Raising the Bar

Raising the Bar – Sixteenth Edition

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As we near the end of 2017, we reflect back on a year filled with family, friends … and important legal developments! It has been our pleasure to share this year with you, and we are very pleased to bring you this final edition of Raising the Bar for 2017.

In this edition, we bring you quick summaries of key cases relating to limits on partial summary judgment, the importance of pleadings and the issues raised by inadvertent disclosure of privileged documents.

In our central piece, we Shine a Light On … Dealing with Employee Fraud. This is an ever-present concern for employers (big and small, public and private sector). The stakes are very high in this unique context, and we aim to equip you with a practical and strategic checklist for dealing with employee fraud.

Lastly, we ask Did You Know … the importance of proportionality in applying all the Rules of Civil Procedure. You may be surprised how important it is!

Before we leave you and turn to 2018, a few important words of thanks. We are indebted to the efforts of Ashlee Common, Amanda Cohen, Will McLennan, Ian Dick and Joseph Marcus, without which this edition would not have been possible. As always, we are very grateful to Pam Hillen and Heather Ritchie of our Knowledge Management & Business Development team.

Seasons Greetings and Happy New Year from all of us here at Raising the Bar!

Frank & Elisha
Co-Editors

In This Issue

Part 1 – Recent Cases

Appellate Court Says Partial Summary Judgment Motions Should Be Used Sparingly

The Ontario Court of Appeal recently cautioned against the use of partial summary judgment motions, stating that a partial summary judgment motion should be a rare procedure to be used only where an issue can be readily broken out from the action.

Butera v. Chown concerned an appeal of a partial summary judgment, which was granted to the respondent solicitors dismissing the misrepresentation portion of a negligence action brought against them by the appellants, former clients. In granting the appeal, the Court of Appeal found that there was a genuine issue requiring a trial.

Significantly, the Court cautioned against the use of partial summary judgment motions, and identified the problems that might result:

- the resolution of the main action may be delayed
- the motions may be costly
- judges are required to spend time hearing these motions and rendering comprehensive reasons on an issue that fails to dispose of the action
- the record on a partial summary judgment motion is unlikely to be as detailed as the record at trial, increasing the risk of inconsistent findings.

The Court stated:

[34] […] A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the Rules be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.

The key themes here are **cost-effective** and **expeditious**. Employers should think carefully prior to bringing a motion for partial summary judgment with these themes in mind, and should conversely consider whether to object to that kind of motion by an opposing litigant.

Appellate Court Overturns Decision Based on Breach not Pleaded

In *Holmes v Hatch Ltd.* the Ontario Court of Appeal allowed an appeal from a summary judgment

motion which had granted the respondent employee 18 months' reasonable notice. It found that the decision was anchored in a breach which had not been pleaded by the respondent, namely that the appellant employer had breached the termination clause in a written employment agreement.

The Court stated that a fundamental principle to the litigation process assumes that the parties' pleadings set out all relevant claims in dispute and define the issues. Here, the appellant employer was "denied the opportunity to lead evidence on the precise breach allegation on which the motion judge's decision ultimately turned. … As a result, prior to oral argument of the motion, [the employer] did not know the evidentiary burden that the motion judge ultimately held it had to meet."

Among other things, the Court held that the fact the motion judge invited oral submissions on the issue was not sufficient remove the prejudice to the appellant. It allowed the appeal and sent the matter back to the Superior Court of Justice for a new hearing before a different judge.

This decision serves as a reminder that **pleadings matter**. This is an important consideration both (1) when drafting (or amending) pleadings to ensure that they cover your theory of the case, and (2) when arguing the case to ensure that your opponent is sticking to the pleadings.

Sometimes Mistakes Happen: Court Considers Privileged Document Inadvertently Disclosed

The Superior Court recently considered whether and when a plaintiff's inadvertent use of privileged documents inadvertently produced merits a stay of proceedings.

The main action in *Court Canada Ltd. v. Ontario* involved a breach of contract claim by the plaintiff. On two different occasions during the litigation process, the defendant realized it had produced privileged documents. In May 2011, it notified the plaintiff accordingly and the plaintiff agreed to remove and destroy the documents. Again, in February 2012, the defendant notified the plaintiff it had inadvertently produced over 100 privileged documents. The plaintiff once more agreed to destroy the original documents and to delete any electronic copies. The plaintiff's newly-retained lawyer also undertook to destroy the documents.

Two incidents led the defendant to believe the plaintiff had not been entirely forthright in its efforts to destroy the documents. First, the plaintiff had delivered a written answer to an undertaking which referenced an email exchange between the defendant and its lawyer. The letter had been on the list of inadvertently produced documents. The plaintiff advised that the reference was taken from a summary of the productions made pre-February 2012. Second, upon request for production of communications between the plaintiff and its expert on damages, the defendant discovered the same email attached to one of the communication threads.

The defendant brought a motion to stay the plaintiff's action or, alternatively, to remove plaintiff's counsel as the counsel of record.

The Court acknowledged the paramount significance of solicitor-client privilege but noted that "mistakes happen." A stay is only available in the clearest of cases: "where solicitor client privilege has been deliberately breached or a party or its lawyer has acted in flagrant or reckless disregard of confidentiality rights," or where "the party's conduct has tainted the case to such a degree as to be manifestly unfair to the other party of the litigation or has brought the administration of justice into disrepute."

The Court emphasized that there were thousands of documents in this case, the plaintiff made good faith efforts to destroy all the copies of the documents, and the two instances where the documents were used were inadvertent. Indeed, the plaintiff's discovery of the documents was due to the defendant's inadvertence, not due to anything done by the plaintiff. Moreover, those two uses of the documents could not fairly be described as "a deliberate breach of [the defendant's] privilege or actions in flagrant or reckless disregard of [its] confidentiality rights". The presumption of prejudice was rebutted for the same reasons.

The Court dismissed the motion. However, it ordered the plaintiff to redouble its efforts to ensure that the inadvertently produced documents were destroyed and no further use occurred.

This decision reminds us that vigilance in protecting privileged documents is called for, and that stays in respect of privileged documents are difficult to get!

Part 2 – Shine a Light on … Dealing with Employee Fraud

"Top Three" Tips For Dealing With Employee Fraud

Employee fraud comes in many shapes and sizes. Whether it involves a few forged invoices or a sophisticated electronic data misappropriation, employers must be prepared to respond swiftly and effectively. In this article, we set out three key issues for employers to consider in minimizing the damage and increasing their chances of recovery.

1. **Check for insurance**
2. **Consider criminal charges**
3. **Civil proceedings to recover the funds – including *Mareva, Anton Piller*, or *Norwich* orders**

1. Insurance

Many employers have what is known as "fidelity" insurance, insuring them against losses arising from the dishonesty of their employees. These policies usually provide for the employer to be compensated for a loss due to the dishonesty of an employee up to a fixed amount. Any proceeds of the crime that are recovered are usually applied as follows:

- the employer is first reimbursed for any costs incurred in taking action to recover the proceeds;
- the insurer is then reimbursed for what it paid out on the policy (subrogated claim); and
- the employer is reimbursed for any loss that was not covered by the policy.

Due to the structure of these policies, the employer will usually have an interest in taking steps to recover the stolen proceeds unless their entire loss was insured.

In doing so, it is important for employers to keep the insurer advised.

A failure to do so, that prejudices the insurer's rights, could result in the invalidation of the insurance coverage.

2. Criminal Proceedings

An employer may also consider whether to report the employee to the police so that the Crown may pursue criminal charges – although it goes without saying that you should carefully consider the accuracy of your information, and seek legal advice, prior to going to the police.

It should be noted that the laying of criminal charges is at the discretion of the Crown based on what the police investigation discloses.

While an employer may want criminal charges to be pursued in order to send a clear message that such conduct will not be tolerated, the employer should also consider the fact that criminal charges may result in adverse publicity. The employer should be prepared to handle media inquiries or client inquiries with a view towards reassuring customers and potential customers that their interests will not be adversely affected by the employee's actions.

In addition, the laying of criminal charges may provide the employee with grounds to have any civil proceedings relating to the same conduct "stayed" (held in abeyance) pending a resolution of the criminal charges so that the employee's right to a fair trial in the criminal matter is not prejudiced.

Remember though that the threat of criminal charges cannot be used to secure the repayment of money, as this may constitute extortion contrary to s. 346 of the *Criminal Code*.

Lastly, a criminal conviction often results in a restitution order (an order that funds be repaid to the victim) as part of the sentence. Again, the decision to request a restitution order lies with the Crown.

A restitution will be based on the amounts that can be proven to have been taken on the criminal standard of proof beyond a reasonable doubt (a higher burden of proof than that required to prove a claim in a civil proceeding) and may not include everything that has actually been taken. Should a

restitution order be imposed, it can be enforced by the employer like a civil judgment. The granting of a restitution order does not preclude the employer from also pursuing a civil action against the employee, but the employer must account for any amounts received pursuant to the restitution order when realizing on a civil judgment.

3. Civil Proceedings

When faced with fraud, an employer should consider how it might best minimize its loss. In addition to commencing civil proceedings against the employee seeking a judgment for the amounts wrongfully taken, there are a number of legal tools that may be used to both facilitate civil proceedings and ensure that as much as possible of the stolen proceeds are still in the hands of the employee when a judgment is obtained. These tools include *Mareva* injunctions, *Anton Piller* orders and *Norwich* orders.

A *Mareva* injunction (or “freeze order”) may be used to prevent assets from being dissipated or moved out of the jurisdiction pending a final determination of the civil proceedings. These orders are considered extraordinary legal remedies, and are only granted where the plaintiff (e.g. the employer) can establish:

- a strong *prima facie* (or “at first sight”) case against the defendant;
- the defendant has assets in the jurisdiction; and
- there is a serious risk that the defendant will remove property or dissipate assets before judgment.[1]

In the case of fraud, courts have been prepared to allow the risk of removal or dissipation of assets to be established by inference, as opposed to direct evidence. As Justice Strathy explained:

It is not necessary to show that the defendant has bought an air ticket to Switzerland, has sold his house and has cleared out his bank accounts. It should be sufficient to show that all the circumstances, including the circumstances of the fraud itself, demonstrate a serious risk that the defendant will attempt to dissipate assets or put them beyond the reach of the plaintiff.[2]

A *Mareva* injunction can be effectively employed to ensure that there is something there to satisfy a judgment once it is finally obtained.

An *Anton Piller* order may be used to preserve evidence to help ensure that the civil action is not frustrated by a lack of evidence. These orders are essentially civil search warrants, permitting a plaintiff (or its representatives) to enter the defendant’s premises in order to search and seize materials and documents that could serve as evidence at trial. Such orders are only granted where it can be established that:

- a strong *prima facie* case against the defendant exists;

- damage to the plaintiff by the defendant's alleged misconduct, potential or actual, will be very serious;
- there is convincing evidence that the defendant has in its possession incriminating documents or things; and
- there a real possibility that the defendant may destroy such material before the discovery process can do its work.[3]

In considering whether a "real possibility" of destruction exists, as with *Mareva* injunctions, courts may take into account the dishonest conduct of the defendant that led to the plaintiff seeking the order.[4] Courts may also consider the physical nature of the evidence and the ease with which it might be destroyed.[5]

A *Norwich* order enables "discovery" of information prior to the commencement of an action to allow that action to be pursued. They have been used for various purposes, such as identifying wrongdoers, tracing assets, preserving property, and evaluating whether a cause of action exists.[6] As with *Mareva* injunctions and *Anton Piller* orders, courts have developed a strict set of requirements that must be satisfied before a *Norwich* order will be made. These include:

- the applicant (i.e. the victim) has a valid, *bona fide*, or reasonable claim against the wrongdoer;
- the third party is somehow involved in the acts complained of;
- the third party is the only practicable source of the information;
- the third party can be indemnified for out of pocket costs to which it may be exposed because of disclosure; and
- the interests of justice favour disclosure.[7]

Conclusion

When dealing with employee fraud, an employer must move fast, strategically and be creative in taking steps minimize its loss and maximize its recovery. A number of legal devices are available for accomplishing this. Unfortunately, there is no time for learning as you go – so give us a call and we can help!.

Part 3 – Did you know?…

… that every Rule in the Rules of Civil Procedure must be applied to give effect to "proportionality"? It's true. Rule 1.04(1.1) says that "In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding". Keep that in mind as you are planning your litigation strategy!

[1] *O2 Electronics Inc. v. Sualim*, 2014 ONSC 5050, para. 67.
[2] *Sibley & Associates LP v. Ross*, 2011 ONSC 2951, para. 63.
[3] *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, para. 35.
[4] *MD Physician Services Inc. v. Jonathan Financial Group Inc*. 2011 ONSC 2409, para. 26.
[5] *Bell Expressvu Limited v. Rodgers*, [2007] O.J. No. 4569, para. 17.
[6] *Subway Franchise Systems of Canada, Inc. et al v. Trent University*, 2017 ONSC 4562, para. 5.
[7] *GEA Group AG v. Flex-N-Gate Corporation*, 2009 ONCA 619, para. 51.

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