COSTS IN ESTATE LITIGATION: HRYNIAK, McDOUGALD AND ALTERNATIVE DISPUTE RESOLUTION MODELS

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The purpose of this review is to examine the "Culture Shift" referred to by the Supreme Court in the *Hryniak v. Mauldin*[1] decision and how this shift has been the primary force behind the push towards alternative dispute resolution models in the context of civil litigation generally.

Within the context of estate litigation specifically, the courts not only in Ontario but also elsewhere throughout Canada have become more sensitive to the issue of rising costs subsequent to the *McDougald Estate v. Gooderham*[2] decision (the "Modern Approach").

As costs continue to rise, there is a movement to extend to the courts more power to intervene in proceedings at an earlier stage which expands upon the summary judgment template proposed by the Supreme Court.

Further, this notion of proportionality, it is submitted, really amounts to imposing upon the parties an obligation to exercise common sense and reasonableness as disputes are pursued.

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*This brief paper is not intended to be a comprehensive academic review of the law in this area. It was prepared in hope that it will "stimulate" and encourage discussion. I would like to thank my colleague Genevieve Mushaluk for assisting in the research and my colleague Ari Hanson for his editorial skills.

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[1] 2014 SCC 7 ("*Hryniak*)

[2] 2005 CanLII 21091 (ONCA) (*"McDougald"*)

Those responsible for the administration of justice have concluded that there is a need – whether that need is labelled the "Culture Shift" as in *Hryniak* or the "Modern Approach" as in *McDougald* – to better "police" matters as they proceed through the court system in an effort to ensure that the matters are dealt with in a timely and cost efficient manner and that those who interfere because they have taken unreasonable or obstructive positions or have simply been irresponsible with respect to their approach to the dispute will, in fact, be "punished".

In the past, this punishment has generally been meted out at the conclusion of the proceedings by way of cost awards against the unsuccessful party.

The Culture Shift and alternate dispute resolution model has given the parties an opportunity to short-circuit the potential for lengthy hearings, thereby accelerating the dispute resolution process and arguably bringing common sense into the dispute, potentially before costs have gotten truly out of hand.

The question that perhaps should not be overlooked is whether this new approach to dispute resolution within the context of estate litigation perhaps ignores, in some cases, the need to more fully explore all of the issues that need to be addressed. In other words, at what point in time will the court feel comfortable in coming to the conclusion that either one or both of the parties has been acting unreasonably, thereby giving license to the court to actively intervene in the proceedings for the sake of expediting the process?

The question that needs to be addressed from counsel's perspective is how can he or she best navigate this new regime in order to achieve the best results for his or her clients.

POINTS TO CONSIDER

Judges will no longer be objective third party dispute adjudicators but, in fact, will become both facilitators and active participants as disputes move through the court system.

Arguably, the *Hryniak* decision invites the "trier of fact" to be more "comfortable" in adjudicating disputes based solely on documentary evidence including affidavits and cross-examination transcripts, or perhaps adopting a hybrid trial model whereby some *viva voce* evidence may be called.

In *Harris v. Leikin Group Inc.*,[3] a motion for summary judgment resulted in the court ordering a hybrid form of trial, in which evidence filed on a summary judgment motion would remain preserved and could be supplemented with further evidence at trial down the road.

The Ontario Court of Appeal ruled that the judge's decision was in keeping with *Hryniak* and the Court noted that a full-fledged conventional trial rather than a modified hybrid trial would likely not have led to counsel taking any different approach to the dispute. The Judiciary Committee of the American College of Trial Lawyers commissioned a report prepared by Kent E. Thomson and Christian Jeoffrey entitled *Working Smarter But Not Harder in Canada* - "The Development Of A Unified Approach To Case Management and Civil Litigation". [4]

[3] 2014 ONCA 479
[4] ACTL and IAALS January 2014 can be found at ACTL at www.actl.com (the "ACTL Report")

The ACTL Report relies heavily on the Supreme Court's comments in *Hryniak* and identifies the fundamental problem of cost and delay that now plagues the civil justice system in Canada.[5]

The ACTL Report makes a number of recommendations, and it notes that some jurisdictions for example, the Yukon, Northwest Territories and Newfoundland have implemented rule changes that deal specifically with case management.

One of the more "radical" recommendations and changes noted with respect to the case management model is referred to as the "one judge model". The ACTL Report identified the need for early intervention by the court to keep the litigation "on track" and assigning one judge shortly after the pleadings close to manage the litigation through the pre-trial and trial processes should be seriously considered as the model to be adopted on a go-forward basis.

The ACTL Report also highlights the importance of introducing the concept of settlement discussions early in the proceedings and keeping these discussions "on the table" throughout. Once more, it was thought that inserting a judge to case manage the proceedings throughout would give lawyers the "cover needed" with clients and opposing counsel to avoid the appearance of negotiating from a position of weakness.

McDOUGALD ESTATE

While some of the cases discussed in this paper dealt with what might be construed as unreasonable conduct exhibited by parties to the litigation, it must be remembered that in

[5] See also *Estate of Lorraine Combs*, 2014 ONCA 2154, and *Skunk vs. Ketash*, 2016 ONCA 841

McDougald, an argument could be advanced that relatively speaking, the conduct and position adopted by the appellants was rather benign.

The primary issue in that case related to the doctrine of ademption and the disposition of property belonging to Ms. McDougald while she was arguably incapacitated.

The application judge concluded that Ms. McDougald was incapable of managing property, thereby permitting her attorneys to dispose of property which, in turn, prevented this property from forming part of the residue of the estate.

While the Court of Appeal concluded that on the record the application judge's determination was unassailable and, further, that the evidence of incapacity was overwhelming, the court did not go further to suggest that the appellants ought to be sanctioned for unreasonable conduct by way of a costs award.

The appellants were only seeking costs on a substantial indemnity basis in the event that they won the appeal, or alternatively, a partial indemnity basis to be paid out of the estate or that they would bear their own costs if they lost the appeal.

The court determined that it was appropriate that the appellants pay the costs of the respondent on a partial indemnity basis and the costs not come out of the estate.

What I find interesting when I review the judgment is that the Court of Appeal reviewed 4 cases which it considered "useful illustrations" of the modern approach towards costs. Each of the cases dealt with fact scenarios where the unsuccessful litigants were responsible for

"unnecessary and ill-advised" litigation or were unreasonable and solicitor-and–own-client costs were awarded as a result in those cases.

It is also noted that the application judge in *McDougald* allowed the appellants their costs payable out of the estate.

What is left to debate further is not whether the "loser pays" regime is appropriate within the context of estate litigation, *i.e.* the Modern Approach, but rather attempting to ascertain and identify the "line" that the courts refer to that a party must cross to attract solicitor-and-own-client / full indemnity costs.

Arguably, the overwhelming evidence of incapacity referred to in *McDougald* ought to have been identified early in the proceedings by the appellants and the application abandoned. Was the litigation "warranted litigation" in *McDougald*?

WHAT IS REASONABLE / IDENTIFYING UNWARRANTED LITIGATION

Mr. Justice Pazaratz in *Jackson v. Mayerle*[6] refers to a letter written by the husband to his wife prior to the court proceeding:

> ***"We are both reasonable people and I really think we can work this out without spending 40 to 50 thousand dollars a piece in lawyer fees only to have a judge tell us something we could arrange ourselves. Please I'm begging you to be reasonable."***

[6] 2016 ONSC 1556

Justice Pazaratz then writes:

> "1. That was August 8, 2012. An e-mail by a father wanting to see more of his young daughter, written more than a year after separation. Months before this court case started.
>
> 2. Fast forward three and a half years.
>
> "*This trial has been financially disastrous for both parties.*"
>
> 3. That was February 10, 2016. A concluding statement in *the mother's* written costs submissions following a 36 day trial.
>
> 4. The father wound up spending $300,000.00 on lawyers. But he won sole custody. So now he wants a quarter of a million dollars in costs.
>
> 5. The mother says he's asking for too much and she can't afford it anyway, because she spent more than $200,000.00 on her own legal fees."

The case involved a custody battle along with a claim for spousal support.

In dealing specifically with the issue of case management, Justice Pazaratz writes:

> "It is not the trial judge's place to control how counsel choose to present their case. Indeed, I suspect the very fact that this trial went 36 days might lead to the predictable suggestion that perhaps I should have taken a more active role in trial management. But this was a high conflict custody case, and both parties had an urgent need to be heard. I understand this." (page 17)

The court was not swayed by the wife's argument that she had limited assets and concluded that the applicant is entitled to recover costs by virtue of his success and the reasonable behaviour (both as a parent and as a litigant (page 19).[7]

Left to their own devices and an open calendar, the number of issues presented to the court and the length of time taken to deal with those issues can become problematic.

[7] On the plea of impoverishment, see Impecuniosity or Hardship as a Factor in the Award of Costs: Towards a Coherent Framework, Emblem and Basmadgian, 2012, *The Advocates Quarterly*, volume 45, pages 420 – 435.

In the *Law Society of Upper Canada v. DeMerchant*[8] decision, the Law Society Tribunal Appeal Division was critical of the Law Society's conduct with respect to its prosecution of two lawyers, and concluded that 138 days of hearing was to a large measure a waste of costs and time.

Historically, unreasonable conduct was sanctioned by the court by an award of costs on a solicitor/client or solicitor-and-own-client basis.

Arguably, everybody involved in an estate dispute exhibits unreasonable behaviour at some point in the litigation as the parties in some instances take the opportunity to revive long simmering family grievances, real or imagined.

Generally speaking, the conduct of the parties in an estate litigation context would, in order to attract such an award, need to fall within the classification of "reprehensible, scandalous, or outrageous". Further, solicitor-and-own-client costs were said to be awarded only in the "rare and exceptional case".

Whether or not the courts have been slowly "lowering this relatively high bar" and now are more open to awarding solicitor-and-own-client costs (both within context of estate litigation and otherwise) is perhaps the subject for another paper. That being said, I think the body of case law that has developed within the context of estate litigation subsequent to *McDougald* has highlighted the important role the courts play in ensuring that the parties act reasonably and that the pursuit of litigation is warranted.

[8] 2017 ONLSTA 5

In *Lounsbury v. Dakota Tipi First Nation*,[9] Justice Saul frames the discussion of solicitor/client costs and costs generally as follows:

> "The award of costs and the measure of costs are within the discretion of the court – a discretion that is exercised in accordance with a number of judicially articulated principles. Simply put, the purpose of awarding costs is to properly indemnify a party for expenses incurred, to encourage settlement, and to promote sensible conduct in court proceedings."

Justice Saul concluded that while solicitor/client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties, there are circumstances where milder forms of misconduct are deserving of reproof or rebuke.

Arguably, the rare and exceptional or unusual has become more commonplace as the conduct of litigants is scrutinized within the context of rising legal costs.

There is also some suggestion in the older case law that the unreasonable, *i.e.* "reprehensible, scandalous or outrageous" conduct must occur during the course of the litigation.

It is submitted that this concept has become refined somewhat, in that the courts are now prepared to expand the notion of "during the course of litigation" to the commencement of the litigation.

The Alberta decision in *Brown v. Silvera*[10] provides a shopping list of unreasonable behaviour and is a good illustration of "what not to do" if you want to stay on the "reasonable side of the fence".

[9] 2011 MBQB 96
[10] 2010 ABQB 224, 2011 ABCA 288 ("*Brown*")

The *Brown* case involved a dispute over the wife's interest in marital property. It is of some interest that, in fact, Ms. Silvera had retained her counsel on a contingency basis and the court offers an interesting discussion of how the contingency contract issue should be treated within the context of offers to settle.

The court had to deal with the following issues.

1. Did the wife's failure to plead a request for solicitor/client costs prove to be fatal? (The answer is no);

2. The court determined that the husband (Mr. Brown) had systematically deceived and misled the wife as to the financial circumstances faced by the family and the full scope of the family's corporate property;

3. The husband misconducted himself both at the outset and during the course of negotiations which took place before the litigation was commenced;

4. The court concluded that the dispute was not an honest difference between the parties, but rather an attempt by Brown to keep from his wife what was rightfully hers;

5. Brown failed during the course of multiple examinations to produce documents which triggered several contempt applications;

6. The wife was required to pursue orders requiring Brown to attend discovery, answer undertakings, produce corporate documents, produce statements of assets, prepare an affidavit and produce expert's reports. The wife's expert report was provided to the husband two full years before the trial commenced, but the husband failed to provide his report until shortly before the trial causing the wife to have her rebuttal report prepared and filed in the middle of the trial. The court referred to this as sloppiness, or deliberate obstructionism which

served to make it difficult for the wife to organize her case and put it forward in an orderly manner;

7. The husband rejected two offers to settle. The court noted that this, in and of itself, was not misconduct. However, taken in the context of the complexity of the litigation, the court concluded that the husband's consistent attempts to avoid going to trial – misleading the wife along the way – permitted the court to consider the history of the formal offers and the husband's responses.

OFFERS TO SETTLE / JUDICIALLY ASSISTED DISPUTE RESOLUTION (JADR) / MEDIATION

It is submitted that in the new case management regime, where settlement discussion is encouraged at an earlier stage of the proceedings, that offers to settle will be disclosed and discussed with the court long before any ruling is made.

In *Reid Estate v. Reid Estate*,[11] the court endorsed the approach in *McDougald*. The court "labeled" the litigation as "risky" and determined that if the costs of the litigation were to be paid out of the estate to both the applicant and the respondent the estate would be substantially depleted which, in turn, would be unjust and unfair to the successful party.

The court reviewed Ontario Rules of Civil Procedure 57.01 and 49.10(1) dealing with offers to settle.

[11] 2010 ONSC 3800 ("*Reid Estate*")

What makes the *Reid Estate* case unique is that, initially, insufficient time was scheduled to complete the trial and it had to be adjourned. During the adjournment, the respondent suffered a stroke and a mistrial was declared.

Justice Wright, the trial court judge, noted in a case conference memorandum prior to the setting down of a new trial that, in his opinion, the dispute should be resolved with a payment of $80,000 out of the estate to the respondent with the balance of the estate then being divided equally. Justice Wright quotes:

> "What a waste of the parents' estate and a complete lack of common sense. I urge the brothers to settle this case on the basis of my above suggestion rather than continue to deplete the assets of the estate with further legal costs."

The respondent took Justice Wright's advice and provided a written offer to settle in accordance with Rule 49. The offer was not accepted and the matter proceeded to trial.

The respondent was successful and the award he received was well in excess of his offer to settle. Under Rule 49 the respondent would have been entitled to partial indemnity costs up to the date of the offer and to substantial indemnity costs after the date of the offer. The court concluded, however, that taking into account all the circumstances, the applicant must have known he was risking exposure to substantial costs, and the court awarded the full indemnity costs subject to a small deduction attributable to two subsidiary issues that were unsuccessfully advanced by the respondent.

There is no question that a well-crafted and timely offer to settle can, to some measure, set the "ground rules" as to what might be construed as "reasonable conduct" in the course of the litigation.

Arguably, even an unreasonable party at the outset can redeem himself or herself with a thoughtful and measured settlement proposal.

That being said, it is important that any offer to settle be responsive to the issues in play and must be "generous enough" to be considered meaningful.[12]

It is important as well that any refusal to accept an offer to settle should, in my view, be accompanied by a counter-offer to settle with a full explanation as to why the offer to settle was rejected.

In the *Sweetman v. Lesage*[13] decision, the court reviewed two offers to settle made by the plaintiff to the trustees of the estate, both of which were rejected. Justice Gray makes the following comments in regards to the non-acceptance of the offers to settle:

> "I am far from saying that the non-acceptance of an offer to settle, standing alone, constitutes unreasonable conduct attracting costs consequences for an estate trustee. I simply say that in this circumstance it was unreasonable and does attract cost consequences. While the outcome of the litigation is, of course, unpredictable, it should have been apparent to the trustees that this litigation carries significant risks for the estate. Those risks could have been eliminated, and still have left fairly large amounts to be paid to the named beneficiaries, if either of the rather modest offers had been accepted. Instead, the trustees chose to soldier on and incur significant cost. I do not think they should be rewarded by having their costs paid by Ms. Sweetman." [14]

With respect to the issue of mediation, the Ontario Rules of Civil Procedure at Rule 75.1 Mandatory Mediation - Estates, Trusts and Substitute Decisions and Rule 75.2 Court-Ordered Estates Mediation compel / permit the parties to "sit down and talk".

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[12] *Orfus Estate v. Samuel and Bessie Orfus Family Foundation* 2013 ONCA 225
[13] 2016 ONSC 5110 (CanLII)
[14] See also *Driscoll v. Driscoll et al*, 2016 ONSC 6013

In Manitoba, it is anticipated that within the near future our rules of court will be amended, and that they may introduce mandatory mediations. Currently, in Manitoba, there is a procedure whereby the parties can request that a judge be appointed to act as a mediator (JADR) to assist in the resolution of litigation including estate litigation. Currently, the judge appointed to mediate is disqualified from acting as the trial judge in the event that a settlement is not achieved. Whether that "restriction" will continue in light of the discussion in the ACTL Report remains to be seen if, in fact, the one judge model or a variation of the one judge model is adopted.

In keeping with the theme of judicial participation in the dispute resolution process, the *Mountain v. TD Canada Trust Company*[15] decision offers up an interesting insight into the judicial mindset.

The plaintiff's son unsuccessfully argued that he was entitled to the transfer of certain farm assets from his parents' estates based on an oral agreement.

At trial, the estate was awarded substantial costs as against the applicant in the sum of $275,000 on a substantial indemnity basis.

The Court of Appeal set aside the lower court ruling including the costs award but in the process made the following observation/direction:

> "I must stress that a new trial is in neither side's interest. This case cries out for a mediated, consensual resolution. This is a rare circumstance where in

[15] 2012 ONCA 806

> the interest of justice I would direct that mediation be conducted prior to any new trial" (page 19).[16]

Professor Oosterhoff in a recent paper comments on whether mediation is permissible in probate.[17]

CONCLUSION

It is submitted that the "Culture Shift" referred to by the Supreme Court in *Hryniak* will continue to push litigation, including estate litigation, further away from the traditional "pleadings, discovery, trial" model that historically set the stage for dispute resolution.

Judges will become more active participants in the dispute resolution process, and whether the one judge model is adopted or not, judicial participation in the litigation model will continue to increase.

From counsel's perspective this, of course, is neither bad nor good in an absolute sense. It is something that will need to be managed as we manage our client's conduct and expectations and our dealings with other counsel.

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[16] It is interesting to note that mediation was conducted by Justice Murray which, in turn, led to the execution of Minutes of Settlement. Notwithstanding what appeared to be the final resolution of the matter, a dispute between the parties developed after the execution of the Minutes of Settlement dealing with its implementation. See *Mountain v. TD Canada Trust* 2015 ONSC 4030

[17] See Albert Oosterhoff – *The Discrete Functions of Courts of Probate and Construction* 2017 Volume 46 *The Advocates Quarterly* pages 316 – 373 (in particular pages 367 – 370 re "Is Mediation Permissible in Probate")

Although it may be difficult to "rehabilitate" a client who is unreasonable, it is possible and arguably mandatory that the client be educated on the tools the court has at its discretion to "punish" inappropriate and unreasonable behaviour associated with the dispute.

Similarly, in my view it is important that counsel take the opportunity to share with opposing counsel and the court how recent developments both from the Supreme Court and the Ontario Court of Appeal and the cases that have followed are likely to impact on the dispute at hand.

PROPORTIONALITY – THE MANITOBA EXPERIENCE

On January 1, 2018, amendments to the Manitoba Court of Queen's Bench Rules (the "MB Rules") will further enshrine and extend the concept of proportionality to all actions in the Court of Queen's Bench.

Rule 1.04 (1.1) will provide as follows:

> In applying these rules in a proceeding the court is to make orders and give directions that are proportionate to the following:
>
> a) The nature of the proceeding;
>
> b) The amount that is probably at issue in the proceeding;
>
> c) The complexity of the issues involved in the proceeding;
>
> d) The likely expense of the proceeding to the parties.

Up until this amendment, our courts have noted that the concept of proportionality was to be applied primarily with respect to expedited actions.

The recent Manitoba Court of Appeal decision in *Tregobov v. Paradis et al*[18] dealt with an appeal, in part, on the issue of an elevated costs award at trial. In that case, the plaintiff alleged that there had been a fraudulent misrepresentation within the context of an allegation that the vendor of a home fraudulently misrepresented foundation problems in the course of a sale of the property.

At trial, the judge dismissed the claim and awarded elevated costs to the defendants.

[18] 2017 MBCA 60 (CanLII)

The Court of Appeal refused to set aside the order and took the opportunity to comment on the concept of proportionality and the role of the Case Conference Judge.

> "Proportionality is the watch word for expedited actions (see QB r 20A(5); *Pitblado LLP* at para. 15; and *National Concrete Accessories Canada Inc. v. AAA-Zaid*, 2017 MBCA 28 (CanLII) at para.35). The plaintiff disregarded the sage advice of the Case Conference Judge who told her to narrow her claim. In our view, Case Conference Judges should routinely express their frank views as to the merits of a QB r 20A action while exploring possible settlement (see QB r 20A(22); and *Pitblado LLP* at para. 15). The benefits of doing so are obvious. The civil trial here took eight days of court time. Many of the damages claimed had no connection to any misrepresentation relating to the problems with the north wall of the home's foundation. That is readily apparent from the record. Court time could have been saved if the claim had been narrowed and reasonable agreements had been made well before the trial."[19]

In *National Concrete Accessories Canada Inc. v. AAA – Zaid*,[20] Justice Cameron of the Manitoba Court of Appeal contrasted the concept of proportionality as set forth, at that time, in Rule 20A(5) to what she refers to as "regular civil actions".

> "Thus, a review of the history and context of r 20A supports the position that imposition of sanctions for non-compliance under r 20A(52) need not involve the exact balancing and consideration of the principles applicable to regular civil actions. Rather, proportionality should be the primary consideration."

(See paragraph 29)

I think it is clear now that with the expansion of the proportionality rule to all civil actions including the "regular" civil actions that proportionality will, in fact, be the primary consideration with respect to the issue of costs (if it is not already).

[19] Ibid, at para. 25. See also *Manitoba Keewatinowiokimakanik Inc. v. McIvor*, 2007 MBCA 134 (CanLII)
[20] 2017 MBCA 28 (CanLII)

The amendments to the MB Rules that will be coming into force on January 1, 2018, also introduce under the new summary judgment Rule 20 the concept of the one judge model discussed in the ACTL Report as noted above.

Where a summary judgment motion has been dismissed, in whole or in part, the new Rule 20.09 provides:

> "The judge who heard the motion must, where practicable, act as the pre-trial judge for the action following the motion. For greater certainty, this rule applies even if there was a pre-trial judge for the action before the motion for summary judgment was heard."

The new Rule 20.10 goes on to provide:

> "Where practicable, the judge who heard a motion for summary judgment in an action, must preside at the trial of the action."

Within the context of pre-trial management, the new Rule 50.01(2) clearly sets out the objectives of the amendments to Rule 20 as follows:

> "This Rule is intended to facilitate the just, most expeditious and least expensive determination or disposition of an action by having a judge manage the pre-trial conduct of an action by:
>
> a) setting early trial dates and establishing time lines with the completion of steps in the litigation process;
>
> b) identifying, simplifying the issues to be tried in the action;
>
> c) avoiding wasteful or unnecessary pre-trial activities;
>
> d) facilitating settlement of the action; and
>
> e) ensuring that the action is ready for trial by making orders and giving directions respecting substantive and procedural issues in the action."

The new Rule 50.11 provides that the pre-trial judge shall not preside at the trial unless with the consent of all parties, or when the judge heard a motion for summary judgment in the action and assumed the role of pre-trial judge for the action under Rule 20.08.

As cases move through the system, the new Rules contemplate judges assisting the parties in a very active manner, focusing their attention on narrowing issues and establishing meaningful lines of communication to ensure the time devoted to the resolution of the matter is reduced. It is likely that in future cases, the "sage advice" of the judges who are assisting counsel – whether within the context of a motion for summary judgment, pre-trial procedures or case management – may be commented upon at the conclusion of the case within the context of the issue of costs as the Court of Appeal did in the *Tregobov* decision. Counsel will be arguing, it is submitted, that the failure to take direction from the court during the case management stage of the litigation ought to translate into an award of elevated costs against the unsuccessful party.

SOLICITOR/CLIENT COSTS IN ESTATE LITIGATION – RECENT DECISIONS

Section 96(1) of *The Court of Queen's Bench Act* provides:

> "Costs - Subject to the provisions of an Act or the rules, the costs of or incidental to, a proceeding, or a step in a proceeding, are in the discretion of the court and the court shall determine liability for costs and the amount of the costs or the manner in which the costs shall be assessed."

Rule 57 of the Court of Queen's Bench Rules sets out the issues the court may consider in addition to the result of the proceeding and any offer to settle made in writing in exercising its discretion under Section 96.

(See Schedule "A")

The criteria set out in Rule 57.01(1) is followed in virtually all cases where costs are an issue. The particular criteria set forth in Rule 57 are superimposed upon the court's general discretion to award costs that are fair and reasonable taking into account all the circumstances.

It is important to remember that, in certain cases, the opportunity to serve an offer to settle under Rule 49 ought to be pursued.

As noted above, the historical approach to cost awards within the context of estate litigation has been slightly different.

So long as there was a reasonable question posed to the court that required an adjudication with respect to the testamentary disposition - for example, the wording of the will was unclear - the legal fees of both the estate executors/trustees and any beneficiaries participating in the litigation were paid out of the estate on a full indemnity (solicitor and client) basis.

As noted above, the *McDougald Estate* decision introduced the modern approach of "loser pays" with the overriding protection in place that any ruling on costs was, of course, subject to the discretion of the court.[21]

If the court determines that an estate trustee/executor has acted unreasonably or primarily for his or her own benefit rather than the benefit of the estate, the estate trustee/executor may be ordered to pay not only its own costs but also the costs of the other participants in the litigation.

[21] See *Brown v. Rigsby* 2016 ONCA 521 (CanLII), and *Neuberger Estate v. York* 2016 ONCA 303 (CanLII)

In the recent Ontario Superior Court of Justice decision, *Craven v. Osidacz*,[22] Justice T. R. Lofchik referring to an earlier decision[23] quotes as follows:

> "Given the emotional dynamics of most pieces of estate litigation, an even greater need exists to impose the discipline of the general cost principles of "loser pays" in order to inject some modicum of reasonableness into the decisions about whether to litigate the estate related disputes."[24]

In the *Craven* decision, the plaintiff was seeking damages against the estate of her deceased husband who had murdered their son. In addition, the plaintiff sought spousal support and damages.

Michael Osidacz (likely the deceased's father or brother) was the executor under his brother's will and the case went on for over 10 years with the court ultimately awarding the plaintiff judgment in the amount of $565,000 including aggravated and punitive damages.

With respect to the issue of costs, the plaintiff sought an order that the executor personally be responsible to compensate the plaintiff on a complete indemnity basis.

Justice Lofchik comments on the issue of proportionality and states the following:

> "The overriding principle of reasonableness and proportionality governs the fundamental objective of costs awards. Partial indemnity costs is the rule, substantial indemnity costs is the exception and full indemnity costs are very rare and should only be rewarded for repugnant behaviour."[25]

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[22] 2017 ONSC 4396 (CanLII) ("Craven")
[23] Re: *Estate of Brett Salter, Salter re: Salter* [2009] 50 ETR 3d 227 (S.C.J.)
[24] Craven, at para. 9
[25] Craven, at para. 12. In Ontario, partial indemnity costs are tariff costs, and substantial indemnity costs are - pursuant to Rule 1.03 of the Ontario Rules of Practice - costs awarded in amount that is 1.5 times tariff costs. Although full indemnity costs are not defined, they are generally considered to be complete reimbursement of all amounts the client has paid to counsel in relation to the litigation.

The court reviews the conduct of the executor and rules that he had advanced speculative and groundless defences and acted in a manner that was anything but reasonable, prudent or appropriate. He offered virtually no evidence and was totally irrational and reckless in his conduct in the management of the litigation.[26]

Justice Lofchik goes on to state that the executor occupied the position of fiduciary as estate trustee, and used that position and the assets of the estate to conduct the litigation in a way that amounted to harassment and to protect his own position.[27]

The court in *Craven* concluded that had the litigation been conducted in a reasonable manner the plaintiff's legal costs would have been in the area of $45,000 and she would have received party-and-party costs of approximately $30,000 which would have required her to pay only $15,000 from her own funds for costs. As a result, the court ordered the executor to personally pay costs of what the court calculated to be reasonable solicitor-and-client costs of $141,310, being the $156,310 that the plaintiff sought less the notional $15,000 she would have had to pay had the litigation been conducted in a reasonable fashion by the executor.

It should be noted that Justice Lofchik sites with approval the decision of Justice Schulman in *S.B. v. A.S.B. (Estate of N.B., deceased),* 2004 MBQB 7 (CanLII) as follows:

> "A comprehensive decision of the Court of Queen's Bench in Manitoba indexed as *S.B. v. A.S.B. (Estate of N. B., deceased)*, 2004 MBQB 7 (CanLII) also sets out the applicable principles. That decision can be summarized by saying that the courts have long ruled that an executor who engages in litigation without proper basis will be held accountable."
>
> **(Paragraph 8)**

[26] Craven, at para. 20
[27] Craven, at para. 21

In *Davies v. Clarington (Municipality) et al*,[28] the Ontario Court of Appeal commented that the fixing of costs is not merely a mechanical exercise:

> "The principles are that the fixing of costs is not merely a mechanical exercise; that the result of applying the costs grid must be considered, in particular whether in all the circumstances the result is fair and reasonable; and that in deciding what is fair and reasonable, the expectation of the parties is a relevant factor."[29]

The court goes on in the Davies decision to refer back to the Supreme Court of Canada decision in *Young v. Young*,[30] where the court makes it clear that solicitor-and-client costs are warranted only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

It is submitted that the conduct of all litigation – both estate and otherwise – has changed dramatically since the Supreme Court's ruling in *Young*.

Especially within estate litigation, the opportunity and responsibility mandated under the proportionality concept and the rules of court across Canada have now, it is submitted, made it far easier to find common ground between the concept of egregious or reprehensible conduct and conduct that might otherwise have been simply "labelled" as unreasonable. As the court stated in the *Davies* decision:

> "Of course, a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other. The former, the thrust and parry of the adversary system, does not warrant sanction: the latter well may."[31]

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[28] 2009 ONCA 722 (CanLII) ("Davies")
[29] *Ibid*, at para. 20
[30] 1993 CanLII 34 (SCC) ("Young")
[31] Davies, at para. 45

As the case law develops in the area and the concept of proportionality is further refined, it is submitted that the issue of costs will become a far more important consideration, especially within the context of estate litigation.

The parties must very early on in the process take stock of the issues, the evidence, and in particular the quality of the evidence relating to those issues that they consider to be contentious and that need to be addressed, so that the parties may properly weigh the risks of being exposed to elevated costs.

SCHEDULE "A"

Excerpt From Manitoba Court of Queen's Bench Rules

RULE 57

AWARD AND FIXING OF COSTS BY COURT

GENERAL PRINCIPLES

Factors in discretion

57.01(1) In exercising its discretion under section 96 of *The Court of Queen's Bench Act*, to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,

(a) the amount claimed and the amount recovered in the proceeding;

(b) the complexity of the proceeding;

(c) the importance of the issues;

(d) the conduct of any party which tended to shorten or lengthen unnecessarily the duration of the proceeding;

(e) whether any step in the proceeding was improper, vexatious or unnecessary;

(f) a party's denial or refusal to admit anything which should have been admitted;

(g) whether it is appropriate to award any costs or more than one set of costs where there are several parties with identical interests who are unnecessarily represented by more than one counsel; and

(h) any other matter relevant to the question of costs.

Costs against successful party

57.01(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

Court may fix costs

57.01(3) In awarding costs, the court may fix all or part of the costs, with or without reference to Tariff A or B, instead of referring them for assessment, but in exercising its discretion to fix costs the court will not consider any tariff as establishing a minimum level for costs.

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Disbursements

57.01(4) The court may disallow a disbursement in whole or in part where, based on all circumstances of the case, it is satisfied that a disbursement claimed by a party was not reasonably necessary for the conduct of the proceeding or was for an unreasonable amount.

Costs may be assessed

57.01(5) Where the costs are not fixed, they may be assessed under Rule 58.

Authority of court

57.01(6) Nothing in this Rule affects the authority of the court,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding; or

(c) to award all or part of the costs on a lawyer and client basis.

DIRECTIONS TO ASSESSMENT OFFICER

Directions

57.02(1) Where costs are to be assessed, the court may give directions to the assessment officer in respect of any matter referred to in rule 57.01.

To be recorded

57.02(2) The court shall record,

(a) any direction to the assessment officer;

(b) any direction that is requested by a party and refused; and

(c) any direction that is requested by a party and that the court declines to make but leaves to the discretion of the assessment officer.

COSTS OF A MOTION

Contested motion

57.03(1) Where, on the hearing of a contested motion, the court is satisfied that the motion ought not to have been made or opposed, as the case may be, the court shall,

(a) fix the costs of the motion and order them to be paid forthwith; or

(b) order the costs of the motion to be paid forthwith after assessment.

Failure to pay costs

57.03(2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such order as is just.

Motion without notice

57.03(3) On a motion made without notice, there shall be no costs to any party, unless the court orders otherwise.

COSTS ON SETTLEMENT

57.04 Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs may be assessed under Rule 58 on filing in the office of the assessment officer a copy of the minutes of settlement or a written consent signed by the party agreeing to pay costs.

COSTS WHERE COURT LACKS JURISDICTION

57.05 Where a proceeding is dismissed for want of jurisdiction, the court may make an order for costs of the proceeding.

COSTS OF LITIGATION GUARDIAN

Payment by successful party

57.06(1) The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent and add them to his own, but may further order that the successful party pay those costs only to the extent that the successful party is able to recover them from the party liable for them.

Recovery

57.06(2) A litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom the litigation guardian has acted, unless the court orders otherwise.

LIABILITY OF LAWYER FOR COSTS

Order against lawyer

57.07(1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, or other default, the court may make an order requiring the lawyer personally to pay the costs of any party.

Right to be heard

57.07(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.

Notice to client

57.07(3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.