, namely Dennis Hanrieder and Bette Chinn."

[58] On the same date Mr. Taylor also wrote to Helen Hanrieder (now Keane) who had earlier been one of the trustees of the Family Trust. The letter enclosed the May 27 letter from Mr. Mont to Mr. Taylor which indicated that Ms. Hanrieder "is willing to sign any interest she has in the Mines and Minerals to Dennis Hanrieder and Bette Chinn." Mr. Taylor also asked Ms. Keane for the details of the leasing agreement he understood the Family Trust had with Chevron.

[59] Letters went back and forth. The lawyers re-entered the scene. The upshot of it all was that Ms. Hanrieder denied that she agreed to transfer her interest in the trust to the children, refused to sign the release, and this lawsuit ensued.

Ms. Hanrieder's Evidence

[60] Among other things, Ms. Hanrieder testified that she did not give Mr. Mont instructions that she had no claim to the Mineral rights. The trial judge did not believe her. The trial judge said this:

> [104] I reject Ingrid Hanrieder's denial of giving instructions to Mr. Mont that she had no claim with respect to the mines and minerals rights as a clear fabrication on her part. Where the evidence of Ingrid Hanrieder conflicts with the evidence of the other witnesses, I regrettably reject her evidence. I do

2013 BCCA 310 (CanLII)

> not find her to be a credible witness. In all likelihood she started to change what Hugo wanted when she told Mr. Mont in their initial conversation of the mineral rights that it "goes to" her and then after her death to his children. She deliberately set out to change what Hugo wanted when she read the June 29, 1998 letter from Chevron. She decided to take the money for herself.

2013 BCCA 310 (CanLII)

[61] This finding, open on the evidence, is not challenged in this Court.

The Grounds of Appeal

[62] The appellant states her grounds of appeal as these:

The learned trial judge erred in:

a. Failing to recuse herself from hearing the trial as she suffered from bias or perception of bias which affected her ability to fairly consider the evidence.

b. Finding that Ingrid Hanrieder held mineral rights in trust for Bette Chinn and Dennis Hanrieder.

c. Finding that there was an agreement made on May 29, 1998 that Ingrid Hanrieder would transfer mineral rights to Bette Chinn and Dennis Hanrieder in return for them delivering executed releases.

d. Failing to find any liability on the part of Roderick Mont.

e. Failing to find any liability on the part of Heath and Co.

Discussion

<u>The First Ground of Appeal − Should the Trial Judge have Recused Herself?</u>

[63] At the beginning of the trial when counsel were reciting to the Court the names of the witnesses to be called, the trial judge told the parties that one of the witnesses, Mr. Taylor, had been a classmate of hers in law school. She said that the last time she saw him was at a Christmas party at the law firm of another classmate.

It became clear during the discussion with counsel that her contact with Mr. Taylor after law school was minimal. Counsel then began to discuss whether there would be any credibility issues with respect to Mr. Taylor. Counsel for Ms. Hanrieder advised the court that there was an issue as to what was said over the telephone between Mr. Mont, Mr. Taylor and Ms. Chinn. He said that there was an issue with respect to the accuracy of Mr. Taylor's recollection. Counsel for Ms. Hanrieder was also concerned that the trial judge might be "uncomfortable" with criticizing Mr. Taylor's actions. Lastly, during the course of the discussion this was said:

> THE COURT: Yes, Mr. Bolan?
>
> MR. LEGH: I have nothing further.
>
> MR. BOLAN: From what My Lady just said, I think there may have been something lost in translation, as they say. We were told in the -- in the hallway by Madam Registrar -- Clerk that no matter -- that basically you would be believing whatever Mr. Taylor said.
>
> THE COURT: He's a very credible person.
>
> MR. BOLAN: Yeah, credible person but basically --
>
> THE COURT: He's a credible person.
>
> MR. BOLAN: -- no matter what his evidence is that you would be believing him.
>
> THE COURT: Maybe that's going a little far.
>
> MR. BOLAN: Yeah.
>
> THE COURT: Maybe that's going a little far and I may have suggested that but I wouldn't go so far as to say no matter what anybody else says, I'm going to believe him.
>
> MR. MAY: No, you haven't fettered your discretion (indiscernible) be the issue.
>
> THE COURT: No, I haven't done that. And I think I should explain to -- to the defendant because you have -- Mr. Legh, with all respect, you haven't quite brought an application and you haven't quite made it clear why you're bringing the application. This isn't a case where you can claim that the judge is biased because, given the facts -- knowing the facts, this isn't a case where a reasonable person apprised of the facts would say that I've already pre-judged the case. I'm going to go ahead with this.

[64] With respect, while this was a somewhat awkward handling of the issue by the trial judge, it does not provide a basis for an apprehension of bias. The trial judge made it clear that she had little contact with Mr. Taylor since law school and

2013 BCCA 310 (CanLII)

could say no more than she assumed that he was a credible person. In my view stating her assumption that he was a credible person was just the same as the assumption she would have to make of all of the witnesses − that is, that they were credible until they testified and until such time the court had something against which to measure their evidence. I agree with the trial judge that a reasonable person apprised of the facts would not reach the conclusion that she would not approach Mr. Taylor's testimony with an open mind. In any event as the trial unfolded it was clear that the clarity and reliability of Mr. Taylor's recollections of events were questioned but his credibility was not. Nothing turned on his credibility *per se*. I would dismiss this ground of appeal.

<u>The Second Ground of Appeal − Was There a Secret Trust?</u>

[65] The trial judge accepted the evidence of Dennis Hanrieder and Bette Chinn that their father had asked Ingrid Hanrieder, on two separate occasions in their presence, to transfer her interest in the Mineral Rights to them. The documentary evidence of Mr. Hanrieder's wishes was clear and consistent. Ms. Hanrieder's denials were poorly constructed and unimpressive. The trial judge was on firm ground when she concluded that Mr. Hanrieder had extracted the promise from Ingrid Hanrieder. If Mr. Hanrieder had possessed the rights to the minerals on his death and thus had the ability to dispose of them in a will, then the decision of the trail judge that there was a secret trust would be unassailable. But that was not the case.

[66] *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) ("*Waters*") describes a secret trust as this at p. 288:

> <u>Whenever a person takes property beneficially under a will or on an intestacy,</u> and it is shown that during the testator's, or the intestate's, lifetime the devisee, legatee, or intestate successor undertook to hold the property on trust for specified objects, he will be held to that obligation on the death of the testate or intestate. What must be shown is that there was a communication to the devisee, legatee, or interstate heir of the deceased's intentions, and an acceptance by that person of the request that he hold the property on trust for the enumerated persons or purposes. The communication is the most essential factor. Once it is established, acceptance, though vital, can be spelled out of the silence of the devisee, legatee, or heir. The courts take the

2013 BCCA 310 (CanLII)

> view that any person having received a request of this nature would be bound to say something if he rejected the idea that he himself should not enjoy the property beneficially. The crucial requirements therefore being of communication and acceptance of trust obligation and trust objects, it is of secondary importance whether the deceased made his will on the strength of the acceptance, left his will unchanged on that basis, or allowed himself to die intestate relying on the fact that his intestate heir had accepted the trust. [Emphasis added.]

2013 BCCA 310 (CanLII)

[67] In my view this passage correctly states the law. A secret trust is grounded on the fact that the testator has an interest in property which he or she can devise under a will or leave on an intestacy. Mr. Hanrieder did not hold such property. The trust agreement provided him with only a life interest. On his death his interest was to go to his surviving wife. Mr. Hanrieder was therefore in no position to extract promises or to create a trust with respect to property which, on his death, was no longer his to control.

[68] In my view the trial judge erred in finding a secret trust in these circumstances. The second ground of appeal must succeed.

<u>The Third Ground of Appeal – Did Ms. Hanrieder Breach an Agreement to Transfer Her Interest in the Trust to Her Husband's Children?</u>

[69] Success on the second ground does not end this appeal. The trial judge also found that Ms. Hanrieder had contracted with Bette Chinn and Dennis Hanrieder to transfer her interest in the Mineral Rights to them in return for their releasing any interest they might have in their father's estate as it related to the Townsite Road property.

[70] The appellant submits that the releases signed by Bette Chinn and Dennis Hanrieder, releasing their interest in the Townsite Road property for the sum of $10, constitute the written contracts between the parties. (Reproduced above at paragraph 33.) He submits that the trial court was wrong to go beyond the written agreement to determine whether there were additional or different contractual terms.

[71] The question for this Court is whether the trial judge was entitled to give effect to the evidence she found established that the parties had agreed that Ms. Hanrieder would deliver her interest in the Family Trust in return for the releases signed by Bette Chinn and Dennis Hanrieder.

2013 BCCA 310 (CanLII)

[72] The appellant submitted that the written agreements, that is, the releases, appeared on their face to be complete agreements. In these circumstances counsel for the appellant submitted that parol evidence was not admissible to contradict, vary, add to or subtract from the terms of the written agreement. Counsel took the position that before the court could consider evidence of prior communications of the parties, there had to be a finding that the written agreement was in some sense incomplete. Counsel took the position that it could not be said that on their face the releases were incomplete. The simple proposition is that the releases say that they were given in consideration of $10, they do not mention the Mineral Rights, and that it was not open to the trial judge to consider the oral or written communication leading up to the signing of the releases.

[73] The respondents begin by noting that the releases do not contain an “entire agreement” clause. Their position is two-fold. First, it can be said that the signed releases form only part of the agreement. The rest, they say, is partly oral and partly in writing, in accordance with this Court’s decision in *TD Bank v. Griffiths*, [1988] 1 W.W.R. 735, 16 B.C.L.R. (21) 117. Alternatively, they argue the parties reached an agreement prior to the signing of the releases which may be characterized as an enforceable collateral agreement.

[74] In my view, both positions of the respondents can be sustained. In *TD Bank,* guarantors of a loan were advised that the loan would be advanced on certain conditions. The conditions were made known to the guarantors before they signed their guarantees and confirmed thereafter in a letter. The guarantees themselves contained a provision that they were not induced by any representation not contained in the guarantee. No mention was made in the releases of the conditions on which the loan would be advanced. In concluding that the trial judge was right to

admit the evidence of the bank's prior representations, Mr. Justice Lambert, writing for the Court, adopted this statement of Mr. Justice Sullivan in *Bank of Montreal v. Perron*, [1982] 6 W.W.R. 442 (Man. C.A.) at 447:

> In my opinion, the submission of counsel for the bank on parol evidence, while correct in law, has no application to the facts of this case. *The parol evidence rule applies only after it is established that the contract sued on was wholly in writing,* and the writing is identified. [Emphasis in original.]

[75] Mr. Justice Lambert went on to approve of K.W. Wedderburn's observations in his article, "Collateral Contracts", [1959] Cambridge L.J. 58 at 62:

> What the parol evidence rule has bequeathed to the modern law is a presumption - namely that a document which *looks* like a contract is to be treated as the *whole* contract. This presumption is "very strong", but "it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement." [Emphasis in original.]

[76] In the case at bar the trial judge accepted that the written releases were not the whole of the contract. The respondents called evidence, which was accepted by the trial judge, that they had signed the releases after being promised the interest in the Mineral Rights in return. Thus the whole of the contract included the offer given in writing by Ingrid Hanrieder and the acceptance given orally by Ms. Chinn on behalf of herself and her brother.

[77] There is an alternative way in which to view the dealings between the parties leading to the signing of the releases. The agreement of Bette Chinn and Dennis Hanrieder to sign the releases in return for the interest in the Mineral Rights may be said to constitute a collateral agreement which was proved by way of parol evidence. In *Ahone v. Holloway* (1988), 30 B.C.L.R. (2d) 368, 12 A.C.W.S. (3d) 41, Mr. Ahone sold his property to Ms. Holloway and another for a down payment of $2000 and the rest by way of a mortgage back to Mr. Ahone. The written mortgage provided that no interest was payable by the mortgagors to Mr. Ahone. Mr. Ahone alleged that there was an oral agreement whereby the mortgagors would pay interest at 6 percent and permit Mr. Ahone to live in the basement. In considering

2013 BCCA 310 (CanLII)

whether the trial judge had been correct in determining that there had been an agreement between the parties requiring the payment of interest and accommodation in the house for Mr. Ahone, this Court considered an argument that the parol evidence rule forbid the admission of evidence of the oral agreement. To that argument Madam Justice McLachlin (as she then was) said this for the Court at 372-3:

> The parol evidence rule is not absolute, as pointed out by Lambert J.A. in … *Gallen v. All State Grain Co*. 9 D.L.R. 9 (4th) 496 at p. 506 [other citations omitted]. Thus evidence of an oral agreement or representation may be admissible notwithstanding the existence of a written document to establish a collateral agreement which, although oral, is enforceable.
>
> A collateral contract is an oral agreement ancillary to a written agreement. As with any contract, the party alleging it must establish the agreement of all parties to its terms. <u>He must also establish consideration, which in the case of a collateral contract consists in entering into or promising to enter into the principal contract</u>.
>
> The Supreme Court of Canada has repeatedly held that a collateral contract - which is one way of characterizing the agreements as to interest and accommodation in this case -- cannot contradict the main written contract: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515; *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102; and, *Carman Construction Ltd. v. Canadian Pacific Railway Co*., [1982] 1 S.C.R. 958. [Other citations omitted.]
>
> This rule has not been abrogated or altered, despite criticism by some of its inflexibility, and is binding on this court ...
>
> It follows that the only avenue open to the plaintiff is to show that the terms of the oral agreements he alleges are not inconsistent with the terms of the written contract.
>
> The agreement to pay interest at 6 per cent is clearly and directly contradictory to the stipulation in the written contract that the mortgage bears no interest. Consequently, that agreement cannot be legally valid.
>
> This result would appear to be consistent with this Court's decision in *T.D. Bank v. Lenec* (1984), 60 B.C.L.R. 36. In *Lenec*, the bank, the petitioning mortgagee, took a promissory note from the respondent mortgagor and a mortgage collateral to the note, as security for a loan of $190,000. The interest rate in both the note and the mortgage was 7½ per cent. The bank contended that there had been a subsequent oral agreement with the mortgagor to pay higher interest which the mortgagor had paid. On the bank's petition for an order nisi of foreclosure the court allowed interest at only 7½ per cent. On appeal by the bank it was held, following *Hawrish*, that oral evidence of the subsequent agreements as to interest was inadmissible to contradict the clear terms of the documents.
>
> The tenancy agreement stands on a different footing. It does not contradict the written mortgage. It can, therefore, be enforced as a collateral contract.

2013 BCCA 310 (CanLII)

> While there is evidence to suggest that the parties intended the tenancy to be a life tenancy, the trial judge's conclusion that its term was the duration of the mortgage was not disputed and I would accept it. [Emphasis added.]

[78] This analysis may be applied to the case before us. The appellant asserts that the respondents' position is that the consideration for the release was the assignment of the interest in the Mineral Rights. The appellant is incorrect. The respondents' position is actually that the consideration for *signing* the releases was the assignment of the interest in the Mineral Rights to them. In other words, the collateral contract made between the parties was that Ingrid Hanrieder would assign her interest in the Mineral Rights to the respondents in return for their entering into the contract of release.

[79] I would not accede to this aspect of the appellant's third ground of appeal.

[80] The next point made by the appellant is that the trial judge was wrong to find that there was a contract between Dennis Hanrieder and Ingrid Hanrieder. Although it is not explicit in the reasons for judgment, the trial judge's conclusions are premised on the finding of fact that Bette Chinn was acting as agent for her brother. Dennis Hanrieder refused to sign the releases until he had conferred with his sister. After Ms. Chinn agreed to sign the release in return for the interest in the Mineral Rights, Dennis Hanrieder forwarded his signed release. In my view there was evidence to support the findings of the trial judge. I would not accede to this ground of appeal.

[81] Finally, the appellant says that if there was an agreement between the parties as to the assignment of the interest in the Mineral Rights, it is not enforceable because the terms of the agreement are uncertain. Counsel for the appellant notes the lack of discussion with respect to the mechanism of the transfer and the absence of a specific date on which it was to occur.

[82] I am of the view that the failure to include the mechanism of the transfer of the interest in the Mineral Rights as part of the agreement does not affect its enforceability. Ingrid Hanrieder as the beneficiary of the Hanrieder Family Trust,

2013 BCCA 310 (CanLII)

was the beneficial owner of the Mineral Rights. There were limited ways in which she could assign her interest to Dennis Hanrieder and Bette Chinn. In *Waters*, the authors say this at p. 185:

> If the property to be settled is an existing trust interest, there is yet another way in which the trust may be employed. It is clear, of course, that the owner may himself have legal title to the land, chattel, or chose in action, but it is possible that he is himself a beneficiary under a trust, the property of which is the land, chattel, or chose in action. In this situation he will have an equitable interest only, and it is that which he wishes to put into another's hand. Again, as with legal interests, that equitable property may either be handed over to the other, or a trust may be employed. If the equitable interest is to be handed over, special assignment rules govern, and those same rules will govern when the owner of the equitable interest decides to employ the trust and to assign his interest to new trustees for the intended beneficiary. With equitable property the owner may decide not to assign to new trustees, nor to declare himself a trustee of his equitable interest for the other, but instead to instruct the trustees of the trust in which he has the equitable interest to hold for the intended beneficiary.

2013 BCCA 310 (CanLII)

[83] In the case before us the contract requires an assignment of Ingrid Hanrieder's beneficial interest in the Mineral Rights to the respondents. The silence of the contract with respect to the mechanism of transfer must be seen in context as a deferral by the parties to Ingrid Hanrieder to complete the transfer in the way that suited her needs and requirements. While she could have accomplished the assignment in a number of ways, it must be inferred that at the very least the agreement required her to hold her interest in trust for the respondents. I would not accede to this ground of appeal.

[84] Finally, the appellant submits that the contract is unenforceable as it provides no fixed date for the assignment of the interest in the Mineral Rights. In my view, the effective date of the contract was the date Ms. Hanrieder received the second of the two releases, August 17, 1998. On receipt of the last of the releases she was required to fulfill her part of the bargain, to transfer her interest in the Mineral Rights to the respondents. Since the assignment involved Ingrid Hanrieder choosing a method of making the assignment which would require, at least, notice to the trustees and some documentation, a specific date for the assignment seems unrealistic. I would infer from the agreement that the parties were content to leave it

to Ingrid Hanrieder to initiate the assignment and complete it within a reasonable time after receipt of both releases.

Conclusion

[85] I would accede to the ground of appeal relating to the declaration of the secret trust. I would dismiss the grounds of appeal relating to the contract issues, but would vary the order made by the trial judge to reflect the effective date of the contract between the parties. The trial judge made insufficient findings to permit this Court to fully dispose of the Third Party proceedings. As a result I would order a new trial with respect to the Third Parties on all issues except that of Mr. Mont's authority to enter into a contract with Bette Chinn and Dennis Hanrieder. That issue was decided against Ms. Hanrieder by the trial judge.

2013 BCCA 310 (CanLII)

[86] In the result, paragraphs 1, 3, 5 and 6 of the trial order will stand. I would allow the appeal only to the extent that paragraphs 2 and 4 of the order be varied to read as follows:

> 2. Ingrid Hanrieder shall account, as of August 17, 1998 for all monies received from the Family Trust, including loss of interest, and there be a reference to the Registrar, if necessary for such accounting.
>
> 4. The proceedings against the third parties may proceed with the exception of the claim against Roderick Mont that he lacked the authority to enter into a contract with the Plaintiffs on behalf of Ingrid Hanrieder with respect to her interest in the Family Trust.

2013 BCCA 310 (CanLII)

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Madam Justice Saunders"

I Agree:

"The Honourable Mr. Justice Groberman"