

Dickie and Dickie - Hull on Estates Podcast #73

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Paul Trudelle: Hi and welcome to Hull on Estates. You're listening to Episode #73 on Tuesday, August 21, 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.

Paul Trudelle: Good morning Craig.

Craig Vander Zee: Good morning Paul. It's a pleasure to be able to podcast with you.

Paul Trudelle: Yes, this is our first time together and I hope it goes well.

Craig Vander Zee: Yes, I wish...I also wish Bianca well as she'll be leaving on maternity leave for a period of time at the end of August. And she was my podcast mate, so I wish her well and I look forward to podcasting with you.

Paul Trudelle: You too Craig, and I wish her well. And I wish Sean well. We've separated as a podcasting team, no artistic differences. Just went off to pursue our own projects, so I'm with you now Craig, so let's...

Craig Vander Zee: Sounds like the break up of Wayne Gretzky and Jari Kurri.

Paul Trudelle: I was thinking more like a Simon and Garfunkel. But yeah, I like yours too. Today we thought we'd talk about a series of decisions relating to the *Dickie and Dickie* matter, which I think a very important concept comes out that we should touch on today regarding contempt.

Craig Vander Zee: Yeah, the case Paul, as you know, deals with really the use of contempt orders. And that's *Rule 60.11* specifically of the *Rules of Civil Procedure* to enforce orders of payment. And the Court of Appeal has long held that you can't use that rule to enforce payments of money. But the *Dickie* decision is interesting because it was dealt with at the lower courts in Ontario, the Ontario Court of Appeal and the Supreme Court of Canada. And dealt with that very issue and in consideration as to whether a line of credit and security for costs securing spousal support was tantamount to a payment of money. So it's an interesting case to take a review of.

Paul Trudelle: No, I agree. I like the way this...the courts dealt with the issue and how they seem to grapple with whether posting a letter of credit or security for costs was a payment of money and whether the individual could be found in contempt for failing to do that. Maybe we should look at the facts briefly.

Craig Vander Zee: Rather than referring to, you know, respondent or applicants because there's different levels of appeal, Paul, I think what I'm just going to refer to is Mr. Dickie and Ms. Dickie because I think that's the easiest way to deal with it. They were living together since 1976 and married in '79. They had three children together and then separated unfortunately in 1991, getting divorced in 1994. I guess Mr. Dickie was a successful plastic surgeon and Ms. Dickie was a registered nurse. But getting to, I guess, more the heart of the matter, in 1991 Mr. Dickie was apparently earning about \$915,000 per annum and pursuant to the Order of Justice Kiteley of the Ontario Court of 2001, he was ordered to pay child support which included about \$9,000 per month and interim spousal support of \$2,500.

Paul Trudelle: Right and I think it's after that point that things start to heat up significantly. After that point, Mr. Dickie decided that he would move to the Bahamas. He sold his properties, cashed out his RRSP's and went to the Bahamas to start a practice there.

Craig Vander Zee: And then, as we know Paul, the Bahamas is a jurisdiction that doesn't have the reciprocal enforcement of judgments legislation to enforce child and spousal support. And so that's where, in part, it became a bit tricky with the enforcement of these Orders.

Paul Trudelle: Right and the different courts note that important point and they say that it's no coincidence that Mr. Dickie went to the Bahamas, where there was no reciprocal enforcement provisions.

Craig Vander Zee: And because of his move, there was a proceeding before Justice Greer of the Ontario Court in December of 2002. And she ordered that Mr. Dickie provide an irrevocable letter of credit in the amount of \$150,000 to secure his child and spousal support obligations pursuant to Justice Kiteley's Order, and then also ordered that he provide security for costs in the amount of \$100,000, which monies were supposed to be paid to his law firm.

Paul Trudelle: I think that's a very important Order there. The prior Order was that he pay support directly to Ms. Dickie. This Order changes the complexion of who the payments are to made and the courts will pick that up later and we'll talk about that. But at that point, rather than paying money to Ms. Dickie, what he was required to do was to post security for costs and post a letter of credit to secure any future support orders.

Craig Vander Zee: And where Mr. Dickie had some problems then was meeting the obligations of the Orders, that is to both actually pay the child and spousal support and then again to post the letter of credit and to pay the security for costs. And as a result of that in this litigation history, Justice Stewart then of the Ontario Court held on February 26, 2004 that Mr. Dickie be held in contempt for failing to comply.

Paul Trudelle: That's right. And the failure to comply was with the Order of Madame Justice Greer to post the security for costs and the letter of credit. He was found in contempt and he was ordered to serve forty-five days in jail, which seems harsh but maybe not so harsh, depending on how you're looking at it. He did serve the time and it was only after that that he decided that he would appeal the contempt order.

Craig Vander Zee: And that's where we find it at the level of the Court of Appeal and that was heard in 2006. And we'll get into the Court of Appeal decision. But just to complete the litigation history, the Court of Appeal, on a majority to minority decision, held that he ought not to have been found in contempt. And then he appealed to the Supreme Court of Canada. He was granted leave and the Supreme Court of Canada overturned the Ontario Court of Appeal's decision, finding with the minority of the Ontario Court of Appeal who was Justice Laskin. So perhaps Paul, what we'll do now is go back to the Ontario Court of Appeal's decision and chat about that for a minute.

Paul Trudelle: Great. Now in the Court of Appeal there were two issues; the first issue was whether Mr. Dickie could...should be allowed to proceed with the appeal because he was found in contempt of the court. The argument was that because he was in contempt, he shouldn't be allowed to rely on the process of the court until he purged his contempt in order to proceed with the appeal. The court also dealt with the appeal itself as to whether the Order finding him in contempt for failure to post security for costs and to post the letter of credit was an Order that could result in a finding of contempt. The problem there being that, as we said earlier, you can't be found in contempt for the non-payment of money. And the court had to deal with whether Madame Justice Greer's Order was an Order for a payment of money which could lead to a contempt finding.

Craig Vander Zee: And interestingly, Mr. Dickie argued at the Ontario Court of Appeal level on the first point you raised, Paul, that where the issue before the Ontario Court of Appeal is the actual jurisdiction of the lower court to make an Order. In this case, to make an Order of contempt, that the Court of Appeal is obligated to deal with it because whether he ought to purge the contempt is dependant on whether the court had the jurisdiction to make that Order to begin with. And the Court of Appeal on that point, the majority held that it would hear the appeal. Interestingly on this point again, Justice Laskin said he would have held that the court not hear it, that it stay the appeal until the contempt had been purged.

Paul Trudelle: That's right. And I guess it's a bit of which comes first. If you're in contempt, you can't go back to court to appeal that. But if you're appealing it to find that you're not in contempt, then you should be able to at least have the audience of the court to make those submissions.

Craig Vander Zee: Well, and I think, I dare say, that I think the majority of the Ontario Court of Appeal would have sided with Laskin on that initial issue if the issue before it wasn't the jurisdiction of the lower court. If it was simply the appealing of the finding of contempt and not the ability of the court to have made that order for contempt, I think that they wouldn't have heard it. I think that Laskin's view would have carried the day

on that point. But I think because, according to the Court of Appeal's decision, the majority felt that it was going to the jurisdiction, that that seemed to sway them.

Paul Trudelle: I think that's right. So before the Court of Appeal then, Mr. Dickie was allowed to appeal. The court felt that it would hear his appeal. They went then to consider whether the contempt Order was proper or not. And the starting premise is that you can't be found in contempt for the non-payment of money. The issue therefore became whether the Order of Madame Justice Greer called for the payment of money such that he couldn't be found in contempt if he didn't pay the money.

Craig Vander Zee: So on that point, Paul, the majority held simply that a letter of credit and a security for cost Order was tantamount to a payment of money, and equivalent to a payment of money. And thus held that a contempt Order was inappropriate for that kind of circumstance and ought not to have been awarded. And obviously, from what we've been discussing and from the decision, Laskin found otherwise. He found that they weren't tantamount to a payment of money and specifically found that the obligation to pay the monies was not to the debtor. So the creditor was not ordered to make a payment of funds to the debtor. Rather, this was a payment into court. Or he even found that if there was a functional equivalent, being a payment or a requirement for a letter of credit or security for costs to be dealt with by way of a solicitor, that again not the end debtor, that that's not the same as a payment of money.

Paul Trudelle: Yeah, I think Mr. Justice Laskin picked up a very fine and detailed argument. It may, however, just shock our sense of logic. A payment of money is a payment of money, whether it's to a third party or not. Mr. Justice Laskin found that it wasn't a debt *per se* and therefore a finding of contempt could be made. I think the problem, though, is that it does, in a sense, lead us back to debtor's prison. If you don't have the money to pay the Order, be it to the debtor, which is what Laskin felt could lead to contempt or to the court or to a third party. I think that is just splitting hairs but that's what Mr. Justice Laskin did and the Supreme Court of Canada picked that one up as well.

Craig Vander Zee: I think that takes us Paul to the Supreme Court of Canada's decision where they reversed the majority decision of the Court of Appeal, substantially finding in favour of Laskin's reasoning at the Court of Appeal level.

Paul Trudelle: That's right. So I guess at the end of the day what we have the Supreme Court of Canada saying is that a payment of money to another party, if you fail to make that payment, that cannot lead to a finding of contempt. However, if the payment is a payment into court or the posting of a letter of security or payments to a third party, in this case, it was a solicitor's trust account, and if you fail to make those payments, that could lead to a finding of contempt.

Craig Vander Zee: So it puts an interesting spin on what might evolve in an estates' context because there's also situations that arise in an estate context where people could be ordered to pay monies. For example, there could be a dependent support claim under Part 5 of the *Succession Law Reform Act* and it could be that monies are ordered to be

paid by others back into the estate, such as joint bank accounts which weren't really joint bank accounts, monies received from insurance. And if those funds aren't paid back, it might be a strategy of counsel to have some sort of security backing the required payment, so that in the event that that isn't made, that a contempt order is a possibility.

Paul Trudelle: That's right. I think that's a very useful tool and something we should consider when pursuing support claims for individuals. If money needs to be repaid, we may want to seek an Order that it be paid into court or secured by a letter of credit. If the payment is not made in that case, then there is the remedy of contempt available to the parties.

Craig Vander Zee: Paul, before we leave today's topic, I think it's interesting to note too that the Supreme Court of Canada also found with Laskin that the Ontario Court of Appeal had the discretion not to hear the appeal and that if the Ontario Court Of Appeal had decided not to hear it, that is, stay it while the contempt was being purged, that they wouldn't have quarrelled with that decision.

Paul Trudelle: That is a surprising finding and I'm a little surprised by that, that you can't go back to court to argue that the Order finding you in contempt is improper. The other thing that I find interesting is the extent that Laskin went to in order to find that this was a proper Order and that contempt could be found as against Mr. Dickie. I think a big part of that might be just the facts of the case. Mr. Dickie was a very affluent individual, he pulled out of Canada without telling Ms. Dickie, despite an agreement that he would do so. There was some evidence in the different court decisions as to his almost...the fact that he was just snubbing his nose at the court. There was evidence about his lavish lifestyle while in the Bahamas. They refer to his Visa bills where he goes to bars and restaurants all the time. He bought a Sea-Doo, rented a second boat. And I think that those facts helped the court in coming to the finding that it did and ordering that he make the payments that he did and also supporting the contempt Order.

Well I think that touches on the case of *Dickie and Dickie* and the various decisions. A very interesting case. There is actually a footnote to that as well; Mr. Dickie went back to court afterwards in order to vary the support that he was paying. He didn't have much better luck there either. But that's maybe for another day or for another topic.

Craig Vander Zee: I think so Paul.

Paul Trudelle: Okay, thanks a lot Craig.

Craig Vander Zee: Thanks a lot Paul and I really enjoyed today.

Paul Trudelle: Thank you.

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

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