Your Sins Are Not Forgiven - Cost Awards and Charities - Hull on Estates Podcast #77

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Natalia Angelini: Welcome to Hull on Estates, podcast #77 on Tuesday, September 18th, 2007 with Justin de Vries and Natalia Angelini.

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.

Natalia Angelini: Hi Justin, how are you?

Justin de Vries: Good Natalia, this is our first time that we're podcasting together. We work closely together on a number of files, so it's nice that we can actually talk on the air, so to speak, about a case. And today, we're going to talk about costs, which is always a favourite, I think, in the estate world because it's a little bit less clear, for lack of a better word, than in the normal or general litigation that one comes across. Today, we're going to talk about the *Ukrainian Catholic Episcopal Corporation of Eastern Canada v. Pidwerbecki* which was a recent decision of the Ontario Superior Court of Justice. And it talks about costs in the estate context. So Natalia, why don't you tell us what was going on there.

Natalia Angelini: Sure. Essentially in this case, the church had commenced an application against estate trustees alleging misconduct, one of whom I believe was a lawyer. They were unsuccessful in the application and the respondents naturally sought their costs. And then the church took the position that no costs should be awarded and that the costs request was excessive in any event.

Justin de Vries: A couple of interesting things coming out of this case. First of all, the Court recognized the general principle that reasonable people could reasonably disagree in the estate context. And where that was the case, and perhaps the most common example of that is a Will interpretation. It's really going to be the estate that pays the costs of the parties. The parties approach the Court and say, we're not quite sure how to figure out this testamentary document, we need some guidance. If both parties take reasonable positions and advance reasonable arguments, the Courts are going to really blame the mess on the testator or the testatrix and therefore costs are payable out of the estate.

But, of course, that wasn't the case here.

Natalia Angelini: Right. In this case, the Court found that there was no dispute arising out of any mistake or lack of clarity or default of the testator. Essentially, the applicant had no basis for commencing its application.

Justin de Vries: So what I found interesting about this case, and I did an earlier blog on it, was the fact that the church took the position, and said well, hold on, we are a not-for-profit organization. We clearly bring other value to the community and as such, you shouldn't award costs against us because the church was unsuccessful in its application. And the judge simply said no, the fact that you're not-for-profit is not persuasive to me. You should have known better. In particular, the judge said you should have known after discoveries that your case was weak. And it's a good reminder to counsel as well that what you should do after discovery is take a good, hard look at the case. Because now you know what allegations are made against you, you now know the evidence to support it, you've seen your client examined as well. So you need to write that opinion letter to cover off the risks of any trial going forward.

So the judge said, church - what's good for the goose, is good for the gander, you have to pay costs as well.

Natalia Angelini: So that's a good point, Justin. I think that reflects the general trend that when you don't have a good case, you're going to be penalized most likely by way of a costs Order against you. And we've seen it in various estate matters. For instance, in Will challenges, when unjustified allegations are made against a defendant, the plaintiff may be ordered to pay the defendant's costs. In dependent support claims, successful claimants may even have to bear their own costs, when the Court considers factors that weigh in favour of that result.

And even in passings of accounts, where executors neglect or refuse to furnish accounts, or fail to keep proper records, they can be ordered to pay the costs of the successful beneficiaries.

Justin de Vries: And let's look what the Court did here. Once the judge determined that costs were to be paid by the estate, the judge approached it as a judge would in any civil litigation matter. First of all, the judge recognized that there were settlement offers made by the respondents, none made by the applicant, which I think had some bearing on the judge. But in any event, in terms of the respondent's settlement offers, none of them qualified as a Rule 49 offer. And it's always important if that's the case, to follow exactly the parameters or provisions of that Rule. But the Court is nevertheless allowed to look at reasonable settlement offers, which they did here. But the Court said great that you made some settlement offers, but it doesn't persuade me that you should be awarded higher costs on a higher scale that is. And just by way of reminder, we now have partial indemnity costs which generally are 30% to 60% of the costs of litigation. And substantial indemnity, which now is probably anywhere from about 80% to 100%. And the Rules talk about both of those scales. There's a Notice to Profession which talks about what the maximum rates should be under partial indemnity costs, though it's not a hard and fast rule. It's just something that's put forward. And then specifically for substantial indemnity costs, the Rules actually define substantial indemnity costs as one and a half times the amount that is awarded on partial indemnity. And here the judge almost did an assessment, which is unusual, because the judge looked at the amount of

hours clocked by the respondent lawyers, and in certain instances, brought it down. There were two sets of lawyers for the respondents and the judge said at one point, one of the respondent's lawyers didn't do as much prep for the trial, didn't carry the weight of the trial when it was ongoing, and therefore reduced the time. And also looked at the hourly rates that were put forward. As the Court pointed out, $350 is the maximum amount that can be charged for these respondent lawyers under this Notice to Profession. But brought it down to $250 an hour as the multiplying factor because the complexity of the case wasn't there. The judge says listen, it was hard fought but there wasn't particularly difficult issues that were brought before the Court.

So it was interesting from my point of view. Again, the judge really almost made an assessment. And often, Courts won't do that. Judges are very quick to point out they're not an assessment officer. They don't get into the nitty gritty. It's sort of a touchy feely type of process and they try to get at what they think is fair. And they very much rely on Rule 57 and the factors set out in that Rule.

Natalia Angelini: That's a great point. When making costs submissions, I would really recommend that everyone review Rule 57 and try to address each of the sub-paragraphs and the factors that the Court will consider because that will most likely help in you getting what you're asking for.

Justin de Vries: And finally, very difficult to appeal a costs award because it's discretionary. The Court of Appeal or the Divisional Court would be very reluctant to look into that because discretion means just that. It's up to the trial judge. The Court of Appeal is not going to really replace its view of what the trial judge did when it comes to costs; wide latitude is given. So bottom-line here is if you're a charity, same rules apply. You better know what you're doing, you better think long and hard about the costs consequences and finally, on Examinations for Discovery, make sure that a client is given some sort of opinion about the risks so that they know whether they should fold their tent and move on. And certainly what kind of settlement offer they should make and make it a Rule 49 offer. Thanks Natalia.

Natalia Angelini: Thank you Justin.

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