Raising the Bar

Raising the Bar – Thirteenth Edition

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Dear Friends,

The Fall is upon us and, with that, the courts are back in full swing. Although this may mean busy times for you ahead, it also means that we can look forward to interesting decisions from the court on topics that may impact your litigation strategies.

On that note, we are shining a light on frivolous and vexatious claims in this edition. This piece will guide you through the various rules that you can use to combat such claims.

We are also giving you summaries on recent cases that you need to know about, including top-of-mind issues such as limitation periods, cost awards and expert evidence.

Finally, do you know whether the same judge can sit on a pre-trial *and* hear the parties' summary judgment motion? Read on to find out the answer to this question and more.

A special thanks to Lisa Kwasek and Paul Schwartzman for all their time and effort on this edition. We could not have done this without their hard work.

Please enjoy this edition and, as always, contact us if there are particular topics you would like us to "shine a light on."

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In This Issue

Part 1 – Cases You Need to Know About

Pickering Square Inc. v. Trillium College Inc., 2016 ONCA 179 (CanLII)

The Court of Appeal has affirmed the concept of a continuing breach of contract, resulting in a "rolling" limitation period.

Trillium College leased premises from Pickering Square under terms that included Trillium College pay rent, occupy the premises and operate its business from the premises for the duration of the lease. Commencing in December of 2007, Trillium College discontinued its operations at the premises but continued to pay rent. Pickering Square commenced an action on February 16, 2012 seeking damages for Trillium College's failure to occupy and operate at the premises.

The Court of Appeal confirmed the motion judge's finding of a continuing breach, holding that Trillium College could have resumed operation each day from December of 2007 until the expiry of the lease but chose not to do so. Each day's failure to occupy and operate under the provisions of the lease gave rise to a new cause of action, each subject to a two-year

limitation period.

Consequently, the Court of Appeal applied a “rolling” limitation period which permitted each cause of action which arose within two years of the date the action was commenced to proceed.

In assessing the limitation period of any given action, parties will need to consider whether a breach of contract might be a continuing one which will permit a rolling limitation period.

Rosenberg v. 206 Bloor Street West Limited, 2016 ONSC 1111 (CanLII)

In considering appropriate costs to be awarded to a successful plaintiff, Justice Myers of the Ontario Superior Court confirmed the importance of the principle of proportionality when assessing costs.

The plaintiff was awarded approximately $525,000 in damages as a result of a failed condominium purchase. Her actual legal fees were $523,645 and she sought approximately $485,000 in substantial indemnity costs on the basis that she had made an offer to settle during the litigation which was more favourable to the defendant than the judgment. The offer sought full recovery of her claim and $80,000.00 in legal fees. Justice Myers noted that the defendant could not have understood at the time of receiving the offer that the plaintiff’s legal fees were substantially higher than its own and that the $80,000 represented a compromise as compared to partial indemnity costs which could be awarded at trial.

Justice Myers held that the *Rules of Civil Procedure* should be interpreted in a manner that promotes clear, genuine and understandable compromise. Given that the defendant could not have had a clear understanding of the compromise in the offer made by the plaintiff, he held that the plaintiff had not established that her offer was more favourable to the defendant than judgment. Consequently, substantial indemnity costs were not awarded. Partial indemnity costs of $225,000 were awarded to the plaintiff.

This decision confirms the importance for parties to litigation to make clear offers which allow the opposing party to readily assess the offer as compared to potential judgment. Failing that, a party may lose the benefit of being awarded substantial indemnity costs.

Gordon v. Canada (Attorney General), 2016 ONCA 625 (CanLII)

The Ontario Court of Appeal recently dealt with the issue of whether an individual decision maker who has been factually involved in the matter before the court, and who has gained expertise through work experience rather than academic qualifications, can give opinion evidence. The issue arose in a case where the Court considered whether evidence sworn by a senior member of the federal Department of Finance, Mr. Rochon, was expert opinion evidence. The matter concerned a *Charter* challenge of the federal government’s *Expenditure Restraint Act*.

The Court noted the increasingly senior positions held by Mr. Rochon within the Department, culminating with the position of Associate Deputy Minister and G-7 Deputy. It held the application judge did not err by accepting Mr. Rochon was a qualified expert witness, noting that “an expert may obtain the necessary qualifications through study or experience” (per *R. v. Mohan*). The application judge had found that the witness was presented as one who could “provide a factual foundation explaining the actions of the government” and given his experience “it did not seem out of place to suggest that he would have an understanding of the role government can play in the face of an economic issue.”

The union, one of the appellants, also argued that the witness was disqualified because no Form 53 was executed, a requirement under the *Rules of Civil Procedure*. The Court disagreed, stating that its earlier decision in *Westerhof v. Gee* addressed the issue: the Form 53 obligation did not apply to “participant experts” and “non-party experts.”

Further, the Court upheld the judge’s finding that Mr. Rochon was not biased. The judge had found that “[t]here was nothing to suggest that direct involvement in the decision and activities that have brought the matter to the court necessarily leads to

the conclusion that a properly qualified witness cannot provide opinion evidence."

Part 2 – Shine a light on…Frivolous and Vexatious Claims – Where Are We Now?

Dealing with frivolous and vexatious claims is an often time-consuming and costly venture, both for the parties to the litigation and for the courts. While there may be little to be done to prevent the *commencement* of a claim that is frail, unsupported by evidence and/or that discloses no cause of action, this does not mean that such claims must proceed through the entire litigation process.

The Ontario *Rules of Civil Procedure* provide several mechanisms to assist parties in dealing with claims that are "frivolous", "vexatious" or an "abuse of process", which we discuss below.

Rule 2.1

Rule 2.1, which came into force on July 1, 2014, provides an expedited process to deal with vexatious claims. Under it, courts have the power, on their own motion, to stay or dismiss any proceeding which appears to be frivolous or vexatious or otherwise an abuse of process. The purpose of rule 2.1 is to further the objectives of efficiency, affordability and proportionality in the civil justice system by eliminating those claims which are clearly frivolous, vexatious or an outright abuse of process[1].

The court will only use the "powerful weapon"[2] of rule 2.1 in the "clearest of cases" where the abusive nature of the claim is evidenced on the statement of claim itself[3]. The rule is intended to be used at the commencement of proceedings to dismiss any frivolous or vexatious claims in a summary manner. Only the pleadings will be examined under the judicial microscope and unless ordered otherwise, the parties may only provide ten pages of written submissions.

Generally, there are two conditions which the courts have referred to in determining whether a claim is frivolous, vexatious or an abuse of process under this rule:

1. The frivolous, vexatious or abusive nature of the proceeding should be apparent on the face of the pleading as required by the rule; and
2. There should generally be a basis in the pleading to support the resort to the attenuated process of rule 2.1[4].

Examples of claims which have been dismissed under rule 2.1 include:

- A claim that the Law Society failed to assist the plaintiff in prosecuting a worker's compensation claim and a claim that the plaintiff was offended because the Law Society had a U.S. convicted criminal speaking at LSUC events[5]
- A claim that the Attorney General was vicariously liable for the actions of the Divisional Court which rendered a decision that was adverse to the plaintiff's interests[6]
- A claim made against numerous judges, the Attorney General of Ontario and Her Majesty the Queen based on a prior decision made in a child protection matter[7]
- A claim against the TTC for failing to provide free wheel-trans services[8]
- A claim involving detailed pleadings that were a cut and paste from a prior action which had already been declared to be frivolous by the courts[9].

Conversely, the court will not exercise its power under rule 2.1, even where a claim is likely to fail, if the claim has the theoretical possibility of proceeding on its face given that the rule "stops litigation in its tracks."[10]

It is important to remember that this rule has a stringent standard which is unique to it: the requirement that the vexatious nature of the proceeding or motion be patently obvious on its face.

Practical Tips When Considering Rule 2.1

Before requesting a court to exercise its powers under rule 2.1, consider the following factors:

- is the claim, on its face, clearly an attempt to re-litigate a prior matter which has already been decided?
- can the claim theoretically succeed?
- does the claim discloses a cause of action?
- is further information required to determine the merits of the claim?
- is there is a causal link between the named defendants and the actual claim?
- is the plaintiff represented by counsel?

Other Avenues that Allow Parties to Deal with Frivolous or Vexatious Proceedings

Under rule 21.01(3)(d), a defendant may move before a judge to have an action stayed or dismissed on the ground that the action is "frivolous or vexatious or is otherwise an abuse of the process of the court and the judge may make an order or grant judgment accordingly".

Similarly, under rules 25.11(b) and 25.11(c) the court may strike all or part of the pleading with or without leave to amend on the ground that the pleading "is scandalous, frivolous, vexatious; or is an abuse of process of the court." Unlike rule 21.01(3)(d), which only addresses frivolous claims made by a plaintiff, rule 25.11 "applies to any document and can therefore be used to attack frivolous defences, motions responses, or positions taken by any party in the litigation."[11]

These options must be exercised by way of a formal motion.

The court will generally only have recourse to these Rules in the clearest of cases, but they are potentially powerful tools because, among other things, the courts have held that any clearly unmeritorious action may qualify as frivolous, vexatious and an abuse of process. Likewise, courts have brought under these Rules claims that are advanced for an improper purpose (e.g. to harass the other parties) and claims that involve re-litigation of previous claims even where the strictures of *res judicata* or issue estoppel do not apply.

The *Rules* also provide recourse in situations where a party brings forth a variety of frivolous motions. In these circumstances relief may be sought from the court under rule 37.16, to prevent the party from making any further motions without leave of the court.

There are also ways of combating the *serial litigant* (e.g. one who continually commences new actions). Relief may be sought under section 140 of the *Courts of Justice Act*, where an application may be brought to have the party declared as a "vexatious litigant", in which case they can be barred from commencing or continuing any civil litigation in Ontario except with leave of the court[12].

Conclusion

As noted above, rule 2.1 only applies in narrow circumstances. The other rules discussed may be more broadly applicable because the moving party can submit a full evidentiary record to establish that the matter is frivolous or vexatious or an abuse of process. Accordingly, these rules may be useful to a defendant in cases where rule 2.1 does not apply.

Claims which are frivolous, vexatious or an abuse of process are not uncommon. Understanding how to utilize the tools available under the *Rule*s to deal with such claims will assist in dealing with these matters on a cost-efficient and timely basis.

Part 3 – Did You Know?

Did you know that the *Rules of Civil Procedure* prohibit a judge who hears a pre-trial conference from presiding at a summary judgment motion, in the absence of consent of the parties? The failure of a party to object on this ground to the presiding judge who heard the pre-trial conference is not a relevant consideration, nor does the strength of a case govern the outcome. (See Royal Bank of Canada v. Hussain, 2016 ONCA 637 (CanLII))

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[1] *Raji v. Borden Ladner Gervais LLP*, 2015 ONSC 801 ("*Raji*")

[2] *Ibid*.

[3] *Scaduto v. The Law Society of Upper Canada,* 2015 ONCA 733 ("*Scaduto*")

[4] *Raji, supra*, note 2, aff'd in *Scaduto*, *supra*.

[5] *Scaduto*, *supra* note 4

[6] *Kavuru v. Public Guardian and Trustee,* 2015 ONSC 6877

[7] *Chalupnicek v. CAS Ottawa,* 2016 ONSC 2787

[8] *Ibrahim v. Toronto Transit Commission,* 2016 ONCA 234

[9] *Markowa v. Adamson Cosmetic Facial Surgery Inc.,* 2014 ONSC 6664

[10] *Polanski v. Scharfe*, 2016 ONSC 4892

[11] *Gao v. Ontario WSIB*, 2014 ONSC 6497 at para. 10

[12] *Ibid*, at para. 7
