MINDEN GROSS LLP

Spring 2013

TOPICS:

A 40-Year Battle Over a Forest Hill Estate:

Would "Med-Arb" Have Been Better?

In a March 2013 decision of the Ontario Superior Court of Justice, a judge has put an end *(or has he?)* to over 40 years of litigation in which more than 30 legal proceedings were commenced. The case involved the estate of the late Edward Assaf who died in 1971. In a nutshell, the bulk of the substantial estate (comprising, among other things, a valuable home in Forest Hill) was left to a daughter and grandson of the deceased, with only small amounts being left to the son and widow. The son was not pleased!

According to one judge, the son's many battles have been "motivated by a belief that a terrible injustice had been done by his father to his mother, who he felt had been abused in life and cruelly treated in the will."

Excerpts from only some of the 30-plus judicial rulings made over the years included the following:

- "…[t]he Assaf estate has been the subject of more litigation than perhaps any other in Ontario history."
- "The relief sought by William Assaf in this branch of the litigation over his father's assets was described by Garrett J. as 'entirely without merit, completely without merit and absolutely without merit'."
- "…egregious conduct of the worst kind…"
- "…figures in a classical tragedy, bent upon destroying that which surrounds them and especially their monetary inheritance."

In this latest judicial saga, the judge dismissed the action. In addition, an Order was made declaring the son to be a "vexatious litigant", requiring the son to first obtain a judge's approval prior to commencing any further claims in the future.

Subject to the possibility of a successful appeal, this particular legal drama will have come to an end. But did it need to progress as far as it did?

While mediation (one of the most familiar and commonly-utilized forms of alternative dispute resolution [**ADR**]) is mandated in various jurisdictions within Ontario in which estates proceedings are commenced, it does not always (although very often it does) result in an end to the dispute. The mediator, who is a neutral, independent third party who helps the litigants facilitate a resolution of their dispute, does not decide anything and, therefore, in the end, it is up to the litigants as to whether they will arrive at a settlement. And in the case of a "vexatious litigant", that result is probably unlikely.

Arbitration, another form of ADR, is a process in which a neutral, independent third party, much like a mediator, is asked to make a final ruling concerning the dispute, which may either be binding or non-binding on the parties, depending upon their joint wishes at the outset.

In studying for my Masters of Laws degree in ADR, we learned about a concept called "Med-Arb", which means nothing more than mediation possibly leading to arbitration. To the best of my knowledge, med-arb had never been used in estates disputes of which I was aware until I had occasion to propose the concept to opposing counsel in a matter in which my client and her siblings (some of whom were unrepresented) were suing a professional estate trustee who had been administering their mother's estate.

Due to the self-representation of some of the parties, a history of tense relationships among some of the siblings, prior judicial proceedings involving the estate, changes of legal counsel along the way, and other reasons, counsel representing the professional estate trustee and I were very pessimistic about the possibility of mediation resulting in a resolution of the dispute. And yet, we knew that, without bringing some finality to the matter, the litigation would continue indefinitely.

We therefore agreed on proposing med-arb, and brought a motion to the Court, on notice to all parties, seeking an Order of the Court that would provide for med-arb to be scheduled, with any arbitration order to be final and binding on all parties. The Order was granted. We were fortunate in retaining one individual who agreed to serve as both mediator and, if necessary, as arbitrator to make a final and binding decision.

We scheduled the "proceeding" for two days, with mediation to take place on Day One, allowing the parties to come to a consensual agreement among them realizing that, if they did not, they would return on Day Two for the arbitration "hearing".

As anticipated, the mediation did not result in a resolution of the dispute and, so, the parties returned on Day Two. Submissions were made, the arbitrator reserved his decision, and ultimately, the decision of the arbitrator was released which, in my view, represented a very fair and balanced decision on the merits of the case. More important than anything, the litigation was over!

If med-arb had been considered in the Assaf Estate case, perhaps more than 40 years, more than 30 judicial proceedings, and enormous legal costs might have been avoided.

Howard S. Black
Partner
hblack@mindengross.com

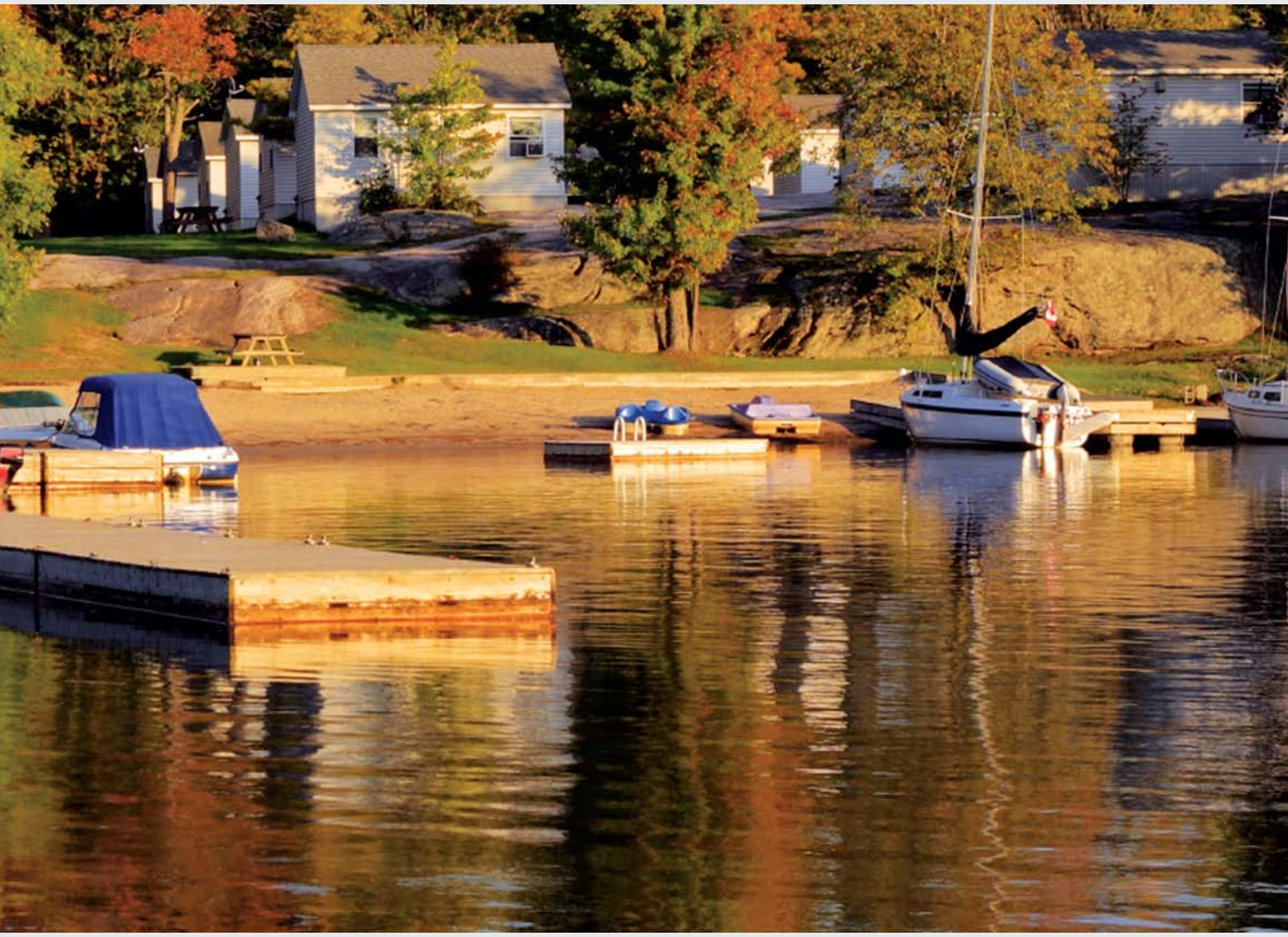
Who Says You Can't Fight CITY HALL

The area around Georgian Bay between Wasaga Beach and Meaford contains many interesting features. The beaches along Georgian Bay, the private ski clubs in the area, the pedestrian village of Blue Mountain, a lengthy cycling trail, and beautiful golf courses are only some of the many wonderful recreational features of the area. As idyllic as it may sound, however, weird things happen in that neighbourhood as evidenced by the recent Court of Appeal decision in a case between the Town of Meaford and a group of home and cottage owners along Georgian Bay and the Meaford area.

In this case, to quote the Court, the Town of Meaford quite literally "found a by-law in a box in its basement". I am not kidding. The by-law was passed in August 1854 by the municipal council in place at the time. It was entitled By-law No. 11 for 1854 and established a lakeshore road along 4 adjoining lots. The road surface would have covered about 6,000 feet abutting Georgian Bay.

The by-law was never registered on title. Rather, it was lost to history for about 150 years. In fact, the road surface was largely lost to Georgian Bay when the area was washed out in a storm in 1986.

The by-law was discovered in the basement in 2004. The Town surveyed the area covered by the by-law and then passed a new by-law confirming the location of the purported road. It then directed the Town's solicitor to do whatever was necessary to remove all obstructions from the area covered by the by-law.



As it happens, those lots are occupied by 10 cottage properties. The municipality sued the cottage owners for a Court Order declaring the road to be a public highway and finding that the cottage owners were trespassing on it.

The cottage owners brought motions for summary judgment. The motions were heard over the course of 5 days. The cottage owners were successful and the Town appealed to the Court of Appeal.

The Court noted first and foremost that there was absolutely no evidence that any public highway ever actually existed. The Court reviewed a variety of deeds and surveys prepared in the 1800's, none of which made any reference to a road. In fact, there was no other township record in existence referring to either By-law 11 or any land that may have been covered by it. There were no records that the road was ever created or maintained by the Town and there were no records that the Town ever paid anyone any compensation for expropriating the roadway area. There was no survey and no evidence of the road on any map.

When the cottage owners built their cottages, they were built based on measurements commencing at the edge of the water. The Town was involved in granting the building permits and approvals for the cottages and certainly never asserted that there was a public roadway along the shoreline. This is not surprising given that the by-law appears to have been completely forgotten for 150 years.

The real basis for the Town's position at the Court of Appeal was that the cottage owners knew or should have known of the existence of the road all along. Unfortunately for the Town, it did not seem to be able to provide any evidence to support that position. In fact, the Town consistently acted as if there was no road. As the Court put it:

"This was not a road not taken. There was simply no road to take."

The appeal was dismissed with a substantial amount of costs.

This case represents yet another example of common sense triumphing over legal technicalities. How anyone at the Town could have imagined that a Court would permit the Town to prejudice the interests of 30 cottage owners in these circumstances is simply mindboggling. I cannot imagine a judge in the world going along with it, especially since the Town and its officials over many generations did not have a clue as to what otherwise might have been its own property rights.

Nevertheless, this case is a useful reminder of the fact that municipalities and the bureaucrats that run them are capable of doing some very strange things.

Incidentally, this does not mean that Meaford isn't a nice place to visit. For example, there is a factory outlet store there that is not to be missed…

A. Irvin Schein
Partner
ischein@mindengross.com

MINDEN GROSS LLP

BARRISTERS & SOLICITORS
145 KING STREET WEST, SUITE 2200
TORONTO, ON, CANADA M5H 4G2
TEL 416.362.3711 FAX 416.864.9223
www.mindengross.com

Firm News and Professional Notes

Kenneth Kallish was quoted in the article ***Ryan only third Canadian to take Meritas helm*** in the April 26th, 2013 edition of the Lawyers Weekly

Samantha Prasad served as a panelist at the MERITAS AGM on Tips from the Masters - Marketing Across Meritas April 2013

Samantha Prasad will join the MERITAS Law Firms Worldwide Executive Committee for Member Relations & Marketing for a one-year term beginning May 2013 and ending May 2014.

Stephen Posen presented a paper at Springfest at the Metro Convention Centre on the topic of **Landlord's Rights and Remedies for Tenant Defaults.** April 2013

Reuben Rosenblatt presented to the Toronto Lawyers' Association on ***Topical Issues in Real Estate: What Every Real Estate Lawyer Should Know*** **(More Cases That Really Scare Me!)** April 2013

Reuben Rosenblatt presented a paper at the 10th Annual Real Estate Summit for the Law Society of Upper Canada on the topic ***Hey, Let's Be Careful Out There!*** **(Cases That Should Change the Way You Practice)** April 2013

Hartley R. Nathan, Q.C. presented **Contentious Issues At Directors' Meetings** at The Directors College. March 2013

Michael Goldberg, along with members of the MERITAS Canada Tax group, presented Essential Tax Strategies for US Businesses in Canada March 2013

Joan Jung, Michael Goldberg, Samantha Prasad and Matthew Getzler of the Minden Gross Tax group presented **Implementing Estate Freezes, Part II: Variations of Freezes** as part of the ExpertEdge Webinars by CCH. March 2013

Joan Jung co-presented the discussion of the Annotated Discretionary Trust and participated in the panel discussion on professionalism issues at the Law Society of Upper Canada seminar, **The Annotated Alter Ego and Discretionary Trust 2013.** March 2013

The Honourable Jerry Grafstein presented **Churchill as a Liberal** at the International Churchill Society's annual general meeting February 2013

Stephen Posen, Stephen Messinger, Michael Horowitz, Christina Kobi, Adam Perzow, Daniel Wiener, Benjamin Radcliffe, Enzo Sallese and Melodie Eng participated in the 2013 ICSC Canadian Law Conference from February 21-22, 2013 in Toronto.

Steven Pearlstein's article **Appeal court rules on validity of right of first refusal** appeared in The Lawyers Weekly February 2013.

Joan Jung presented **Taxation of Trusts - a selection of issues** at AJAG. AJAG is a firm which organizes continuing education seminars for accountants. February 2013

Stephen Posen along with Ray Roberts were interviewed on Canada AM regarding Canadian legend Glenn Gould who received a special Grammy. Stephen was to accept the Lifetime Achievement Award on behalf of the Glenn Gould Estate from the U.S. Recording Academy during the 2013 Grammy Awards. February 2013