Raising the Bar

Raising the Bar – Twelfth Edition

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Dear Friends

Welcome to the first 2016 issue of *Raising the Bar*! We are looking forward to a year full of exciting developments in the world of civil litigation. However, before we know where we're headed, we thought it would be wise to reflect on where we've been.

Now that the dust has settled, we are pleased to bring you our list of the top ten legal developments from the past year. This includes an assessment of the important issues that we are betting will recur and be top of mind for you in 2016 and beyond.

As always, we are also giving you summaries of recent cases you need to know about, on issues ranging from privilege to summary judgment.

Thanks to Josh Concessao and Pam Hillen for their hard work on this issue, without which it would consist only of this letter!

Happy reading, and we look forward to hearing from you.

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Co-Editors

IN THIS ISSUE

PART 1 – CASES YOU NEED TO KNOW ABOUT

Bevilacqua v Gracious Living Corporation, 2016 ONSC 327 (CanLII)

Justice Dunphy of the Ontario Superior Court of Justice recently outlined in specific detail his expectations of the parties in a hybrid summary judgment hearing.

The action involved what the Court characterized as a “comparatively simple wrongful dismissal suit with only a very narrow, discrete issue where viva voce evidence may be somewhat necessary.” Justice Dunphy explicitly set out the procedure to be used with respect to the one day hearing, including, for example, the materials to be submitted prior to the hearing, the due dates for those materials, the number of witnesses, the maximum length of the introductions in chief (five minutes) and the maximum length of the cross-examinations (one hour).

This case shows the extent to which a court will manage and structure a hearing – particularly when counsel may be unable to agree on a procedure themselves. Parties should therefore consider framing their own procedure if agreement can be reached on reasonable terms.

The Corporation of the United Counties of Prescott Russell v David Laflamme Construction, 2016 ONSC 1059 (CanLII)

Justice R. Smith of the Ontario Superior Court recently held that neither litigation privilege nor common law privilege existed in a Risk Management Report (Report) which was prepared for consideration by senior management of a company (WSP) and which was subsequently sent to its insurers. He concluded that information regarding a risk assessment and shared by an employee with senior management merited confidentiality but did not give rise to privilege. In addition, the relationship between an insured and its insurers is not “one which the courts have deemed necessary to be privileged.”

The plaintiff in this action, the United Counties of Prescott-Russell, sought to add WSP, its engineering consultant, to an action launched against a contractor who was retained to repair a bridge. There were numerous problems with those repairs, and both the contractor and the WSP faulted each other. WSP raised a limitation defence.

The Report was prepared by an employee of WSP who was responsible for reviewing all of WSP’s projects and assessing the risks of litigation. WSP refused to produce the Report on cross-examination that employee. Counsel asserted that the Report was not relevant as the plaintiff had sufficient evidence to add WSP as a party without it. Moreover, the Report was protected by litigation privilege and common law privilege.

The Court disagreed. First, it held that the Report was relevant to the issues of discoverability and when the plaintiff ought to have discovered the material facts to assert its claim against WSP, which was its professional advisor.

Second, the Court found that the Report was prepared further to WSP’s new risk management policy and was not prepared for the dominant purpose of litigation.

Third, common law privilege did not apply. Applying the *Wigmore* criteria, the Court found the Report did not originate in confidence as it was prepared by the employee to be shared with senior management.

This case reminds employers to think carefully about legal issues, including potential privilege issues, as part of the decision-making process in preparing these kinds of reports.

Conway v. The Law Society of Upper Canada, 2016 ONCA 72 (CanLII)

The Ontario Court of Appeal recently granted leave to file an amended statement of claim to allow the appellant to plead "with proper particulars a tenable cause of action against the LSUC based on the tort of misfeasance in public office arising out of its alleged bad faith conduct in relation to the appellant." This decision reflects the courts' general reluctance to strike a claim in its entirety without leave to amend except in the "clearest of cases."

The appellant was a lawyer whose disbarment had been set aside in appeal proceedings. He sued the Law Society and his statement of claim was struck without leave to amend on the basis that it disclosed no reasonable cause of action and was frivolous, vexatious and an abuse of process. The Court of Appeal found that the motion judge correctly struck out many of the allegations as "scandalous, frivolous and vexatious."

On the issue of whether leave to amend should have been granted, the Court stated that the decision not to grant leave to amend should only be made in the "clearest of cases" but noted that decision was discretionary and subject to deference on appeal. Here, the motion judge concluded that there was no proper plea of the tort of misfeasance in public office. The Court, however, found that while the statement of claim was "untenable in that it did not disclose in proper form the constituent elements of the tort of misfeasance in public office or any other properly pleaded tort," the motion judge erred in concluding that "the pattern of acts and omissions alleged by the appellant in his statement of claim, even if properly pleaded, could not give rise to a cause of action, and in failing to grant leave to amend the pleading if it was deficient in pleading the cause of action."

PART 2 – SHINE A LIGHT ON – THE TOP TEN LITIGATION DEVELOPMENTS OF 2015

The law of civil litigation is a broad universe, one which is constantly developing and evolving. A review of the case reports shows that 2015 proved to be no different!

We have selected these top ten developments that are of importance to employers, and have provided a brief and to-the-point summary of each of them:

1. Limitations of Summary Judgment

The year 2014 brought to the fore the importance of summary judgment as a tool for advancing a case without resorting to the often long and arduous process of a full trial. But recent developments have revealed some limitations of the summary judgment process and have hinted at the court's willingness to restrain its use where summary judgment would be inappropriate. In *Adam et. al. v. Ledesma-cadhit et. al.*, the Ontario Superior Court noted that the case before it was not ripe for summary judgment because of the moving party's inability to limit the motion to discrete issues and its attempt to include expert evidence in a manner that improperly shielded the expert from cross-examination.

2. Preparation of Expert Evidence

Early in 2015, the Ontario Court of Appeal released its much anticipated decision in *Moore v. Getahun.* The case addressed the permissibility of interactions between counsel and an expert during the preparation of the expert's draft opinion. While acknowledging an expert witness' obligation to maintain independence and objectivity, the Court affirmed a counsel's role in assisting with the drafting of an expert's report. In recognizing the legitimacy of this role, the Court also confirmed that draft expert reports are not automatically subject to disclosure and production absent a factual basis for the suspicion that counsel exercised improper influence over the drafting of the report.

3. Vexatious Litigants and Summary Dismissals

Vexatious litigants are an administrative burden to the courts. However, procedures designed to remove such cases from the court's docket can sometimes prolong the abuse of the court's procedures by providing fresh opportunities for such litigants. In *Raji v. Borden Ladner Gervais LLP*, the Ontario Superior Court reviewed the utility of Rule 2.1 as a means to obtain the dismissal of vexatious proceedings on a summary basis. It noted that while Rule 2.1 is not for cases that are "close calls", a defendant may avail itself of the summary procedure under the Rule by submitting a brief request for summary dismissal to the Registrar of the Court.

4. Constructive Dismissal and Indefinite Suspensions With Pay

In *Potter v. New Brunswick Legal Aid Services Commission*, a majority of the Supreme Court of Canada (two justices concurring in the result) stated that "To the extent that the proposition that the employer's discretion [to withhold work] is absolute was ever valid, it has been overtaken by modern developments in employment law." The Court held that placing an employee on an indefinite administrative suspension with pay constituted constructive dismissal: even where pay is provided, employers do not "have an unfettered discretion to withhold work" and no employer may withhold work from an employee "either in bad faith or without business justification."

5. Compliance with Trial Management Orders

In an effort to reduce the increasing backlogs in the courts' resolution of cases, judges have turned to trial management orders to ensure that necessary steps are completed within pre-established schedules. In *Saleh v. Nebel*, the Ontario Superior Court considered a defendant's rampant failure to abide by such orders as the case advanced towards trial. This included a refusal to cooperate with opposing counsel in the preparation of trial materials and a failure to ensure the timely production of documents and expert reports. As a result, the trial of the action was unnecessarily prolonged. Even though the plaintiff proved unsuccessful at trial, the Court refused to award the defendant its costs of the action in light of the defendant's conduct. As a result, the defendant was deprived of a cost award of approximately $100,000.

6. Personal Liability of Corporate Directors and Officers In Employment Litigation

As a general rule, directors and officers of a corporation are not personally liable for the corporation's breach of contract. To hold directors and officers personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation. This longstanding rule was applied by the Ontario Superior Court in *Ontario Chrysler Jeep Dodge Inc. v Delisle* where it dismissed a proceeding initiated by a former employee against the president of the corporation. Notably, the Court described the latitude available to corporate directors and officers, stating that they may act "imprudently or prudently, brazenly or diplomatically; but when the company president fires an employee, for no personal gain and without using the corporation for any ulterior purpose, it is the company that must live or die by the president's actions."

7. Qualification of Expert Witnesses

The traditional position at common law typically only considered the relevance, necessity and the qualifications of the expert witness in determining admissibility of his or her evidence. So long as these requirements were met and there was no reason to exclude the expert's opinion, the evidence was admissible. The weight to be accorded to issues such as the expert's impartiality or independence was to be determined at trial after the evidence was heard. However, in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, the Supreme Court of Canada held that in very clear cases, an expert's lack of impartiality and independence could form the basis for the court's refusal to admit the evidence as a threshold matter.

8. Presumptive Factors Establishing Jurisdiction

In disputes that extend over multiple jurisdictions, courts are often called upon to determine the appropriate jurisdiction for a hearing of the dispute. In making this determination, the courts will look to certain presumptive factors such as where the party is domiciled, where it conducts its business, where the tort was committed and where a contract connected with the dispute was made. In *Forsythe v. Westfall*, the Ontario Court of Appeal considered this last factor and provided clarification by stating that a contract between a party to the litigation and a third party is not a presumptive factor that will give an Ontario court jurisdiction over a claim involving an extra-

provincial defendant. Thus, for a contract to be considered a presumptive factor in establishing jurisdiction, the parties to the litigation must also be parties to the contract in dispute.

9. Discretionary Bonuses During The Period of Reasonable Notice

In *Fraser v. Canerector*, the Ontario Superior Court rejected an argument that a discretionary bonus that has been awarded to an employee with regularity constituted an integral part of the employee's compensation. In declining to award damages, the Court held that it could not create a substitute for the employer's exercise of its discretion by employing an average of the employee's past bonus awards given the discretionary nature of the bonus entitlement. According to the Court, it would be arbitrary to employ such a methodology. This case is currently being appealed.

10. Relief from the Deemed Undertaking Rule

The deemed undertaking rule ensures that information provided to litigants in the course of discovery is not disclosed beyond the confines of the litigation itself. In order to avoid the application of this rule, the party seeking to disclose the information must obtain the consent of the party who provided the information or obtain leave of the court. In seeking the latter, a party must provide the court with the documentary evidence to be revealed and identify the public interest that justifies the disclosure so that the court can weigh the seriousness of the public interest in light of the evidence. In declining to grant relief under this rule, the Ontario Superior Court in *Orbixa v Ribeiro* held that it is insufficient for a party to provide an affidavit with merely conclusory statements without a robust evidentiary record.

PART 3 – DID YOU KNOW?

Did you know … The Ontario Court of Appeal recently clarified that "an offer to settle must strictly comply with the seven-day timing requirement set out in r. 49.03 before the mandatory costs consequences of r. 49.10 apply" (*König v. Hobza*). The Court held the timing requirements are mandatory and there is no "near miss" policy.