

Estate Law Case Study - Hull on Estates Podcast #72

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Justin de Vries: Welcome to Hull on Estates. You're listening to Episode #72 of our podcast on Tuesday, August 14th, 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.

Justin de Vries: I'm Justin de Vries and I'm with Megan Connolly.

Megan Connolly: Hi.

Justin de Vries: And we're going to discuss a case from our famous Court of Appeal. It's actually a 2005 decision but I think it recently came into my path and I thought it was worthwhile talking about. Its *Simone Estate vs...*

Megan Connolly: Cheifetz.

Justin de Vries: Cheifetz, thank you Megan. I'm not very good at that. It's a silent "C". In any event, the panel was Doherty, LaForme and MacFarland. So Megan, why don't you take it away and just give us a little bit of the factual background and then we'll discuss the meat of the decision.

Megan Connolly: The deceased in this case were Emidio and Laila Simone. They were killed in a plane crash. Emidio had been an entrepreneur and he owned a tooling company. They had a lawyer who was Stephen Cheifetz and he did all of their legal work for them. This included drafting both of their Wills. Now in their Wills, they named him and I'm guessing each other, the estate trustees because they died together and the case says that when they died he was the only existing estate trustee.

Justin de Vries: I think that's right.

Megan Connolly: Now the Simones' were survived by two daughters who were eighteen and nineteen at the time. And I think the two daughters inherited the entire estate.

Justin de Vries: And it would have been a significant estate. And the case also says, of course, and maybe this is why, there was a decision that the relationship deteriorated between Cheifetz and the two daughters. And then the two daughters brought an application to remove him as executor and trustee. And he eventually resigned and then there was a passing of accounts.

Megan Connolly: That's right. So he brought an application to pass accounts and the daughters objected and sought through a payment of money that had been paid to him and to his holding company in the way of salary and compensation. At the passing of accounts, the judge ordered Cheifetz to repay about \$500,000 in compensation and other fees that he and his holding company had received.

Justin de Vries: And there was some questions raised by Mr. Justice Flinn who was hearing the case that it may be that Mr. Cheifetz was self motivated. But in the end, he really didn't make any profound findings on that. And interestingly enough, the kids, the two daughters, had asked for over \$900,000 to be repaid. So they got some but not all. And then what was interesting is the TD Canada Trust Company was appointed executor of the estates of both parents as well as trustee for a family trust. And then Canada Trust, in its capacity as estate trustee, sued Mr. Cheifetz, his wife Barbara, and two companies of which they were the sole officers and directors, their family trusts. And as the court said "person unknown" for damages, essentially for breach of trust and breach of fiduciary duty on the part of Mr. Cheifetz while he acted as executor and estate trustee.

Megan Connolly: So Cheifetz then submitted his defence. And Canada Trust turned around and tried to strike out parts of that defence on the basis that some of issues he'd raised in the defence had been previously decided by the judge on the passing of accounts. And they said that since these matters had already been decided, he couldn't raise them once again.

Justin de Vries: And just from a procedural point of view, Canada Trust brought a *Rule 20* motion which is a *Summary Judgment Motion*, which was ultimately not allowed or not granted by the judge at first instance. And they also brought a *Rule 21* motion, presumably for failing to show a reasonable cause of action or abuse of process or more likely *res judicata* and that was granted. And in fact, the court, in first instance, and it wasn't Flinn 'cause this is a separate proceeding, but the judge at first instance agreed that Flinn had already considered these matters on the passing of accounts and certain defences were struck from the Cheifetz's Statement of Defence. That in turn was appealed to the Court of Appeal, which brings us to this decision.

What the Court of Appeal said, which has caused, I think, some controversy among the estate bar, is that essentially all that a passing of accounts is looking at is compensation and the right amount of compensation, even though the court recognizes that *Section 49* of the *Estates Act* says that on a passing, the court has the discretion, and it's quite wide discretion, to look into any matters and order damages or that amounts be repaid. So many people in the bar, in the estate bar, felt that if you don't raise it on an estate, on a passing of accounts, in other words, if you didn't raise some sort of a claim for damages or a surcharge for money to be paid back, then you were out of luck and doing it in a separate proceeding at a later date. But this case made it clear that the court didn't believe that to be the case. They felt, in fact, that a passing was more or less limited as I said to compensation and that a breach of trust or breach of fiduciary duty claim was really separate. And there was no reason that this could not be brought now. And while some of Mr. Cheifetz's behaviour would have an impact on the breach of trust and was

considered in the passing of accounts, when it was considered in the passing of accounts, it just reduced his compensation. It didn't go to whether or not he was negligent.

Megan Connolly: Right and the Court of Appeal said that during the passing of accounts, the judge never specifically decided or even considered whether there had been a breach of trust or breach of fiduciary duty. Now while a breach of trust could be a reason for reducing compensation, the fact that compensation was reduced doesn't mean the judge decided a breach of trust occurred.

Justin de Vries: And Mr. Cheifetz didn't argue interestingly enough, to say well hold on, there was a passing of accounts - you should have raised these issues as to damages because of my behaviour and an ordering back of money on the passing and therefore you're barred because of this order from proceeding. In fact he said listen, I have a right to defend this action for breach of fiduciary duty, breach of trust and I'm doing it. And what is a little bit unclear, at least from the Court of Appeal decision and we would have to look carefully at the lower Court decision, is whether or not *Section 49* was relied on to pay back the money. But I don't think it was. I think it was all the compensation taken by Mr. Cheifetz and part of that was ordered repaid.

Megan Connolly: Now the other point the Court of Appeal raised was that in the action for damages for the breach of trust and breach of fiduciary duty, the parties for the proceeding were different. In the action, the parties included Cheifetz's wife, and I guess two holding companies they had an interest in. The wife wasn't a party to the passing of accounts. So if on the action the court had said we'll rely on the findings of the judge in the passing of accounts, the effect would have been they would've in effect been binding the wife who wasn't a party to that passing of accounts to the findings that had been made in it.

Justin de Vries: Yeah and not surprising, the court said there's a high onus or a high standard when that is the case. It is possible, but the court wasn't prepared to find it in this case. What I think is interesting as well is I wonder, just sort of cloud punching, how aware or why the Court of Appeal didn't consider the fact that on a passing of accounts where *Section 49* is relied on and serious damages are asked for, or what some people call a surcharge, in other words, the money to be paid back because of a breach of trust or negligent management of monies or administration, that usually what happens is that there is a trial of an issue that is carved out. So you can have pleadings ordered by the court, you can have discoveries, and you can have actually a trial. So it seems to me there's some merit to say listen, on a passing of accounts, if you want to take a run at someone and want damages, you need to raise it then, because there is a procedure to handle that, and that is, trial of an issue. But the Court of Appeal said no, we essentially think that a passing is just for comp and you can always bring a breach of trust and fiduciary claim later.

So the one cautionary note, I think, is that when people say, well there's a passing of accounts and you're essentially...your liability is extinguished or you can't be sued once the accounts are passed, certainly for a breach of trust case that may not be quite as clear.

And you may be able to argue that you're entitled to bring it, even though there has been a passing.

Megan Connolly: Right.

Justin de Vries: Alright, that's our podcast for today. Hope you enjoyed listening and we'll speak with you again next time.

Megan Connolly: Bye.

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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