

## **Hull on Estates Podcast #27**

### **Compensation of an Estate Trustee Continued**

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David Smith: Hello and welcome to Hull on Estates. You are listening to Episode #27 of our podcasts on Tuesday, September 26<sup>th</sup>, 2006.

*Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull and Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.*

David Smith: Hi, it's David Smith here again with Bianca La Neve. Hi Bianca.

Bianca La Neve: Hi David.

David Smith: Bianca, last week we were talking about executor's compensation and we had, I thought, a really interesting discussion on the manner in which compensation is calculated, and how the courts have typically considered the various issues presented on a passing of accounts, where the estate trustee's compensation is challenged by the beneficiaries. Today we want to talk about some other associated issues, and the first one that comes to mind and which I understand is also quite often a very contentious issue, is the issue of pre-taking of compensation.

Bianca La Neve: The issue of pre-taking compensation, I think there is now relatively settled case law that an executor can likely pre-take compensation so long as the compensation has actually been earned before it's taken. However, there is still some case law authority for the proposition that any pre-taking by an estate trustee actually constitutes a breach of trust. And this is because the executor is benefiting from his or her position before an actual distribution is made to the beneficiaries, and without the consent of the beneficiaries, or Order of the court.

David Smith: I think that's understandable, Bianca. If I were a beneficiary and was waiting for my distribution from the estate, I would certainly expect that my entitlement would take precedence over the entitlement of the estate trustee. But I understand that that's not always the case.

Bianca La Neve: Well I think the point has been made that in many estates, especially with the wide range of assets that now can be held in an estate, there is a lot of work that has to be done by the estate trustee. And understandably, a lot of the estate trustees can argue that they are taking a lot of time away from their full-time job and other duties to devote to the estate, and they shouldn't have to wait a year or so or more before obtaining some compensation.

David Smith: It really ties in, I think, Bianca, to the discussion we had last week which is the nature of the relationship between the estate trustee and the beneficiaries. I mean, if you've got a situation where the beneficiaries are on good terms with the estate trustee, and see the hard work that he or she is doing, there is no reason that they can't consent to the estate trustee receiving some compensation ahead of their entitlement to a distribution. If the estate trustee is being very cautious, he'll want those beneficiaries to receive independent legal advice before giving that consent. But Bianca, what about the situation where the estate trustee wants to pre-take compensation, the beneficiaries have written very nasty letters, have engaged counsel, and have made it clear that they're going to oppose the pre-taking of compensation. Does the estate trustee have any remedy?

Bianca La Neve: The only remedy I see, David, is a formal court passing by the estate trustee in order for the estate trustee to obtain the sanction or approval of the court of his or her compensation.

David Smith: And that proceeding, of course, would be on notice to all of the beneficiaries, and certainly tactically, if the estate trustee is forced to invoke the court's assistance rather than rely upon the co-operation of the beneficiaries, that will set a pretty bad tone for the communication relationship between the estate trustee and the beneficiaries for the remainder of the administration.

Bianca La Neve: That's right, David. And in such situations, an estate trustee should probably think twice before bringing a court application to pass accounts solely for the purpose of obtaining some compensation.

David Smith: Bianca, I understand that the situation, and we've been talking, of course, about estate trustees and their entitlement to pre-take compensation. Of course, in our practice where we act in respect of the estates of deceased persons, we also act with respect to the estates of incapable persons, where the estate is administered by a guardian of property or an attorney for property. And my understanding is that the situation with respect to pre-taking of compensation is different where an attorney or a guardian is concerned.

Bianca La Neve: That's right. The governing legislation for attorneys for property and guardians for property is the *Substitute Decisions Act* and this Act actually expressly permits pre-taking by the attorney. And so this inconsistency in the statutes, in the provisions between the *Trustee Act* and the *Substitute Decisions Act* can be argued both ways. On the one hand, the failure of the legislature to include or permit pre-taking in the confines of an estate trustee through the *Trustee Act* could be seen as an argument against pre-taking. But on the other hand, there really isn't any reason why executors and attorneys for property should be treated, or should be subjected to different standards.

David Smith: It's clear that each case has to be considered on its own merits, which, of course, is the appropriate approach to take in respect of any situation where legal advice is being given. One thing we haven't touched on and I think just in a final comment that

should be made with respect to the pre-taking of compensation, is the issue of a fee agreement. Bianca, I understand that some estate trustees may insist on a fee agreement being referenced in the Will as a means of remedying this whole issue.

Bianca La Neve: Yes, I think it's a way for estate trustees to obtain some certainty with respect to their compensation and the pre-taking of compensation. Many trust companies will insist on such an agreement before they agree to be named or before they agree to take on the role of estate trustee. And really an individual should consider whether they should include a provision for the fixing of compensation and pre-taking compensation in their Will as a way of providing certainty for the administration of their estate.

David Smith: And certainly to avoid conflict between the executor and the beneficiaries.

Bianca La Neve: That's right, David, you don't want your estate to be eaten up by legal fees when you could have avoided a contested application by giving a bit of thought to this issue, and including a provision in your Will.

David Smith: And, of course, this is a good segway I think into our next issue, which we did touch on last week but I think it's worth some further exploration, and that is the whole issue of the fixing of compensation. I know last week, Bianca, you mentioned that an individual may fix compensation in his or her Will, and if he doesn't fix compensation it's going to be left up to the courts to decide what appropriate compensation is in the event that the beneficiaries and the estate trustee cannot agree. What does it mean exactly to fix compensation?

Bianca La Neve: Well, David, actually the courts are not clear on what it means to fix compensation. It's not clear from the case law as to whether fixing compensation is or means a liquidated amount, or a scheme of distribution as agreed between the testator and the estate trustee. At first glance, you would think the term "fixed" suggests that the testator has to refer to an actual number or a specific amount in the Will that the executor would receive in lieu of his or her entitlement under the provisions of the *Trustee Act*. But there are situations where instead a Will will include a provision for an estate trustee to be paid on the basis of an hourly rate, and so here the amount or the total amount of compensation is not fixed per se, but there is a scheme or a method in place for the estate trustee to determine his or her compensation.

David Smith: Right, and the conflict is most clearly highlighted between a decision of Madam Justice Greer in *Andrewchuk* and a decision of Justice Lalonde in the case of *Chaney and Byrne* that you referred to last week. In *Andrewchuk*, Justice Greer came to the conclusion that a Will that provided for what was called a reasonable per diem did not fix compensation. On the other hand, in *Chaney and Byrne*, Justice Lalonde appeared to determine that a Will which provided that solicitors could bill the estate their lawyer's hourly rate in addition to the usual approach did in fact fix compensation.

Bianca La Neve: It's interesting, David, that in *Chaney*, it appeared that Justice Lalonde may have been influenced by the fact that the compensation is based on the application of

the *Jeffrey* approach almost exactly equaled the amount of compensation as set out in the Will.

David Smith: That's right, Bianca, and I know that in *Andrewchuk*, the amount of compensation arrived at through the calculation of a per diem as determined by the estate trustees was far in excess of what they would have received under the formula, and I think there, you can see that the judge was given a very good reason to reduce that compensation.

Bianca La Neve: That's right. And another interesting point from the *Chaney* decision is that again we see how specific facts will play into a judge's decision. And in *Chaney*, the judge noted that the testator was a sophisticated individual, a retired and senior life insurance executor, who had likely dealt with countless lawyers over the years. And so in deciding on a scheme of compensation based on the lawyer's hourly rate, the judge probably took into account the testator's long time experience with lawyers and likely decided that the testator knew the amount of compensation that would ultimately be paid out to his estate trustee.

David Smith: Of course, the case as you've sort of indicated, is distinguished in the sense that there is clearly other cases where courts really carefully scrutinized the role of lawyers who act as estate trustees and carefully scrutinized to what extent their double billing, if you will, by charging at their hourly rate as lawyers and in their capacity as estate trustees. And this provides an appropriate segway to our next discussion, which is the whole issue of how to delineate between lawyer's work and executor's work.

Bianca La Neve: Actually, David, we've run out of time for today, but let's talk about that issue at our next podcast.

David Smith: I'll look forward to it, Bianca.

Bianca La Neve: Thanks for listening. Bye David.

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