## Raising the Bar

# Raising the Bar – Eleventh Edition

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Dear Friends,

As we are heading into the busy holiday season, we wanted to give you, our loyal RTB readers, some reading material for any quiet moments that you might be able to steal before the New Year. We are delighted to bring you this newest edition of RTB.

In this edition, we bring you a selection of interesting and important cases hot off the presses. These cases can help you to have a frivolous claim dismissed, to draft better offers to settle, and to understand the impact of the common employer doctrine on your organization.

We also shine a light on Employment Practices Liability Insurance, which is a topic that you should know more about. Many employers are not familiar with EPLI and yet it can play an important part in managing your organization's risks. In this RTB, we explain EPLI and how it can affect your organization and defending claims against it.

Lastly, we give you an important tip about new legislation aimed at fighting back against SLAPPs, which are lawsuits meant to silence public participation and speech.

We would like to thank our contributors to this edition: Carey O'Connor and Maureen Quinlan. As always, we thank Pam Hillen for her steady hand in editing and contributing to this publication.

We wish you all the best heading into 2016, and look forward to hearing from you.

Frank Cesario and Elisha Jamieson-Davies
Co-Editors

## In this Issue

## Part 1 – Cases You Need to Know About

*Scaduto v. The Law Society of Upper Canada*, 2015 ONCA 733 (CanLII)

In *Scaduto*, the Court of Appeal for Ontario makes clear that a motion judge can dismiss a proceeding on the basis that it is frivolous and vexatious without looking at the evidentiary record. The materials before the judge are properly limited to the pleadings and the submissions of the parties made pursuant to rule 2.1.01 of the *Rules of Civil Procedure*. The rule should be applied robustly, but only in the clearest of cases.

The rule states:

2.1.01 (1) The court may, on its own initiative, stay or dismiss a proceeding if the proceeding appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

The Court of Appeal provided the following helpful guidance with respect to this rule:

- The rule should be interpreted and applied robustly so that a motion judge can effectively exercise his or her gatekeeping function.
- The use of the rule should be limited to the clearest of cases where two conditions are met. Those conditions are:
    - the frivolous, vexatious, or abusive nature of the proceeding should be apparent on the face of the pleading; and
    - there should, generally, be a basis in the pleadings to support the resort to the attenuated process of rule 2.1.

The second condition is not specifically required in the rule. Rather, it is a guideline that reminds the court that there are other rules available for the same subject matter, such that resort to the attenuated process in rule 2.1 should be justified in each case.

***Puri Consulting Limited v. Kim Orr Barristers PC***, 2015 ONCA 727 (CanLII)

*Puri* is a reminder that precision in drafting is king when it comes to an offer to settle under rule 49. If costs are not specifically addressed in your rule 49 offer, then ambiguity reigns and cost consequences are potentially severe.

In this case, the plaintiff's rule 49 offer asked for "$50,000 plus HST *in full and complete satisfaction* of the plaintiff's claim." The question on appeal was whether this was inclusive of the plaintiff's costs.

The Court of Appeal for Ontario overturned the motion judge's decision and held that the offer was not inclusive of costs, in accordance with the plaintiff's interpretation of the offer. Specifically, it found:

- The motion judge made a reversible error by conflating the plaintiff's "claim" with her "action." The plaintiff's offer was *in full and complete satisfaction* of the plaintiff's **claim**. "Claim" in rule 49 is not the same as "action". The wording of rule 49 distinguishes "claim" from "proceeding", and an "action" is a type of proceeding under the rules.
- Here, the offer disposed of the plaintiff's claim. The offer, when interpreted in the relevant context, did not provide for disposition of costs.
- The motion judge made a reversible error by focusing on the words "full and complete satisfaction" and failing to consider "the factual matrix" which in this case included:
    - the rule 49 context in which the parties were operating;
    - the timing of the offer and its acceptance in the litigation; and
    - the fact the parties were lawyers, represented by counsel. [para. 14]
- Rule 49.07(5) contemplates a rule 49 offer that does not provide for the disposition of costs. It states that where an offer to settle is accepted, the plaintiff is entitled:
    - where the offer was made by the defendant, to the plaintiff's costs as of the date the plaintiff was served with the offer; or
    - where the offer was made by the plaintiff, to the plaintiff's costs as of the date that the notice of acceptance was served.
- The purpose of the rule is to encourage settlement. If the defendant's interpretation of the plaintiff's offer to settle was accepted – which was $50,000 inclusive of costs – then the value of the plaintiff's offer to her would diminish over time, as her legal costs grew. If the plaintiff's interpretation was accepted, then the value of the plaintiff's offer to settle to her would grow over time, as her legal costs grew.

For a discussion of the lower court decision, see our June 2015 issue of *Raising the Bar.*

***De Kever v Nemato Corp.,*** 2015 ONSC 6273 (CanLII)

This case is important because the Ontario Divisional Court kept a claim alive that rested on the common employment doctrine – the claim survived a motion to strike.

Recognizing the intricacies of modern business and the modern employment relationship, the common employer doctrine imposes joint and several liability for breaches of an employment contract on the legal entities who had a meaningful role to play in the employment relationship. The doctrine recognizes that an employee may have a collective entity as an employer.

The Divisional Court upheld a motion judge's decision holding that – notwithstanding a "bare-boned" pleading – it was not plain and obvious that a common employer claim among corporate defendants in a wrongful dismissal action was bound to fail. The pleading contained material facts

and “a narrative that shows an interconnection and a commonality of operations and commercial purposes upon which evidence from the discovery process may substantiate a common employment plea.” The action was allowed to proceed.

The Divisional Court stated that the motion judge correctly concluded that whether the common employment doctrine applies is an open question, and a developing area of law.

## Part 2 – Shine a Light on … Employment Practices Liability Insurance

There are several steps that corporate counsel typically take upon service of a Statement of Claim, including confirming the date of service, ensuring that a proper corporate representative was served and determining whether the claim was made in the proper jurisdiction. One step that can often be forgotten is to consider whether any liability related to the claim is covered under one of the company’s insurance policies.

Many are surprised to learn that Canadian insurers offer policies that cover workplace issues, such as wrongful dismissal, defamation and claims of discrimination and/or harassment. Employment Practices Liability Insurance (“EPLI”) provides such coverage for Canadian employers. Since the late 1980s, EPLI coverage has been available to employers in Canada through a number of different insurers. In recent years, the number and scope of employment-related claims have steadily increased and show no signs of slowing down; as a result, EPLI coverage, as known as HR Malpractice insurance, is of increasing importance to Canadian employers.

The types of claims covered under an EPLI policy are very broad and can include:

- claims of discrimination and/or harassment pursuant to provincial/federal human rights legislation;
- occupational health and safety issues;
- allegations involving a failure to hire and/or a failure to train employees;
- bad faith conduct;
- employment-related breaches of privacy; and
- wrongful termination and/or constructive dismissal.

Originally, insurance coverage for employment-related issues was founded in a company’s Directors’ and Officers’ Liability policy (“D&O policy”). For a claim to fall under the D&O policy, however, it must focus on the wrongful conduct of one of the corporation’s officers and/or directors. The narrow scope of the D&O policy meant that coverage did not often extend to standard wrongful dismissal claims or other workplace issues since these types of claims typically do not bring the conduct of a director or officer under scrutiny.

EPLI coverage was developed to fill this gap and is much broader in its scope than a D&O policy. An EPLI policy is generally intended to cover all of a corporation’s employees, as well as its

directors and officers. Each policy, of course, varies, but both managerial and non-managerial employees alike are typically covered under an EPLI policy. Usually the policy will also cover full-time employees as well as part-time, temporary and/or fixed term employees.

This is significant since claims of discrimination and/or harassment often name individual employees as defendants – and not the company alone. Claims like these that involve personal defendants can make the proceedings more complex and, consequently, more expensive. They can also involve conflicts of interest that may require the retention of outside counsel. An EPLI policy can help reduce some of these related legal costs and provide more cost certainty for an employer involved in the litigation process.

An important consideration for EPLI purposes is the identity of the corporation named in the Statement of Claim and the name of the corporation to whom the insurance policy has been issued. If a corporation has been improperly named, it may be necessary to bring a motion to correct that issue, before coverage will be provided. It may also be important to determine if the EPLI coverage extends to a corporation's subsidiaries and related entities. The corporation's insurance broker may be a useful resource for questions such as these related to coverage.

It should be noted that in some policies, EPLI coverage is not a stand-alone policy, but instead, the coverage is found within the corporation's Commercial General Liability ("CGL") insurance policy. If there is no stand-alone EPLI policy, it may be worthwhile to review the company's CGL policy to determine if EPLI coverage can be found there. As you would expect, the exact scope of EPLI coverage varies from insurer to insurer and from policy to policy. Some policies provide "duty to defend" coverage, meaning that the insurer will provide coverage for any legal fees related to the claim; the insurer is not responsible, however, for any damage award issued against the company. This type of coverage can provide cost certainty in the face of litigation and protect against the increasing expenses of litigation.

Under a "duty to defend" policy the insurer typically has the ability to unilaterally select the corporation's counsel. For this reason, it can be helpful to file a claim under the EPLI policy as soon as possible so that the appropriate counsel can be retained early in the process. Often insurers have a panel of employment law experts from whom to select to provide their insured's with representation. For example, Hicks Morley is a member of each of the major Canadian insurers' employment law panels.

Other EPLI policies provide for coverage of the amounts that the corporation is found legally obligated to pay as a result of the claim including, in some cases, punitive and exemplary damage awards. Statutory amounts, such as termination and severance pay obligations pursuant to the Ontario *Employment Standards Act, 2000*, are often excluded from coverage, but you should review your policy to determine the exact scope of coverage provided.

It is critical to be aware of the terms of your EPLI policy, and the nature of coverage provided, in

advance so that when a claim is made against the company triggering coverage under the EPLI policy, a claim can be filed in accordance with the policy's time requirements. The notification requirements are important since, if they are not met, coverage could be denied, particularly when the insurer's ability to select counsel and/or play an active role in the defence has been prejudiced. For this reason, it is essential to consider the terms of the EPLI policy upon receipt of a Statement of Claim or, even better, as workplace issues arise.

## Part 3 – Did You Know?

*Did you know that* … On November 3, 2015, legislation aimed at preventing proceedings that limit freedom of expression on matters of public interest came into force. The *Protection of Public Participation Act, 2015*, among other things, amends the *Courts of Justice Act* to provide members of the public with better means to defend themselves against SLAPPs ("Strategic Litigation Against Public Participation"). A SLAPP is a lawsuit that is intended to intimidate or silence critics through litigation.

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