

Hull on Estates Podcast #36

Mediation

Posted on November 28, 2006

Sean Graham: Hello, and welcome to Hull on Estates on November 28th, 2006, Episode #36.

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.

Sean Graham: Hi Paul.

Paul Trudelle: Hi Sean. We're back again once here in the podcasting seats and today we are going to speak about certain issues that come up with respect to mediation.

Sean Graham: Mediation has really taken off in the estates area of litigation. In the past, I guess, 15 years or so. Certainly now it's a central facet of what we do, and in fact it's mandatory in certain jurisdictions, including Toronto, Ottawa and the County of Essex. And so, whether or not lawyers like to mediate, there really, in estates litigation anyway, they don't have much choice in the City of Toronto.

Paul Trudelle: That's right, but I find that most counsel do like to get to mediation, and I find that in a lot of our cases, mediation serves to allow the parties to come to a quick resolution without the need to go to trial, and I find that it saves time, money and the emotional risk associated with going to court. So I think it's a very productive and useful development in litigation in general, and in estates litigation in particular. Now, with respect to mandatory mediation in Toronto, there's a number of areas of law or types of cases that must go to mediation in Ontario, in Toronto, and those are set out in Rule 75.1, and what are some of those Sean?

Sean Graham: Well, there's any sort of Will challenge or interpretation of a Will, dependents relief claims where a dependent of the deceased asserts that he or she has not been adequately provided for under the Will, guardianship and Power of Attorney litigation, so that's also fiduciary-type litigation, and then there are several other sub-categories that don't come up very often, the *Absentees Act*, the *Charities Accounting Act* and a few others, the *Trustee Act* and *Estates Act*. So essentially, really anything where you are dealing with an estate or a trust, or fiduciaries dealing with other people's property, at least, fiduciaries in the sense of a Power of Attorney or a guardian. So it's really quite broad in our area of practice, and encompasses just about any dispute we would get into.

Paul Trudelle: And most things on the estates list, which is the specialized court set up in Toronto to deal with estates and estate-related and trust-related matters, would lend

themselves to mediation and are probably covered by the mandatory mediation provisions. Now there is provision in the Rules for a party to opt out of mediation. A court Order is required and again, it's not necessarily just the parties that can opt out. The court has some say and has a strong interest in seeing that the matter go to mediation, so even in cases where all the parties agree that mediation may not be appropriate, it's not simply a case of getting the court's rubber stamp. The court must be satisfied that the mediation probably won't be effective in the circumstances.

Sean Graham: And I've had mediations where the parties have gone to court for my client and the other side has said the same, we can't, we ought not to mediate, there is no chance of settlement, and the court says, I disagree, you're going to mediate whether you like it or not, off you go. And the parties will often say, great, well, what we'll do, we'll show up on that date, we'll stay for the required, I think it's 3 hours or something in that area, and then we'll leave, and we don't even need to talk to each other, we'll just take some reading material. I've had cases like that which actually settle, so.

Paul Trudelle: Strangely enough, the ones that are least likely to, the least expected to settle, are the ones that often do come out with a resolution.

Sean Graham: And there is something about the process where you have an independent person who really has no axe to grind, the lawyers have, are supposed to be dispassionate but, you know, you're working for your client so it's not always easy to, you never want to ignore that. But you have that dispassionate person and somehow that person shuttling from door to door seems to settle things that really shock me sometimes.

Paul Trudelle: It's also often the first time that the parties spend a significant amount of time actually evaluating the strengths of their own cases, the strengths of the other side's case and they have a third party pointing out the strengths and weaknesses of the various positions and that, I think, has a sobering effect on the parties, and also they realize the emotional investments that will have to be made if the matter is going to go to trial. They are caught up in the emotion of the day and I think that often helps them, helps put them in the frame of mind that's more likely to lead to a settlement.

Sean Graham: No doubt. And I, one of the great things about mediation is the confidentiality and that allows you to be totally open. I've been amazed sometimes at the impact on the parties, because up to mediation, the lawyers will be saying and writing, we have a great case, you have a terrible case, you're going down in flames and we're going to win. And then you show up at the mediation and you can drop that façade, and you can say, well listen, we acknowledge we have a problem here, but we think you've got a problem there. And I find the parties, their approach to the entire dispute can change just by hearing the other side say, we have a weakness here. It's really quite striking the way that's worked, and I'm still surprised to find how effective that can be.

Paul Trudelle: And if it's not the parties themselves who are making that concession that they may have a weakness, then hopefully the mediator will step in and point out the weaknesses of both cases and that reality check, let's say, helps the parties come to what

may be a good resolution for them. Now, one of the things that we often talk about in our office here and is a consideration that everybody should keep in mind is, when do you go to mediation? The Rules themselves don't provide a specific time for the mediation, the court is to order what the procedure is and the court will make an Order and listen to the submissions of parties with respect to when it's to take place. But I guess there are a few times, mediation can happen at any point along the road towards trial, when do you feel, Sean, that the best time to mediate is?

Sean Graham: Well, it tends to, you know, my weasel answer is, it depends on the case. But to just broaden that out a bit, to me the trade-off in a lot of my cases anyway is between trying to get there as quickly as possible so that the legal fees are reasonable enough that the parties haven't invested too, too much into the fight, in terms of monetary investment, as opposed to disclosure of information. So one of the major steps in a lawsuit is the exchange of Affidavits of Documents and discoveries, where the parties show each other all the relevant documents they have and then ask each other questions under oath as a sort of trial run to preparing for trial. That can be a very expensive process, but in order to understand the relative strengths of the cases, it can be a helpful process. And so my difficulty in deciding when to have the mediation tends to be whether to do it before or after the discovery process. Most times I want to do it as quickly as possible though.

Paul Trudelle: I agree, and I go back to your weasely answer, I don't think you are weasely at all, but it depends on the type of case. If it's a Will challenge case, where capacity is an issue, I don't really feel Examinations for Discovery add very much. What you would want, though, is to have all of the medical evidence and also solicitor's notes and records before you go to the mediation. If it's a dependent support claim where the issue is whether a person cohabited with the deceased for the sufficient amount of time, then you may want to go to discovery before you go to mediation just to flush out that issue. If it's a Will interpretation case, you may not need any of that. You may just be able to go to mediation based on what you know about the Will, and perhaps solicitor's notes and records. So I think your answer that it depends on the type of case is a good one. Now, however, having said that, now the other thing you'd need to know and a big part of any mediation and one of the first things the mediator asks is, is what the estate is worth. So I think you need to be able to get a very clear picture of what the estate is worth, what the assets are, what the tax liabilities are, because you'd need to know if you are going to come to a settlement, what the size of the pie is.

Sean Graham: No question. There are some cases where you won't know what the estate is worth, for example, if the estate trustee is fighting with the Canada Revenue Agency over taxes and so forth. And in those cases, you may still want to go, it's certainly not ideal, but in those cases you tend to have to negotiate on the basis of percentage of what's left once CRA gets what they think is coming to it. But no doubt that ideally, in all except very few cases, you need to know what's in the estate.

Paul Trudelle: And in a lot of cases, you have to look at what information you have available, it may not be a complete picture but you may have to just hold your nose and

say, that's enough perhaps. Or have any settlements subject to a final determination of what the assets are.

Sean Graham: And again, it's that trade-off between keeping the legal fees down as much as possible, but having as much information as possible. And that tends to be the sort of tug-of-war that you have in deciding when to do the mediation.

Paul Trudelle: Yes. Now in deciding to do the mediation, one of the things you need to agree upon or get the court's direction on is who the mediator is to be. And there are a number of different considerations that go into selecting the mediator, especially in the area of estate litigation. One of the things we often look for is the experience of the mediator, whether they have any specific estate mediation skills. There are a number of mediators in the field who specialize in estate mediation, and I feel that they bring a very valuable skill set to the table in helping the parties decide amongst themselves what a reasonable resolution is.

Sean Graham: Yeah, in theory you ought to be able to have a mediator without sort of lengthy legal experience in the area of the law, but in practice, I have found that the most effective mediators by far are experienced lawyers in the area. And the few mediations I've had which did not, where the parties did not choose someone fitting that description, have not gone as well, and they did not settle, in fact. And I think it's a real shame if the choice of mediator has an impact on whether you settle or not, especially if it means, well it's a great thing if you settle, because that is helpful for the parties. But if the choice of mediator reduces the chances of a settlement, that's very unfortunate.

Paul Trudelle: Yeah, I agree, and I think that an experienced mediator can see through the bluff and bluster of any one party, so that is helpful, can give the parties a better reality check, have some experience as to what a court might do. And also, because of their specialized knowledge in the area, might be able to see creative solutions that the litigants themselves may not have seen, simply because of their experience in dealing with these very issues that estate mediators deal with day in and day out.

Sean Graham: I agree.

Paul Trudelle: On that point as well, though, we often deal with experienced estate counsel and at that point, maybe, would you agree that perhaps the choice of the mediator isn't as important?

Sean Graham: Definitely. Especially if they're experienced and you've established over the years of practice a rapport with them. Often, in those cases, the mediator sometimes becomes a bit superfluous. The lawyers know all the strengths, there's really no need for someone to tell them where they are going wrong because they've chatted with each other on a very collegial basis and as long as they are honest with each other, that is a case where the choice of mediator matters a great deal less.

Paul Trudelle: Just on the other side of that coin, though, having an experienced mediator may not be of as much importance to counsel where counsel are experienced, but I still think there is an important role vis-à-vis the client to have the mediator there. The lawyers may not, the clients may not know what the lawyers are doing or may not follow or agree with what is happening. I think that having an experienced mediator there to explain to the clients, and give an independent third opinion, is of some assistance.

Sean Graham: I agree, and the one problem you can run into with experienced counsel who are kind of going over the head of a mediator is that the clients begin to wonder whose side you're on, and if you are constantly agreeing with the lawyer on the other side when you're really supposed to be the advocate. In essence, putting your place in the mediator, putting yourself in the mediator's place, you can kind of run into client trust problems, and so that extra person definitely helps to reduce that dynamic.

Paul Trudelle: I think that's a very good point. Another consideration in choosing a mediator is just the personal approach of that mediator. A lot of mediators are very right-spaced and they'll look at what the outcome at the trial will be. Others will look at the interests of the parties and come at it from that way. That's the classic distinction that we are all talking to, we are supposed to be dealing with interests and rights in the context of interests. The other difference, I see, in mediators is a lot of mediators act more like judges than facilitators and they'll tell you what the law is, and how bad your case is, and why you should settle. Whereas, mediators on the other end of the scale may not hazard any opinion whatsoever, and are just there to keep the discussions going back and forth, and won't offer an opinion even if asked.

Sean Graham: And I think, even though I believe that principals are that mediators are supposed to be very careful about offering their opinions, I think it's an extremely effective tool, and I've really found that, it may be that textbook mediation says that you're not supposed to start giving your opinions, but it really helps move the parties, and sometimes the lawyers into getting out of the sort of strict advocate we're fighting role, and into the let's try to work this thing out to avoid a need for trial. And I've found that mediators who offer their opinions, even some of them fairly strong, tend to be quite effective, at least, in this area.

Paul Trudelle: I think that's right and I think if it's done properly, the mediator could avoid alienating the client who doesn't want to necessarily hear that opinion. Those are all very good points, and important considerations, I feel, in the consideration of going to mediation, when you have to go to mediation, and selecting the mediator. I want to apologize for my sound of my voice, I'm just finishing up with a cold and hopefully by the next podcast, I'll be well over it.

Sean Graham: Yeah, you're doing yeoman's work showing up in this frame, and thanks so much, Paul.

Paul Trudelle: Thank you Sean.

This has been Hull on Estates with the lawyers of Hull and Hull. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.

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