

EALM: Litigation Management During COVID-19 and Beyond

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The COVID-19 pandemic has changed the way that we are able to practice law. For the time being, many of us and our staff are working remotely from home and avoiding in-person meetings. Access to assistance through the courts also remains limited due to the pandemic. In its Notice to the Profession dated May 5, 2020, the Ontario Superior Court of Justice announced that it would not resume in-person hearings until July 6, 2020, at the earliest. The notice states that the scope of matters being heard by the courts virtually will be extended in the near future beyond those that are truly urgent in nature, but the particulars regarding such an expansion have not yet been released.

While access to the courts remains limited, the Estates Arbitration and Litigation Management (“EALM”) initiative launched by our firm is available as a means of obtaining assistance in the determination of procedural and/or interim (and certain substantive) matters that are not necessarily urgent in nature and, accordingly, not likely eligible for a virtual court hearing at this time.

The Mechanics of EALM

If all parties are agreeable to participating in EALM, they will typically negotiate terms of an EALM agreement that sets out the matters to be arbitrated, primarily relating to procedural and interim relief. Examples of issues that may be submitted for determination include timetabling issues, such as the scheduling of examinations, mediation, or other next steps in the litigation, as well as related directions, interim dependant’s support under section 64 of the *Succession Law Reform Act*, the appointment of an estate trustee during litigation, production issues, and a number of other issues that the parties and the arbitrator agree to submit to arbitration.

A precedent EALM agreement can be found on the Hull & Hull LLP website.¹ The precedent EALM agreement is intended to serve as a template, to be

updated by counsel prior to its execution as may be agreed upon by the parties and the proposed arbitrator based on the circumstances of the case, the issues to be submitted to arbitration, and the terms of the engagement of the arbitrator.

A list of senior wills and estates practitioners who are prepared to assist as EALM arbitrators at a reduced hourly rate can be found on the Hull & Hull LLP website.² The proposed arbitrator should be consulted regarding the terms of the EALM agreement to ensure that he or she is prepared to assist the parties as intended and set out in the agreement.

The EALM agreement will set a deadline (for example, three days prior to the arbitration date) for delivery by email of any sworn evidence and/or a Statement of Law or Position Statement of a specified maximum length (for example, no more than ten pages), setting out the party’s position in respect of the issues to be arbitrated, including references to relevant documents and case law. The EALM agreement can also set out the terms, including a deadline and maximum length, for any reply materials.

EALM arbitrations can take place via teleconference or video conference, depending on the preferences of the parties and the arbitrator. It is anticipated that the arbitrations will not last more than one to two hours. On the consent of the parties, the hearing may take place only in writing.

If the decision of the arbitrator requires a court order to be effective (for example, the appointment of an estate trustee during litigation or an order directing the production of records in the custody of third parties), the parties will typically agree as a term to the EALM agreement to file a consent motion in writing to obtain the necessary order.

The parties may return to court to address substantive issues once normal operations are restored (or on an urgent basis in the interim if

¹ To access a copy of our precedent EALM agreement, please visit: https://hullandhull.com/wp-content/uploads/2020/05/DRAFT-Estate-Arbitration-and-Litigation-Management-Agreement-040120_2078-PGT-OCL-Comment.pdf

² To access a list of senior estates practitioners who are prepared to assist as EALM arbitrators, please visit: <https://hullandhull.com/wp-content/uploads/2020/05/EALM-Arbitrators-updated-050820.pdf>

appropriate), or may instead elect to proceed to arbitration or mediation in respect of substantive matters. However, the arbitrator's decision on issues to be arbitrated pursuant to the EALM agreement is binding upon the parties and is not intended to be subject to appeal, as set out in the precedent agreement.

Role of the Public Guardian and Trustee and The Children's Lawyer

Since its launch, the EALM initiative has received the support of the Office of the Public Guardian and Trustee (the "PGT") and the Office of The Children's Lawyer (the "OCL"). EALM is not intended to in any way circumvent the role of the PGT or the OCL where an estates matter involves unprotected charitable interests or the rights of persons under legal disability. As such, the EALM draft agreement recognizes the potential role that the PGT and/or the OCL may have in the EALM process.

Where any substantive issue to be submitted to arbitration affects the rights of persons under legal disability, or an unprotected charitable interest, the parties must provide notice of their intention to enter into an EALM agreement to the PGT and/or the OCL and ensure that the PGT and/or the OCL are provided with the opportunity to participate. As usual, the PGT and/or the OCL should be served at the early stages of an estates matter, particularly when the determination of certain issues will have a significant effect upon the interests that they represent, and matters commenced or continued by way of EALM are no exception.

Where the PGT and/or the OCL are already participating in a proceeding, their consent to proceed to EALM is required. Where it is necessary for a court to appoint the PGT or the OCL as litigation guardian, however, each office may consider requests to engage in the EALM process after they have been appointed as litigation guardian (rather than prior to their formal appointment).

An arbitrator's decision to resolve substantive issues involving the rights of persons under legal disability will be considered to be a final settlement, which requires court approval under Rule 7.08 of the *Rules of Civil Procedure*.

The Benefits of Implementing EALM

Since announcing the EALM initiative, we have heard from many members of the Estates Bar who look forward to implementing EALM into their own practices. EALM is modelled after a similar initiative that has seen success within the context of family


law. While it is still at an early stage, we have heard from some members of the Estates Bar of their positive experiences with EALM.

EALM is a timely and cost-effective measure to move litigation matters forward. It also provides the parties to litigation with more control than the traditional court process.

Once the courts resume full operations, we can only anticipate that they will be at full capacity and hearing dates will be in high demand. In light of this, we are hopeful that EALM will continue to assist parties to estate litigation and their counsel as a suitable and efficient alternative to in-court hearings where appropriate.

Summary

COVID-19 has presented many unique challenges to the legal profession. It is important that we employ new measures to continue to move matters forward for the benefit of our clients and colleagues throughout the Estates Bar. EALM is not only a timely and cost-effective tool in limiting the disruption to our practices and our clients' lives during this challenging time, but we are hopeful that it will continue to be an efficient alternative to in-person court hearings when the courts resume full operations.

If you would like to discuss strategies for introducing EALM into your own practice, please contact me at spopovic@hullandhull.com. 



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