Raising the Bar

Raising the Bar – Ninth Edition

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Dear Friends,

Welcome to summer! We're very pleased to bring you this pre-beach edition of *Raising the Bar*.

In this edition, we'll guide you through important recent decisions on topics ranging from offers to settle, to case management, to costs, to the question of when is enough discovery "enough".

We will also Shine a Light on the "new and improved" summary judgment process. We take stock of how the process is working for employers, and what you need to consider to approach these motions strategically and effectively.

Finally, we will leave you with a tip about a powerful tool to secure the dismissal of frivolous actions.

We would like to acknowledge and thank Allison MacIsaac, Lauren Cowl, Maureen Quinlan and Pam Hillen for their very helpful contributions to this edition.

We hope you find this edition of *Raising the Bar* stimulating and, as always, we welcome your feedback and look forward to hearing from you. Happy reading!

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Co-Editors

IN THIS ISSUE

PART 1 –– CASES YOU NEED TO KNOW ABOUT

Puri Consulting Limited v. Kim Orr Barristers PC, 2015 ONSC 577 (CanLII)

When drafting an offer to settle, it is important to ensure that all required terms are reflected in that offer or a party may end up with an unintended result.

In this case, the defendant accepted the plaintiff's offer to settle, which included the statement that the offer was in "in full and complete satisfaction of the plaintiff's claim." The plaintiff's later assertion that the offer did not include costs was rejected by Justice C.J. Brown of the Ontario Superior Court, who found that the offer was clear on its face and unambiguous. The language provided for the disposition of the entire action, including the plaintiff's costs. Had the plaintiff wished to have costs paid in addition to the settlement amount, then either express language to that effect was necessary or the plaintiff should not have used the terms "in full and complete satisfaction" in the offer.

In light of this finding, Justice Brown concluded that it was not necessary to admit extrinsic evidence from the parties' confidential discussions at the pre-trial conference. Her Honour did, however, provide guidance regarding when such evidence could be considered:

- At common law, settlement discussions are privileged. However, settlement privilege can be set aside to prove the existence or scope of a settlement agreement: "evidence regarding negotiations leading up to an agreement to settle is therefore admissible where the existence of the offer is contested or where the language of the settlement is ambiguous".
- Rule 50.09 of the *Rules of Civil Procedure* concerns the confidentiality of statements made in a pre-trial conference, essentially codifying one facet of the common law principle of settlement privilege. The rule states that pre-trial conference statements cannot be disclosed at hearing or on a motion or referenced in the proceeding unless the statement is disclosed either in a pre-trial judge/master's order or in the judge/master's pre-trial conference report. In the case at hand, neither exception applied.
- Although the court is permitted to exercise discretion and dispense with compliance with Rule 50.09 "in the interests of justice", Justice Brown concluded that the plaintiff's submissions had not engaged any "interest of justice" factors here – for the court to exercise its discretion, there must be a suggestion that the settlement was accepted based on non-disclosure, duress, fraud or illegality.

The Court noted that to the extent the parties had disagreed at pre-trial regarding the meaning of the plaintiff's offer to settle, it was open to the plaintiff to clarify the offer in writing, which had not

occurred. In any case, as it was the plaintiff's offer to settle, Justice Brown would have applied the doctrine of *contra proferentem* and resolved any ambiguity in meaning in favour of the defendant.

Cali's Plumbing Limited v. National Dispatch Services Limited, 2015 ONSC 1918 (CanLII)

This case serves as a useful reminder of the impact that the *Toronto Regional Pilot Practice Advisory* ("Practice Advisory") has had on the administration of Civil Practice Court in Toronto. Prior to the implementation of the Practice Advisory, motions court suffered from "severe systematic delays". Under the current Practice Advisory, parties are required to be proactive because motions are mandatorily scheduled within 100 days of the scheduling appearance. At Civil Practice Court, the parties are required to agree to a timetable for the completion of steps required before the motion date. Where there is no consensus between the parties, the court directs them through brief case conferences. The Practice Advisory is a response to the need for increased access to "speedy, efficient, affordable, proportionate civil justice".

In the case at hand, Justice Myers chastised the parties to a summary judgment motion when they appeared on the motion's return date and requested an adjournment on consent. While the Court acknowledged that the plaintiff's consent to the adjournment request was "obviously collegial and civil", that consent should not be determinative. Justice Myers expressed his view that the timetable formed part of the scheduling judge's order regarding the return date, as the timetable had been appended to it. While the defendant had been unable to comply with the timelines for the completion of examinations for discovery, the parties failed to return to Civil Practice Court to ask for an amendment to the schedule. As a result, the parties appeared unprepared on the return date, scarce court time to hear motions was wasted, the case was left in limbo for several weeks, and the Court's order regarding the timetable had been breached.

Justice Myers reminded the parties that Civil Practice Court is a case-managed court as a result of the Practice Advisory: "Case management consists of active judicial involvement and oversight bounded by agreements and orders. It is not for the parties alone to determine the procedure applicable to their motion. The parties should return to Civil Practice Court right away for case management if it appears for any reason that the scheduled return date of the motion may not be met."

Tossonian v. Cynphany Diamonds, 2015 ONSC 766 (CanLII)

This case was noted by the Court as "one of those unfortunate cases where the costs incurred greatly exceed the amount of damages recovered." The plaintiff had brought a wrongful dismissal action in Ontario Superior Court, claiming in excess of $420,000 in damages. The Court awarded two months' notice of termination, or $13,520 plus pre-judgment interest.

As the trial award fell within the Small Claim's Court's monetary jurisdiction of $25,000, it was open to the Court to order that the plaintiff would not recover any costs of his action. However, Justice

Mew exercised his discretion and awarded the plaintiff partial indemnity costs in the total amount $92,030.98 based on the following:

- It was reasonable for the plaintiff to bring his action in Superior Court. If he had been successful at trial, he stood to recover damages in excess of the monetary limits imposed under the Simplified Procedure or in the Small Claims Court and his decision to proceed by way of ordinary procedure in Superior Court was not without basis.
- The defendant employer had played “hardball” throughout the litigation and therefore bore a significant amount of responsibility for the expenses incurred. For example, it failed to make a reasonable offer to settle and brought an unnecessary (and unsuccessful) motion for security for costs, its non-compliance with the pre-trial judge’s directions was significant and it made “a steady flow of largely unmeritorious evidentiary and procedural objections” that had prolonged the length of the trial.
- The defendant had asserted that there was insufficient evidence of actual costs incurred because the plaintiff had entered into an disclosed contingency fee arrangement with counsel. However, Justice Mew indicated that contingency fee arrangements are ubiquitous in wrongful dismissal litigation and there was no authority for the proposition that a contingency fee must be disclosed before a party can recover partial indemnity costs.

Letang v. Hertz Canada Limited, 2015 ONSC 72 (CanLII)

Justice Myers of the Ontario Superior Court considered the principles of fairness and justice in concluding that there need not “be perfect disclosure and perfect discovery on every path and alleyway in order to achieve a fair and just outcome of the case on the merits.” In that regard, His Honour denied an adjournment requested by the defendants on the basis that it was “old brain thinking” that the defendants could “ignore a trial date and sit on material for a month without bothering to call their expert and just deliver another fat motion record to buy another 90 days of unlimited discovery time for more fishing for documents.”

The plaintiffs, “basically an individual whose financial security is at risk”, submitted certain back-up documentation after a second pre-trial, adding $120,000 to the initial damages claim of $3.5 million. The defendants immediately sought an adjournment of the January 12, 2015 trial date and the plaintiffs (an individual and his company) refused to consent.

The Court stated that the defendants’ counsel then did what “counsel steeped in the traditional Toronto motions culture do – they served a big, thick motion and waited for their adjournment.”

Justice Myers referred to *Hryniak* and asked “when is enough, enough?” The defendants had the resources to sift through the documents on a timely basis, or they could have sent them to their expert instead of moving for an adjournment. Here, the defendants could raise their concerns at trial or the trial judge could order further production.

In dismissing the motion, the Court stated:

But the last decade of efforts has proven that delay cannot be combatted successfully just by dismissing the oldest cases. Delay at all stages should be recognized as a serious form of prejudice that undermines affordability and proportionality and rots the uncompromisable goals of fairness and justice. (at para 19)

PART 2 –– *SHINE A LIGHT ON…SUMMARY JUDGMENT MOTIONS – WHERE ARE WE NOW?*

In January 2014, the Supreme Court of Canada rendered its decision in *Hryniak v. Mauldin*, a landmark ruling which laid out a new approach for courts in the use of summary judgment motions. The decision called for a "shift in culture" toward increased access to justice by creating a faster, and cheaper, alternative to the full trial process. Lower courts have since applied *Hryniak* in all manner of actions. Principles distilled from these decisions provide a useful guide for employers facing, or considering bringing, a summary judgment motion.

As explained below, following *Hryniak* judges are likely to take a more proactive approach to resolving motions for summary judgment, including by making partial orders for summary judgment and overseeing the litigation in order to resolve outstanding disputes.

HRYNIAK – THE "NEW AND IMPROVED" APPROACH

In *Hryniak*, the Supreme Court expanded judicial powers on summary judgment, requiring the motions judge to consider the following:

- Have the parties placed before the court, in some form, all of the evidence that will be available for trial?
- Does the summary judgment motion provide the court with sufficient evidence required to fairly and justly adjudicate the dispute and is it a timely, affordable and proportionate procedure?
- If there appears to be a genuine issue requiring a trial, has the court exercised its new powers under the *Rules of Civil Procedure* to consider whether the trial could be avoided. This is done by weighing the evidence, evaluating the credibility of a deponent and drawing any reasonable inference from the evidence. Alternatively, has the court, where appropriate, ordered a "mini-trial" where oral evidence is to be presented by one or more parties, with or without time limits on its presentation (rules 20.04(2.1) and (2.2)).
- Can these new powers be used by the court, at its discretion, in the interests of justice and where their use "will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole." [1]
- The issue of proportionality, namely "whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication." [2]

Even if a full summary judgment outcome is not appropriate, the Supreme Court held that a motion judge should make findings where possible, and make orders where necessary, to enable it to determine any remaining issues.

THE AFTERMATH OF *HRYNIAK*

Since *Hyrniak*, courts have since considered whether a case is "ripe" for summary judgment [3] and whether the process can be managed in accordance with the principles of proportionality.

In one decision, a court stated that the "challenge in a summary judgment proceeding is assessing the real and pragmatic issues that require resolution in a case and striking a fair and just balance between procedure, access and proportionality." [4] In another, a court noted that special considerations may apply on a simplified procedure action, where there "may be limitations on the ability of a party to provide relevant evidence to the judge." [5]

Summary judgment motions are frequently brought in wrongful dismissal actions, with judges reaching varied conclusions which have included the following:

- A trial in the "primary sense" was not necessary to determine reasonable notice having regard to mitigation; a mini-trial under was ordered, with oral evidence limited to mitigation and reasonable notice. [6]
- Reasonable notice was awarded on a summary judgment motion in a case where the notice extended beyond the date of the motion. On the issue of mitigation, the court ordered the defendant to pay reasonable notice on a monthly basis for the balance of the notice period, during which period the defendant could challenge the mitigation efforts by way of summary judgment or a trial. In this respect, "[t]he employee's right to a determination of the appropriate period of reasonable notice has been satisfied and the employer's right to challenge the employee's mitigation efforts has been preserved. As the parties know what their obligations are, the likelihood of the need for further court proceedings is minimized." [7]
- An assertion of cause was rejected by a court on a partial summary judgment motion where, in a brief endorsement, the court found that the plaintiff had been wrongfully dismissed and was entitled to reasonable notice. The court did not accept the defendant's argument that cause existed because the plaintiff was not dedicating himself full-time to its business. [8]
- A claim for statutory severance pay was granted on partial summary judgment, but in the absence of mitigation evidence it could not be proven that the plaintiff suffered any damages and that issue was referred to trial. [9]
- In a wrongful dismissal case involving the interpretation of an employment contract, the court provided a succinct overview of why summary judgment would be appropriate:

  There is no issue that requires a trial. There is sufficient documentary evidence to allow the

court to carry out a fair and just adjudication of the dispute on this motion for summary judgment. The interests of justice do not require that the evidence be presented and assessed at a trial. The cost savings to the parties by proceeding with a motion for summary judgment are considerable when compared to the cost of the trial that [the defendant] says is required. [10]

- A wrongful dismissal case, where there were "relatively narrow issues [which were] sufficiently well-explored, few in number and confined in scope" was found appropriate for summary judgment despite the existence of a contradiction in the evidence." [11]
- In a case where the parties agreed to proceed by way of summary motion and on the basis of "affidavit evidence of the plaintiff, the plaintiff's former manager and the defendant's human resources manager […] along with transcripts from their cross-examinations", the court considered numerous, detailed issues, including the reasonable notice period, base of salary compensation, entitlement to bonus compensation, benefits and the plaintiff's mitigation efforts. [12]

PRACTICAL TIPS

What is clear from these cases is that trials are no longer the default venue for resolving disputes. Here are some practical tips to keep in mind before bringing, or responding to, a summary judgment motion:

- A defendant will no longer be able to deflect a summary judgment motion by simply arguing that there are issues in dispute. Following *Hryniak*, courts will make partial orders on issues that are determinable and then make interim orders to ensure that the remaining issues can be addressed.
- The motion judge's importance has increased in the litigation. The judge may seize himself or herself of the litigation and oversee further steps.
- Both plaintiffs and defendants have an obligation to bring forward relevant evidence and put their "best foot forward". Practically, this means in-depth searches and investigations which may have been conducted closer to trial in the past must now be conducted at the onset of the litigation.
- Affidavits from counsel or firm members on summary judgment motions are best avoided. [13]
- While the evidentiary record need not be as extensive as that of a full trial, the court must still be able to determine that a moving party has met its burden of proof. Thus, a defendant's responding materials should particularly emphasize all deficiencies on this point.
- In some cases a court's willingness to address extensive, complex issues on a summary judgment motion (as opposed to at trial) means that employers must provide sufficient evidence to support employee terminations on what used to be a preliminary motion.

CONCLUSION

Courts have taken the Supreme Court's admonition in *Hryniak* to heart. Summary judgment is a powerful tool for the parties to consider using and employers can use it as a tool to have a court deal efficiently with a case (or an issue) in a cost effective manner. Employers should carefully consider the principles and tips discussed in this article when faced with (or when considering) a summary judgment motion. This motion is a crucial strategic piece of litigation and needs to be approached thoughtfully and proactively.

PART 3 –– DID YOU KNOW?

Did you know… … under Rule 2.1 of the Ontario *Rules of Civil* Procedure the court can, on its own motion, apply an attenuated process to quickly review and dismiss actions that are, on their face, frivolous, vexatious or an abuse of process. Introduced in June 2014, Rule 2.1 has been described by the court as a "powerful weapon" to control vexatious proceedings that would be an abuse of the court's processes.

Requests for these types of orders can be made under Rule 2.1.01(6). These requests should be as brief as possible and limited to only one or two sentences. Submissions from a defendant are not expected or required unless directly requested by the court.

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[1] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII) at para. 66

[2] *Ibid.* at para. 33

[3] *Adam et al. v. Ledesma-cadhit,* 2015 ONSC 3043 (CanLII)

[4] *Fraser v. Canerector,* 2015 ONSC 2138 (CanLII)

[5] *Bogatyreva v. Ricky3 Holdings Ltd.* 2014 ONSC 3516 (CanLII)

[6] *Howard v. Benson Group,* 2015 ONSC 2638 (CanLII)

[7] *Markoulakis v. Snc-lavalin Inc.* 2015 ONSC 1081 (CanLII)

[8] *Hall v. Jones DesLauriers Insurance Management Inc.,* 2015 ONSC 1438

[9] *Kimball v. Windsor Raceway,* 2014 ONSC 3286 (CanLII)

[10] *Gregory Smith v. Diversity Technologies Corporation*, 2014 ONSC 2460 (CanLII) at para 26

[11] *Fraser v. Canerector, supra*

[12] *Wolfman v. Rocktenn-Container Canada, L.P.*, 2015 ONSC 1432 (CanLII)

[13] See *Adams v. Ledesma-cadhit, supra*
