COURT OF APPEAL FOR ONTARIO

CITATION: 2089322 Ontario Corporation v. Des Roches, 2025 ONCA 17
DATE: 20250115
DOCKET: COA-23-CV-0448 and COA-24-CV-0796

Favreau, Monahan and Gomery JJ.A.

BETWEEN

2089322 Ontario Corporation

Applicant (Respondent)

and

Luc W. Des Roches*, Nicole L. Des Roches, and Rezmart Gas and Tobacco*

Respondents (Appellants*)

Luc W. Des Roches, acting in person

Nicholas Macos and David Chung, for the respondent

Heard: December 16, 2024

On appeal from the order of Justice Kathleen. E. Cullin of the Superior Court of Justice dated March 17, 2023, with reasons reported at 2023 ONSC 1681, and from her judgment dated July 10, 2024, with reasons reported at 2024 ONSC 3917.

Monahan J.A.:

OVERVIEW

[1] The appellant Luc Des Roches appeals two orders dealing with the enforceability of a joint venture agreement between himself and the respondent 2089322 Ontario Corporation ("208"), providing for the establishment and

operation of a convenience store and gas bar (the "Rezmart Business") on the lands of the Wasauksing First Nation (the "WFN").

[2] The first order (the March 2023 Order) found that the joint venture agreement was enforceable against the appellant and was not void by virtue of s. 28 of the *Indian Act*, RSC 1985, c. I-5.

[3] The second order (the July 2024 Order) found that, as a result of breaches of the joint venture agreement by the appellant, 208 was entitled to permanent and exclusive possession of the Rezmart Business and all of its assets provided, however, that nothing in the July 2024 Order bound the WFN in its management and administration of any lands under its jurisdiction.

[4] The appellant appeals these two orders on the following grounds:

(i) the application judge erred by failing to find that the joint venture agreement was void for inconsistency with s. 28 of the *Indian Act*;

(ii) the application judge's July 2024 Order granting 208 permanent possession of the Rezmart Business is inconsistent with s. 35.3 of the Wasauksing First Nation Land Code (the "*WFN Land Code*");

(iii) the application judge made a palpable and overriding error in finding that the joint venture agreement as submitted by 208 was authentic and enforceable, since a redaction in the document along with his initials had been forged; and

(iv) the application judge erred in granting 208 possession of a 20.7-acre allotment when his true allotment was only 3 acres.

[5] The appellant also seeks leave to admit fresh evidence in support of the fourth ground of appeal.

[6] As I describe in more detail below, the application judge did not commit any of the first three errors alleged by the appellant. The fourth alleged error involves a new argument raised for the first time on appeal. I would not entertain this new ground of appeal, nor would I admit the fresh evidence that the appellant seeks to introduce in support of it. Accordingly, for the reasons that follow, I would dismiss the appeal with costs.

FACTUAL BACKGROUND

[7] The factual background and procedural history of this litigation is complicated, including a previous appeal to this court in 2019. I summarize below the key facts and circumstances relevant to the current appeal.

[8] The appellant is a member of the WFN. In August 2005, he approached Wasausink Lands Inc. (WLI), a not-for-profit corporation with a mandate to foster the economic development of members of the WFN, seeking WLI's support to operate the Rezmart Business on WFN lands. The appellant initially requested a personal business loan from WLI, which was denied. WLI then proposed an alternate funding arrangement whereby it would enter into a joint venture agreement with the appellant for the development and operation of the Rezmart Business.

[9] Over the following months, WLI and the appellant executed various documents that were intended to form the framework for the joint venture agreement. WLI decided to enter into the joint venture agreement through a subsidiary, namely, 208.

[10] The parties subsequently executed the joint venture agreement. It set out the respective rights and responsibilities of the parties regarding the establishment and operation of the Rezmart Business, including their respective financial contributions. The appellant added and initialed the words “Without Prejudice U.C.C. 1-207” beside his signature at the end of the document, which will be referred to as “JVA1”.[1]

[11] JVA1 was subsequently reviewed by a lawyer acting on behalf of WLI and 208, who advised that the “Without Prejudice” notation needed to be redacted from the document.

[12] What happened next is in dispute. According to 208, the appellant subsequently met with a representative of 208, crossed out the “Without Prejudice” notation from JVA1, and initialed next to the redaction (this redacted version of the agreement being “JVA2”). The appellant denies that he redacted or initialed JVA1, claiming that the redaction was made without his knowledge or consent and the

[1] Nicole Des Roches, the appellant's sister, was also a party to JVA1, and she added the same “Without Prejudice” language next to her signature. However, she was subsequently released from JVA1 and has not participated in the current appeal.

initials beside the redaction were forged. He asserts that JVA1 is the operative agreement between the parties and, further, that JVA1 is not binding on him by virtue of the “Without Prejudice” notation he added to the document.

PROCEDURAL HISTORY

[13] 208 invested significant funds in the Rezmart Business. However, shortly after entering into the joint venture agreement, 208 alleged that the appellant had failed to comply with his contractual obligations. In August 2007 it commenced an application seeking a determination of the parties’ rights under the agreement, as well as an interim and permanent injunction granting it possession, operation and control of the Rezmart Business. The agreement that was initially filed in evidence by 208 in support of this application was JVA1.

[14] The litigation became dormant and was not revived until May 2017. On April 19, 2018, the matter came before Koke J. for a hearing. Immediately prior to the April 2018 hearing, 208 filed a copy of JVA2 and claimed that it, rather than JVA1, was the operative agreement between the parties. Koke J. accepted JVA2 as the final version of the joint venture agreement and found that it was binding on the appellant. Koke J. further found that the appellant had been operating the Rezmart Business without regard to his obligations under JVA2 and, moreover, that he was in civil contempt for breaching three prior court orders made in the course of the proceeding. He ordered that, on an interim basis, 208 be placed in possession of

the Rezmart business and its assets, and that the matter return before him to determine the ultimate relief that should be granted.

[15] When the matter came before Koke J. for further hearing in October 2018, the appellant argued that the interim injunction should be suspended pending a forensic examination of JVA2 because the purported redactions to the document had been made without his knowledge or consent. The appellant further argued that JVA2 was void since it permitted 208, which was not a member of the WFN, to occupy WFN land, contrary to s. 28 of the *Indian Act*.[2] Koke J. rejected the request for a forensic examination and ordered, *inter alia*, that 208 may either wind up the Rezmart Business or sell it, as it saw fit.

[16] The appellant successfully appealed Koke J.'s October 2018 order to this court, which ordered a rehearing by the Superior Court on two issues: (i) whether JVA2 was an authentic document or whether the redactions to the document had been made without the appellant's consent; and (ii) whether JVA2 was rendered void by virtue of s. 28 of the *Indian Act*: *2089322 Ontario Corporation v. Des Roches*, 2019 ONCA 355 ("*208 v. Des Roches* 2019"). Even though the appellant's appeal was successful, the court expressed concern over the manner in which the

[2] Section 28 provides that, subject to certain exceptions, agreements purporting to permit persons other than a member of the First Nation to occupy or use reserve land is void.

appellant had conducted himself throughout the proceedings, indicating that this conduct gave real cause to doubt the *bona fides* of any position he advanced.[3]

THE APPLICATION JUDGE'S REASONS

[17] The litigation subsequently came before the application judge, who elected to proceed in two stages. The first stage considered the two issues that had been referred back for rehearing in *208 v. DesRoches* 2019*,* namely, (i) whether JVA2 was an authentic document; and (ii) whether, even if authentic, it was voided by s. 28 of the *Indian Act*. The second stage dealt with any relief consequential upon the findings made at the first stage.

(1) March 2023 Reasons

(a) The application judge finds that the JVA2 is authentic and the appellant's initials were not forged

[18] The key issue in dispute in relation to the authenticity of JVA2 was whether the appellant had actually redacted the words "Without Prejudice U.C.C. 1-207" from JVA 2 and initialed the redaction, or whether the purported redaction and initials were forged.

[3] See *208 v. Des Roches 2019* at para 23, where the court noted that the appellant had not attempted to purge his contempts, nor had he cooperated in any way with 208 in respect of various concerns that had been raised in the proceedings before Koke J.

[19] The application judge proceeded on the basis that the onus to prove the *prima facie* authenticity of JVA 2 rested with 208, as the party relying upon the document. If 208 satisfied this "relatively low" evidentiary threshold, the burden would then shift to the appellant to prove forgery, which had to be demonstrated "to a high degree of probability".

[20] The application judge reviewed in some detail the evidence that had been tendered over the course of a multi-day hearing. She found that the evidence of the lay witnesses who testified on behalf of 208 was either not reliable or not germane to the issues in dispute. This evidence was therefore insufficient to support the *prima facie* authenticity of JVA2.

[21] The application judge then proceeded to consider the evidence of the two experts who had testified in the hearing, Graham Ospreay ("Ospreay") on behalf of 208 and Marc Gaudreau ("Gaudreau") on behalf of the appellant. Ospreay had been qualified as an expert in forensic handwriting analysis. The application judge accepted and was persuaded by his evidence that there were unique features of the appellant's handwriting and initials present in the impugned initials that would have been difficult for someone other than the appellant to identify and replicate. She accepted Ospreay's opinion that it was "highly probable" that the redactions and initials on JVA 2 were written by the appellant, and that any other hypothesis was very unlikely to be true. She therefore concluded that Ospreay's evidence was

sufficient to establish on a balance of probabilities that the redactions and initials on JVA 2 had in fact been made by the appellant.

[22] The application judge also considered the expert evidence of Gaudreau who, in contrast, had concluded that the handwritten initials on JVA2 were "probably not" written by the appellant. The application judge preferred the evidence of Ospreay over that of Gaudreau on a variety of grounds, notably that Ospreay's qualifications were more relevant to the analysis of handwriting. The application judge also had concerns over the methodology used by Gaudreau in coming to his conclusion, particularly the fact that he relied upon sample initials provided by the appellant that had not been prepared under supervision. She therefore found that Gaudreau's evidence was not sufficient to displace Ospreay's opinion that the initials on JVA2 were those of the appellant.

[23] The application judge further reasoned that this conclusion was consistent with the totality of the evidence. In her view, it was not plausible that 208 would have resorted to forging the appellant's initials on JVA2 when it had other legitimate avenues to rectify any issues associated with the "Without Prejudice" notation on JVA1. The only logical conclusion based on the evidence as a whole was that the appellant's initials were genuine and had not been forged, and that JVA 2 was the original, authentic agreement between the parties.

(b) JVA 2 was not rendered void by virtue of s. 28 of the *Indian Act*

[24] The application judge found that if JVA2 had been a lease, or otherwise conferred a possessory interest in WFN land, it would have been void by virtue of s. 28 of the *Indian Act*. In her view, however, although JVA2 contemplated the execution of a lease in connection with the operation of the Rezmart Business, the agreement did not itself amount to a lease or grant the right to possess land. Nor had the parties ever negotiated the lease that was referred to in JVA2. Furthermore, at the time of the execution of JVA2, the appellant was properly in possession of the land where the Rezmart Business was to be operated. As such, JVA2 was not rendered void by virtue of s. 28 of the *Indian Act*.

[25] The application judge also noted that WFN land is now subject to the *WFN Land Code*, which came into effect on June 1, 2017.[4] As a result, certain provisions of the *Indian Act*, including s. 28, no longer applied to WFN land.[5] Instead, the *WFN Land Code* requires the approval of the WFN in order for a person who is not a citizen (as that term is defined in the *Code*) to occupy WFN land. Because the Rezmart Business was located on WFN land and 208 was not a WFN citizen, it was unclear whether the court had jurisdiction to make an order granting 208

[4] The *WFN Land Code* was ratified by the WFN and came into force in accordance with the Framework Agreement on First Nation Land Management 1996 (the "Framework Agreement") and the *First Nations Land Management Act*, S. C. 1999, c. 24.
[5] Section 38(1)(a) of the *First Nations Land Management Act* specifically provided that when a land code comes into effect, s. 28 of the *Indian Act* no longer applies to lands subject to the land code.

possession of the land associated with the Rezmart Business without the WFN's consent. The application judge stated that this remained a live issue in the application.

(2) The July 2024 Reasons

[26] In her July 2024 reasons, the application judge considered the remedies to which 208 was entitled given that JVA2 was binding upon the appellant and that he was in breach of the agreement.[6]

[27] She found that neither damages nor specific performance would be an adequate remedy for the harm suffered by 208. The most appropriate relief was a mandatory order giving 208 permanent possession of the Rezmart Business and all of its assets, with the right to operate, sell or wind up the Business as it deemed appropriate. This would provide 208 with the best opportunity to attempt to recover its losses resulting from the appellant's breach of the agreement.

[28] The application judge nevertheless recognized that the ability of 208 to enforce this remedy might well require the consent of the WFN, by virtue of the *WFN Land Code*. She therefore directed that nothing in her order would bind the WFN in its management and administration of WFN Lands. She also directed that any issues relating to the enforcement of her order could be addressed through a

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[6] In April 2018, Koke J. had found the appellant was in breach of JVA2 and that order was not appealed in *208 v Des Roches* 2019.

request for a reference pursuant to r. 54.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

ANALYSIS

(1) The application judge did not err in determining that JVA2 was not void by virtue of s. 28 of the *Indian Act*

[29] The parties agree that the application judge's determination as to whether s. 28 of the *Indian Act* rendered the JVA2 void involves a question of law subject to review on a standard of correctness.

[30] The appellant accepts that JVA2 did not in itself directly grant 208 the right to possess WFN land. However, he argues that 208 could obtain (and in this case did obtain) such a right of possession through a court order issued to remedy his breaches of the agreement. The appellant therefore argues that the application judge ought to have found that the JVA2 was rendered void by virtue of s. 28 of the *Indian Act*.

[31] I do not agree. The application judge correctly found that the JVA2 did not itself grant 208 the right to possess WFN land. The appellant cites no authority for the proposition that an agreement is void simply because one of the possible remedies upon its breach is not permitted by a statutory provision.

[32] While the application judge did grant 208 the right to possess all assets associated with the Rezmart Business, that order was issued in July 2024, at which

time s. 28 of the *Indian Act* had ceased to apply to WFN land. Moreover, the application judge's remedial order was expressly subject to the jurisdiction of the WFN to determine rights regarding the possession of WFN land. Although 208 is a corporation and thus not a member of the WFN, it is controlled by individuals who are members of the WFN. As such, it can be expected that 208 will cooperate with the WFN in obtaining all necessary approvals required under the *WFN Land Code*.

[33] I would dismiss this ground of appeal.

(2) The application judge did not make a palpable and overriding error in granting 208 the right to permanent possession of the Rezmart Business

[34] The appellant objects to the characterization of the July 2024 Order granting 208 possession of the Rezmart Business as a permanent rather than an interim order. He argues that this Order is inconsistent with s. 35.3 of the *Land Code* which prohibits non-citizens from acquiring a permanent interest in WFN land.

[35] I would not give effect to this submission. As explained above, the application judge's order is explicitly made subject to the rights of the WFN to administer WFN land. The WFN will determine whether a transfer of land owned by the Rezmart Business to 208 is inconsistent with s. 35.3 of the *Land Code*, and it may refuse any transfer that it deems impermissible. If the parties disagree as to how to implement the July 2024 Order with respect to the assets of the Rezmart

Business, including land, this can be resolved through a reference under r. 54.02 as directed by the application judge.

[36] I would dismiss this ground of appeal.

(3) The application judge did not make a palpable and overriding error in finding that JVA2 was authentic and that the appellant's redaction and initials had not been forged

[37] The appellant concedes that the application judge set out the correct legal test for determining the authenticity of JVA2. However, he argues that the application judge made palpable and overriding errors in her assessment of the expert evidence on this issue. He further argues that the application judge drew unreasonable inferences from the factual record to support her conclusion that the redaction and initials on JVA2 were authentic rather than forged.

[38] The application judge did not commit any of these alleged errors. It is well established that the weight to be given an expert's opinion is within the discretion of the trier of fact and deference is owed on appeal: *R. v. S.A B.*, 2003 SCC 60, 14 CR (6th) 205, at paras. 62-63. It is not open to a reviewing court to carry out its own assessment of the probative value of an expert's testimony or opinions simply because it may disagree with the assessment reached in the court below. Nor should a reviewing court interfere with a trial judge's preference for one expert opinion over another unless the choice is unreasonable or patently wrong: *Mouvement Laïque Québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R.

3, at para. 105; *Petz v Duguay*, 2018 ABCA 402, at para. 10, leave to appeal to S.C.C. refused, 38495 (June 13, 2019).

[39] The application judge carefully reviewed the evidence of the expert witnesses and clearly articulated why she preferred the evidence of Ospreay over that of Gaudreau. Her findings were reasonable and open to her on the record. The appellant asks us to substitute our view of the expert evidence for that of the application judge, which is not our role.

[40] Nor did the application judge make a palpable and overriding error in drawing certain inferences from the evidence as a whole in support of her acceptance of Ospreay's expert evidence. The inferences she drew from the evidence were reasonable and accorded with common sense. In any event, her conclusion on the authenticity of JVA2 was primarily based on her analysis of the expert evidence and the impugned inferences drawn from the record as a whole merely corroborated that conclusion.

[41] In short, the application judge did not commit a palpable and overriding error in finding that the JVA2 was authentic. I would dismiss this ground of appeal.

(4) I would not grant leave to the appellant to raise a new argument on appeal relating to the size of his allotment on WFN land

[42] A few weeks prior to the hearing of the appeal, the appellant sought to raise a new issue, namely, that his allotment of land was only 3 acres, rather than the 20.7 acres referred to in the JVA2. He also sought to adduce evidence in support

of this new ground of appeal in the form of a two-page document in which he purports to have transferred his 3-acre parcel to Natalie Smith. The document states that a further 17.7-acre portion of land is not owned by the appellant.

[43] Appellate courts generally do not permit an issue to be raised for the first time on appeal, and the burden falls squarely on the party raising it to satisfy the court that it should exercise its discretion to permit a new argument to be advanced: *7550111 Canada Inc. v. Charles*, 2020 ONCA 386, 21 R.P.R. (6th) 1, at para. 14. In exercising this discretion, the court must be satisfied that all the facts necessary to address the proposed issue are as fully before it as they would have been had the issue been argued at trial: *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

[44] The appellant has failed to address, much less to satisfy, these basic requirements. This litigation has been ongoing for close to two decades and the appellant has offered no satisfactory explanation as to why he neglected to raise this issue earlier. In any event, the application judge's Orders do not make any reference to the size of the appellant's allotment, instead merely directing that 208 shall be entitled to possession of the assets of the Rezmart Business. In the event that a dispute over the size of the appellant's allotment arises in the implementation of the application judge's Orders, it can be addressed through a r. 54.02 reference as contemplated by the July 2024 Order, subject to the jurisdiction of the WFN

over its lands. In short, even if I were to entertain this ground of appeal, I fail to grasp its relevance to the live issues before us.[7]

[45] I would therefore not grant leave to raise this ground of appeal. On this basis, it is unnecessary for us to consider the admissibility or legal effect of the two-page document in which the appellant purports to transfer his allotment of land to Natalie Smith.

DISPOSITION

[46] I would dismiss the appeal with costs in the amount of $15,000 to the respondent, on an all-inclusive basis.

Released: January 15, 2025

"P.J. Monahan J.A."
"I Agree. L. Favreau J.A."
"I Agree. S. Gomery J.A."

[7] In his oral submissions, the appellant advised that he was raising the issue because in its written submissions, 208 had argued that a particular provision in the WFN Land Code authorized it to take possession of the land associated with the Rezmart Business. However, 208 abandoned this argument in its oral submissions, and agreed that any right to possess WFN Land was subject to approval by the WFN, as directed by the application judge.