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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Commercial Litigation Update

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This newsletter is designed to bring news of changes to the law, new law, interesting decisions and other matters of interest to our commercial litigation clients and friends.
We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Commercial Litigation group:

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"Bringing a summary judgment motion can allow a party in an action to have a judgment rendered more expeditiously than in the trial process."

SUPREME COURT REFINES ONTARIO LITIGATION RULES: AIMS FOR LOWER COSTS, MORE ACCESSIBLE CIVIL JUSTICE

Aaron Grossman

There is a prospect for faster, less expensive and more accessible justice for Ontario businesses and residents by virtue of a decision recently issued by the Supreme Court of Canada.

The decision provides for summary judgment to be granted in a wider variety of cases than was previously available. Bringing a summary judgment motion can allow a party in an action to have a judgment rendered more expeditiously than in the trial process. The Court's primary rationale for expanding the availability of summary judgment was to increase access to justice and lower the cost of litigation for Ontarians.

A summary judgment hearing is normally conducted on the basis of affidavit evidence and transcripts from the cross-examinations of the witnesses who swore the affidavits. Previously, live witnesses were generally not permitted and the summary judgment motions judges decided the case on the basis of a paper record, without seeing or hearing the witnesses live.

Amendments to the summary judgment rules were made in 2010 to allow for some live witnesses to be called on discrete issues. In addition, summary judgment motions judges were provided new fact-finding tools that were previously not available to help them decide such motions -- the ability to weigh the evidence, to evaluate the credibility of a witness and to draw reasonable inferences from the evidence, even though they never saw or heard the witnesses in person. It was these amendments that were recently interpreted by the Supreme Court of Canada.

In a case called *Hryniak v. Mauldin*[1], Robert Hryniak "lost" several million dollars provided to him by investors that was earmarked for investment in an offshore bank. The plaintiffs were investors who alleged that Hyrniak was liable for civil fraud. Rather than go to trial, the plaintiffs brought a summary judgment motion asking the court to decide, on the basis of a paper record, without live witnesses, that the fraud had been perpetrated. They succeeded on the motion, with the Supreme Court of Canada endorsing the motion court's judgment.

Writing for a unanimous Supreme Court, Madam Justice Andromache Karakatsanis set out the foundation for the Court's decision as follows:

> "Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue

[1] 2014 SCC 7.

COMMERCIAL LITIGATION UPDATE

"The trial is no longer the default dispute-resolution mechanism, as most litigants never get to trial nor do they expect to do so."

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> when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> "Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> "Summary judgment motions provide one such opportunity. …"

This opening set the tone for the remainder of the decision, in which the Supreme Court concluded as follows:

- Historically, summary judgment has evolved from weeding out *clearly* unmeritorious claims or defenses to granting judgment in situations where the dispute can be resolved *fairly and justly*.
- Summary judgment motions can be an effective and efficient dispute resolution tool in *appropriate* cases.
- Judges generally *must* utilize their new fact-finding powers if doing so will assist in granting summary judgment, unless doing so would be against the interest of justice. Again, these powers include hearing evidence from live witnesses, weighing the evidence, making findings of credibility and drawing reasonable inferences from the evidence.
- The trial is no longer the default dispute-resolution mechanism, as most litigants never get to trial nor do they expect to do so.
- Summary judgment is a key tool in promoting access to justice and reducing the cost and delay associated with court based litigation in Canada. A key to the effective use of the rule is proportionality -- tailoring the procedures used to the importance and size of the case.
- In order to grant summary judgment, the motions judge must have confidence that the summary judgment procedure will justly resolve the merits of the case. In addition, summary judgment must be "a proportionate, more expeditious and less expensive means to achieve a just result." The concept of proportionality in litigation is that orders made and procedures used in a given case should be proportionate to the relative importance of that case.
- If judgment in not granted on a summary judgment motion, the costs expended should not be thrown away. Motions judges have been mandated to keep the case through to trial, even if they dismiss the motion for summary judgment, so that the institutional knowledge gained by the judge is not lost. Motions judges are now expected to assume a case management role over these matters, which includes making orders to expedite and focus the remaining steps in the action and making orders that narrow the true issues to be decided.

The Supreme Court of Canada's conclusions differed significantly from the Ontario Court of Appeal's previous interpretation and application of the 2010 amendments to the summary

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"In [its] decision, [the court] found that the practice of some Ontario lawyers of reviewing expert reports and providing comments before the reports are finalized is improper."

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judgment rule. The Court of Appeal had held that summary judgment was only available when a judge could "fully appreciate" the evidence as if the judge were hearing the evidence at a trial. This interpretation of the amendments to the rule had tilted the balance in favor of trials as the preferred method of dispute resolution and was seen by many as emasculating the very purpose of the amendments, which was to make summary judgment more available. The Supreme Court disagreed with the Court of Appeal's interpretation and application of the amendments, recognizing that in the modern day, a trial is often neither realistic nor desirable.

Analysis and Future of Summary Judgment – Easier for the Right Types of Disputes

Based on the Court's comments regarding proportionality, efficiency of the legal system, and the desire for enhanced access to justice, cases involving relatively small amounts of money in dispute between the parties appear to be ripe for summary judgment. In addition, cases with simple legal or factual issues are good candidates for summary judgment, even where some oral testimony is required or there is a key credibility issue. However, oral evidence and credibility disputes will have to be discrete and manageable in order for summary judgment to be an effective alternative method of dispute resolution.

It will be interesting to see how the legal community and the courts respond to the Supreme Court's guidance, which has the potential for a "cultural shift" in how cases are decided in Ontario. It remains to be seen as to whether the decision will have the desired effect of increasing access to justice and decreasing delay and costs. ■

ONTARIO SUPERIOR COURT TIGHTENS RULES: 'YOUR' EXPERT WITNESS MAY NOW BE ANYTHING BUT

Catherine MacInnis

A recent decision of the Ontario Superior Court of Justice sheds light on the law regarding expert-witness evidence in Ontario, with a focus on maintaining the independence of experts.

In her decision in *Moore v. Getahun*, Madam Justice Janet N. Wilson found that the practice of some Ontario lawyers of reviewing expert reports and providing comments before the reports are finalized is improper.

She also commented that a lawyer's instructions to his/her client's expert witness must be given in writing and must be disclosed to opposing counsel. Accordingly, all communications with that expert in preparing their report will be scrutinized at trial.

Background

Lawyers frequently recommend that their clients retain subject-matter experts to assist in litigation. In the commercial litigation context, we commonly advise clients to engage experts to prepare business valuation or accounting opinions. Often, these expert reports help the parties understand their case and reach a resolution of their matter before trial.

However, should the matter proceed to trial, the expert is expected to help the court understand matters outside the court's technical expertise – like financial accounting. The courts require experts to be fair, objective and non-partisan. To

"The court … state[d] that where it is necessary for counsel to 'clarify' or 'amplify' a report, such input should be in writing and disclosed to opposing counsel."

be sure, this requirement has been codified under Rules 4.1.01 (1) and 53 of the *Rules of Civil Procedure* which, among other things, require that experts sign a form acknowledging their duties to the court.

That being said, it is the client, and not the court (or the taxpayers of Ontario), who pays for the expert's time. Perhaps as a result, the practice has developed that lawyers review draft expert reports in advance and provide comments so as to help the expert clarify or amplify his or her evidence.

In some cases, lawyers were merely providing the expert with corrections on grammar and punctuation. In other cases, however, the integrity of the expert reports and testimony before the courts may have been affected.

In an effort to curb the trend and remove any doubt as to whether experts truly are "hired guns," Madam Justice Wilson issued a lengthy decision on the role of experts in litigation in Ontario.

Decision in *Moore v. Getahun*

While *Moore v. Getahun* was a personal injury matter, the findings of the court will affect all civil litigation in the province. In her decision, Madam Justice Wilson stated as follows:

> "*…the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft expert report are no longer acceptable.*"

The court went on to state that where it is necessary for counsel to 'clarify' or 'amplify' a report, such input should be in writing and disclosed to opposing counsel. Presumably, these further comments from Madam Justice Wilson were aimed at addressing the practice of many counsel of providing experts only with oral instructions in order to avoid scrutiny by opposing counsel or the court at a later date.

The result of the *Moore v. Getahun* decision is that counsel in Ontario will have to reconsider how they provide instructions to experts. The decision makes it clear that all instructions to experts should be in writing, with the expectation that if the expert opinion is to be relied upon by a party at trial, opposing counsel will have an opportunity to review all communications between counsel and the expert.

Despite the temptation of both counsel and clients to view their expert as an "advocate," it must be remembered that regardless of who pays the bill, your expert's duty is ultimately to the court, not to you.

A notice of appeal from this decision has been filed and may result in further or different direction from the Ontario Court of Appeal regarding this important issue. ■

COMMERCIAL LITIGATION UPDATE

"The unlawful means tort allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party."

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CLAIMS AGAINST COMPETITORS FOR BUSINESS INTERFERENCE MUST MEET STRICT NEW SUPREME COURT TEST TO SUCCEED

Bradley Phillips

If you are thinking about suing a competitor for interfering with your business because of its improper dealings with a third party, your case will have to pass a more exacting test if it is to have any chance of success.

The test is set out in the Supreme Court of Canada's recent decision in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*

A.I. Enterprises focuses on a tort (a wrongful act leading to legal liability) that has been referred to by a number of different names -- "Unlawful interference with economic relations," "interference with a trade or business by unlawful means," "intentional interference with economic relations" and, as adopted by the Supreme Court in *A.I. Enterprises*, the "unlawful means" tort.

The unlawful means tort allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. In *A.I. Enterprises*, the Court used an example from the case *Tarleton v. M'Gawley* (1793), Peake 270, 170 E.R. 153 to demonstrate how the tort operates.

In *Tarleton*, the defendant, the master of a trading ship, fired its cannons at a canoe that was attempting to trade with the defendant's competitor, the plaintiff. The plaintiff was able to recover damages for the economic injury resulting from the defendant's wrongful conduct towards third parties (the occupants of the canoe).

A more modern example of how the tort could apply would be where Competitor A approaches a supplier and makes intentional misrepresentations to the supplier regarding Competitor B, resulting in the supplier electing to cut off the supply of inventory to Competitor B. The resulting loss may give rise to the unlawful means tort.

The Supreme Court of Canada, in *A.I. Enterprises*, has defined what sort of conduct constitutes "unlawfulness" and when the "unlawful means" tort can be pursued in an action.

What Does "Unlawful Means" Mean?

The Supreme Court concluded that "unlawful means" must be interpreted narrowly and should apply only to conduct that would give rise to a civil cause of action by the third party (the canoeists in the *Tarleton case*), or would do so if the third party had suffered loss as a result of that conduct.

The Court also stated that "Mere foreseeability of economic harm does not meet the requirement for intention in the unlawful means tort. The defendant must have the intention to cause economic harm to the plaintiff *as an end in itself or the intention to cause economic harm to the plaintiff because it is a necessary means of achieving an end that serves some ulterior motive* … It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, *even where the defendant realizes that it is extremely likely that harm to the plaintiff may result.*"

"[The] Court concluded that 'unlawful means' must be interpreted narrowly … finding that a broader definition … would not promote legal or commercial certainty."

In adopting a narrower definition, the Court expressly rejected arguments seeking to leave open a broader definition of "unlawful means" and/or allowing a judge to find "principled exceptions" to the rule in certain circumstances.

The Court rejected both these arguments, finding that a broader definition of "unlawful" would be inconsistent with the common law historically providing less protection to purely economic interests and that it could undermine (legitimate) commercial competition in Canada.

In short, the Court found that a broad interpretation of "unlawfulness" would result in the courts making assessments of "commercial morality" and could impose liability for malicious conduct alone and that this would not promote legal or commercial certainty.

The Court similarly found that allowing "principled exceptions" to the unlawfulness requirement would invite the danger of too many *ad hoc* decisions being made by judges, which is precisely what the Supreme Court is attempting to avoid by its decision.

Of note, the Supreme Court also found that establishing that the defendant had knowledge of a valid business relationship between the plaintiff and third party was ***not*** an essential element of the unlawful means tort. Rather, it found that the issue to be focussed upon was whether unlawful conduct *intentionally* harmed the plaintiff's economic interests. This seems to be consistent with the Supreme Court's comment that to establish intention under the tort a plaintiff may demonstrate that a defendant caused economic harm as a necessary means of achieving an end that serves some ulterior motive. We query, however, how one can establish that a defendant *intentionally* harmed the plaintiff's economic interests without the plaintiff having to show that the defendant knew about the business relationship.

When Can the Tort of "Unlawful Means" Be Pursued by a Plaintiff?

The Supreme Court of Canada expressly rejected the approach taken recently by the Court of Appeal of Ontario in *Alleslev-Krofchak v. Valcom Limited*, 2010 ONCA 557, where the Court of Appeal concluded that the tort of "unlawful means" could be pleaded *only* where there was no other cause of action open to the plaintiff.

The Supreme Court instead found that general principles of tort liability accept concurrent liability and overlapping causes of action in respect of the same incident. The Court noted, however, that based on the narrower definition of "unlawful" that it had established, pleading the tort would rarely, if ever, be more advantageous to a plaintiff rather than pursuing another available cause of action.

Application of New Definition of "Unlawful Means"

In *A.I. Enterprises*, a group of family members, through their companies, owned an apartment building. The majority of them wanted to sell it, but one of them did not. The dissenting family member took a series of actions to thwart the sale, including attempting to invoke an arbitration process under a syndication agreement, registering encumbrances against the property, and denying entry to the property to prospective purchasers. The result was that the ultimate sale price was nearly $400,000 less than it otherwise might

have been. The majority (successfully) sued the dissenting family member to recover this loss, with the trial judge finding that the dissenting family member and his company were liable under the tort of unlawful interference with economic relations.

On appeal, the New Brunswick Court of Appeal upheld the trial judge's decision. However, it concluded that while none of the conduct against third parties was actionable as a civil claim, it applied a "principled exception" to find liability under the tort in any event.

The Supreme Court of Canada, applying the Court's new, narrower test, concluded that because the dissenting family member's conduct towards third parties could not result in a civil claim by them, and that no "principled exception" was permitted under the tort, the test for the "unlawful means" tort was not met. The Supreme Court did, however, find alternative, concurrent grounds (breach of fiduciary duty) to justify upholding a finding of liability against the dissenting family member and his company. ■

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