

## **Hull on Estates Podcast #37**

### Limitation Periods and Equalization Payments

**December 5, 2006**

Justin de Vries: Welcome to Hull on Estates, Episode #37 on Tuesday, December 5<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.*

Justin de Vries: My name is Justin de Vries and I'm joined today by Megan Connolly and today we're going to talk about limitation periods and equalization payments. We've chosen an interesting case to talk about today to frame our discussion. The case that we're dealing with is *Webster v. Webster Estate* and it's a recent decision of the Ontario Superior Court of Justice. Now limitations generally aim to strike the appropriate balance between an aggrieved party's right to seek redress and a potential litigant's right not to remain under a cloud of litigation indefinitely and also to deal with the fact that it's often hard for a defendant, after a long period of time, to gather the necessary evidence to answer any claim made against him or her. Now, Megan, you're going to tell us a little bit about the facts in the *Webster Estate*.

Megan Connolly: O.k. Well the Websters were married for 29 years. It was a second marriage of both of them and they both had children from their previous marriage. When Mr. Webster died in 2003 he left behind an estate worth approximately \$24,000,000.

Justin de Vries: Now, what's interesting about the Webster family is that they were well known in Montreal and in the world of philanthropy and both Mr. and Mrs. Webster had given generously to their community during the lifetime of Mr. Webster.

Megan Connolly: That's right, and I guess you could say that was reflected in his Will, when he left the bulk of his estate to the Eret T. Webster Foundation.

Justin de Vries: And what did Mrs. Webster get out of it?

Megan Connolly: Well, to his wife he left residences in Ottawa and Florida for her use while living, as well as \$250,000 a year for life from a spousal trust.

Justin de Vries: Alright, and Mrs. Webster was 81 years old, I think you said, when Mr. Webster died in 2003 but by the time that this case came before the Ontario Court, she had developed Alzheimer's Disease.

Megan Connolly: Right. She wasn't able to testify so I think it was her son who brought the application for her.

Justin de Vries: Right. And we'll come back to that inability to testify as a witness in the proceeding before the court because that was something that the court paid some attention to in its reason.

Megan Connolly: Right.

Justin de Vries: Who were the estate trustees under the Will of Mr. Webster?

Megan Connolly: Under his Will, the estate trustees were his wife, her son from a previous marriage, his son from a previous marriage and his financial advisor.

Justin de Vries: And it's important to note the Websters never had any children of their own.

Megan Connolly: No they didn't.

Justin de Vries: They had adult children, it looks like, when they got together.

Megan Connolly: Right. They were married for 30 years so it must have been in their 50's when they got married.

Justin de Vries: There's also an issue here about a marriage contract, and what did the court have to say about that?

Megan Connolly: Right. Well though the Will, I believe, was made in Ontario, there was a pre-nuptial agreement in Quebec that was signed in 1974. The agreement provided that Mrs. Webster and her husband would be separate as to property upon dissolution of the marriage by death. However the court said that the marriage contract didn't bar the wife from an equalization claim because it did not expressly address election issues upon the death of one of the spouses.

Justin de Vries: So that's an important drafting point for anybody who is drafting a marriage contract, that even if it speaks to dissolution upon death, it also has to go on to speak under election periods that a wife has the ability to make. And that's really what brought the application in front, or brought the proceeding in front of the Ontario Court. There was an application to extend a limitation period. What was going on there?

Megan Connolly: Well Mr. Webster died in October, 2003 and I guess Mrs. Webster and her son later claimed that they weren't aware that she could make an election under the *Family Law Act*. Now they became aware of this in June, 2004 which would have been 8 months after Mr. Webster's death. After this, they waited another 4 months to consult with a lawyer, so that would have been in October, 2004 when they sought legal advice. And then they still waited 3 more months until January, 2005 to file an application. So they didn't file an application for equalization until 15 months after Mr. Webster's death.

Justin de Vries: So it's important to note that in Ontario, when a spouse dies with a Will, the surviving spouse may elect to take the benefits bestowed under the Will, or seek the equalization of net family property from the estate as calculated under the provisions of the *Family Law Act* and the limitation period for that is 6 months after date of death. So as you said, Mrs. Webster, through her son, brought an application to extend that limitation period of 6 months. In Section 2(8) of the *Family Law Act* which provides that the court may extend the time if it is satisfied that there are no apparent grounds for relief, secondly that relief is unavailable because of the delay that has been incurred in good faith and thirdly, no person will suffer substantial prejudice by reason of the delay. And the courts have been generally liberal in extending the time line, especially when there is some evidence that the parties have been in some sort of negotiation about the extension. However, the court found that that was not the case here. So under Section 2(8) of the *Family Law Act* the court may extend the prescribed time for an election if it is satisfied that firstly, there are apparent grounds for such relief, secondly, relief is unavailable because of delay that has been incurred in good faith, and thirdly, no person will suffer substantial prejudice by reason of the delay. And generally the courts have been generous in extending the time line or extending the limitation period where there is any sign of ongoing negotiation between the parties. In other words, it's in discussion and the court recognizes that it should extend the limitation period. That was not the case here and as you said, Megan, the court said no to extending, or not to using the pre-nuptial agreement to prevent Mrs. Webster from making the claim. And there was even some evidence that Mrs. Webster was satisfied during the lifetime of Mr. Webster that the Will provisions were adequate to her. But the court recognized that a spouse can change their mind after the fact, especially if they decide to seek legal advice and they may have been unaware of that right beforehand. So it took about, as you said, Megan, 15 months for Mrs. Webster, through her son, to finally decide that they were going to make an election and bring this application for an extension in front of the court. However, the court held that the criteria for extending that limitation period, that 6 months was not incurred in good faith. Failure by Mrs. Webster and her son to make inquiries amounted to willful blindness and the court held there was no justifiable reason for not making such inquiries. The court also recognized that even though Mrs. Webster may have been upset because her husband died, it was no excuse not to make inquiries or contact a lawyer with respect to whether or not she had any additional rights. The court knew that many spouses face the same level of grief in dealing with the death of a spouse. And finally the court noted as well that Mrs. Webster may have even had the ability or did have the ability to consult a lawyer, which she decided not to do.

Megan Connolly: Now one thing I thought was interesting was they pointed out that one of the other estate trustees, the financial advisor, had been aware that she was entitled to make this equalization claim, but never said anything. I'm wondering what, if any, obligation do you think another estate trustee would have in this sort of situation?

Justin de Vries: Well, in this case, I don't think you could say that that estate trustee, the financial advisor, had any to Mrs. Webster. Mrs. Webster was also a trustee, there must have been an estate solicitor in place, so Mrs. Webster could have made inquiries. If she was solely a beneficiary, you could likely argue that the estate trustee should advise her

to get legal advice. But in this case, she was able to make that decision on her own and really, the estate trustee's first duty or if not it's first, certainly a primary duty, is to respect the wishes of the testator where there is a testamentary document, as the case was here.

Megan Connolly: Now there are a couple of other things I thought were kind of interesting in this. The first thing was that the court pointed out that although Mrs. Webster was receiving \$250,000 a year, her actual expenses were only about \$50,000. So it seemed the court felt that well, she didn't really need the money that much anyway. The second thing I thought was interesting is the court, near the end of the decision, made mention to the fact that Mrs. Webster was now suffering from Alzheimer's. She had a pre-existing Will that she'd made, I guess, while she was still healthy, that left her entire estate just to her three sons. So concern seemed to be that if she did receive more money, it wouldn't have gone to the charities that the deceased wanted it to, and it would have ended up being a windfall for her three sons. Do you think that played a part in the decision?

Justin de Vries: Oh, absolutely. I think the court, if you think about this, and what makes it an interesting decision, you have \$24,000,000, you have a second marriage, Mrs. Webster is looked after as part of Mr. Webster's Will. The son then comes along and really tries to upset the applecart and rather than the money going to charity, it's really going to go to, at least her half, is going to go to Mrs. Webster's three sons from her first marriage. Whereas Mr. Webster's half isn't going to go to his family, but go to the charity and I think that must have sat wrongly with the court and the court said that unless there were compelling grounds, they really weren't going to see the need to redistribute the wealth as Mr. Webster had seen the case. And society obviously benefits, and this is a case where the court, I think, had the right facts but will often do what is necessary in order for the greater good. And that was the case here, and it didn't help that the son who was acting for Mrs. Webster, really didn't explain the delay. He really didn't put his best foot forward, such that the court said listen, there's willful blindness on the part of Mrs. Webster for not seeking legal advice and making an election, you don't explain the delay, you're trying to get money that you were never entitled to, plus Mrs. Webster has Alzheimer's and so the estate is very much prejudiced because it really can't talk to her about why she didn't make an election within the 6 month period. So it's an interesting case and one that attracted quite a bit of notoriety in the press as well because of the family and the money involved. Megan, thanks very much, see you next time.

Megan Connolly: Thank you.

*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.*

*To listen to other podcasts, or to leave a question or comment, please visit our website at [www.hullandhull.com](http://www.hullandhull.com).*

*Our theme music is Upper Structure by D. J. Aviad and is courtesy of the Podsafe Music Network.*

/mem