

Tips for Managing and Controlling Estate Litigation **Hull on Estates Podcast #63**

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Bianca La Neve: Hello and welcome to Hull on Estates. You're listening to Episode #63 of our podcast on Tuesday, June 12th, 2007.

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 & Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.

Bianca La Neve: Hi Craig, how are you?

Craig Vander Zee: Great Bianca, yourself?

Bianca La Neve: Great.

Craig Vander Zee: Did you have a nice weekend?

Bianca La Neve: I did. Did you?

Craig Vander Zee: Yeah it was great, busy with the kids.

Bianca La Neve: So Craig I thought in terms of concluding our discussion today on tips in controlling and managing your estate litigation. We touched on contempt motions in general.

Craig Vander Zee: Specifically Bianca, we covered off the general Rules of Civil Procedure that cover contempt motions, specifically *Rule 60.05 and 60.11* and touched upon the decision of the Court of Appeal in *Forrest vs. Lacroix Estate*, which confirmed that such orders or attempts to use contempt orders for the payment of money will not be successful. And so, in deciding whether you want to enforce an order, if it's going to have to deal with the payment of monies only, then you're not going to be able to avail yourself to a contempt order. We also touched upon the evidentiary burden that needs to be met for bringing a contempt motion, keeping in mind that it is quasi criminal in nature, and as such, the proof required is beyond a reasonable doubt. And everyone needs to be mindful, especially when we're bringing a contempt motion that the materials will have to be prepared with that in mind. That a court is not simply going to judge it on the same standard of proof, that is, balance of probabilities, as it would be in a regular civil proceeding. And with that having been covered, today we thought we would look at sanctions that may be granted or imposed by the court. And also the costs associated with findings of contempt.

Bianca La Neve: Now *Rule 60.11(5)* sets out the sanctions available to a judge when hearing a contempt motion. And under this Rule, when disposing of a contempt motion, a judge may make such order as is just. And where he or she actually finds contempt, the judge may order that the person in contempt either be imprisoned for a period of time, be imprisoned if the person fails again to comply with the term of the order, pay a fine, pay such costs as are just, and comply with any other order that a judge considers necessary. So there's really a lot of discretion under this sub-rule when disposing of a contempt motion.

Craig Vander Zee: Well I think the important thing to bear in mind, at least this is what I try to do, is that the focus of a contempt motion doesn't have to be what people traditionally think about a contempt motion, which is, the goal of imprisoning someone...

Bianca La Neve: Um hmm, yes.

Craig Vander Zee: ...The courts are extremely reluctant to imprison someone for having disobeyed an order because it may very well be that the disobedience was unintentional or it was intentional but it can be rectified by a simple order, as opposed to a finding of contempt. And frankly, the harsh reality that your liberty might be taken away for a weekend or for longer or for up to six months, as what was imposed in a case we're going to chat about. So from that standpoint, it's the use of the contempt motion to really obtain the objective that you need. And it may very well be that you just need a second act, through a finding of contempt, to impose a course of conduct on the parties. And if that course of conduct is again disobeyed rather, then imprisonment may be the only way, or a fine may be the only way to really catch someone's attention and require them and get them to do what they're supposed to do.

Bianca La Neve: So really, even though it looks like jail is just one of the options, it really is seen by judges as a last resort.

Craig Vander Zee: I mean, that really just makes sense, given the broad discretion that the courts have. Sometimes if it is in the estate context, which we're talking about today, and it has to do with a passing of accounts, and someone is just simply disobeying an order or perhaps multiple orders, with respect to the preparation of accounts, you have to look behind that...

Bianca La Neve: Um hmm.

Craig Vander Zee: ...It may very well be that the person has made efforts. They haven't complied, but they've made genuine efforts and the courts going to be reluctant to perhaps throw them into jail or to fine them, if the reason behind it is that they just don't have the records or they don't have the requisite sophistication to prepare the accounts...

Bianca La Neve: That's a good point.

Craig Vander Zee: ...In that context, *Rule 60.11(9)* deals with contempt orders. And in the situation I've just described, a judge could very well essentially accept the level of frustration with the estate trustee for not preparing the accounts, and deal with it a different way. And by that, I mean, under *60.11(9)*, a judge can, instead of, or even in addition to making a contempt order, order that an act be done. In this case, the preparation of accounts, at the expense of the disobedient person, but by another person. And this could be utilized by having a professional who is acquainted with the preparation of accounts taking on that responsibility and getting paid by the disobedient party. That way, there could be a strict time line for the preparation of the accounts, all the documents, receipts that are available could be transferred to that person whose been tasked with this, they would be paid and it would be at the disobedient party's expense. That really would allow everyone to meet the objectives. And yet you don't have to fine someone, you don't have to throw them in jail, to meet your end. And so really, looking at it as an objective-orientated task, as opposed to a sanctioned kind of a task,...

Bianca La Neve: Right.

Craig Vander Zee: ...may get the job done.

Bianca La Neve: Right, it's about being results-oriented, as opposed to punishing the person in contempt.

Craig Vander Zee: Exactly.

Bianca La Neve: Now you had mentioned you were going to speak about *Belanger*; I thought that was an interesting case to discuss. In that case, I believe, an estate trustee actually had a finding of contempt made against him and then had it successfully set aside.

Craig Vander Zee: *Belanger and McGrade Estate* is quite a well known case at this point. And in this particular case, the estate trustee was sentenced to six months imprisonment. And actually, in a sense, did the time or at least did some of the time...

Bianca La Neve: Yes.

Craig Vander Zee: ... and the reason...

Bianca La Neve: More than Paris Hilton.

Craig Vander Zee: ...Yes. The solicitor in this case, that is the solicitor for the estate trustee, had repeatedly failed to provide documents and I guess prior orders of the court to the estate trustee. And as a result, with continued proceedings before the court, the court was frustrated and sentenced the estate trustee to the sentence of six months' imprisonment. It was only later that the court found out, when light of this fact came to its attention, that it was really due to lack of knowledge...

Bianca La Neve: Um hmm.

Craig Vander Zee: ...on the part of the estate trustee of the actual orders, that the order was removed and the trustee was released. The solicitor, not surprisingly, was found personally liable to pay costs. And I guess the offshoot of this, not surprisingly, was that there was an action between the estate trustee and the solicitor, that is, as against the solicitor, for damages...

Bianca La Neve: That's right.

Craig Vander Zee: ...And the court awarded general damages and aggravated damages and costs due to the conduct of the solicitor. Now this is, frankly, an extreme case, where there must have been a number of orders and a number of situations of disobedience laden with what appears to be solicitor's negligence...

Bianca La Neve: Right.

Craig Vander Zee: ...to have a person thrown in jail. And so you can see that, even in this kind of situation, the court would have to think long and hard before sentencing someone to imprisonment for that length of time.

Bianca La Neve: Now aside from ordering sanctions, when there has been a finding of contempt, the judge has the ability to actually set aside, vary, or give directions in respect of the contempt order. And this is found in sub-rule 60.11(8). And a person can bring such a motion where they can show that perhaps the evidence before the judge who made the initial contempt order was inaccurate or it was incomplete or perhaps because the sanction imposed had been too harsh.

Craig Vander Zee: Or alternatively, perhaps the contempt had been purged and...

Bianca La Neve: True.

Craig Vander Zee: ...as a result, there was no longer a need for the order that was in place. With that, Bianca, in terms of controlling and managing your estate litigation, when you have situations that arise where an order is being defied, simply not obeyed, then the contempt motion, contempt order is certainly an avenue that you can pursue. But given what we've chatted about in terms of the evidentiary burden and the different kinds of sanctions and other available relief that you can seek, it may not be from a practical or a cost standpoint the most effective way of obtaining your end objective. It may very well be that in order to seize back control of the proceedings, that a motion to either strike or dismiss a claim, perhaps strike an affidavit, perhaps strike a certain aspect of material that has been provided, may be actually what you want to achieve. And if they are not complying with an order, that may be the best way to go about it. It could very well be that you decide to bring a motion for directions. Perhaps you acknowledge that there is likely an unintentional aspect to the defiance of the order,...

Bianca La Neve: Um hmm.

Craig Vander Zee: ...something that will be explained quite reasonably to the court and as such, you don't want to go through the cost and the time of preparing contempt motions and everything that goes along with that. Getting an order for directions to redefine the time line, to redefine the conduct that's required may be the best alternative at the end of the day. Again, non-compliance and defiance can derail a legal strategy that you may have, but in order to avert that, sometimes taking the easy relief...

Bianca La Neve: Yes.

Craig Vander Zee: ...the least costly and most effective relief is better in the end for your client than jumping to a contempt motion.

Bianca La Neve: That's right, it really is, I think you would agree ,Craig, a measure of last resort.

Craig Vander Zee: A measure of last resort or in certain situations, it may very well be that it's a pattern of behaviour where the opposing party, each and every time that there's an order, defies it...

Bianca La Neve: That's right.

Craig Vander Zee: ...and requires a second order. It could be that as a matter of taking back control of the process that a contempt motion needs to be brought, even if, at the end of the day, contempt may not be awarded by the court, if alternative but effective sanctions can be granted. It may be that the shot has to be fired over the bow. So if that's the case, it may not be a measure of last resort, but certainly it's not the measure of first resort in every instance. Thanks Bianca.

Bianca La Neve: Thanks Craig.

This has been Hull on Estates with the lawyers of Hull & 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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