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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Commercial Litigation Update

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, Lou Brzezinski at 416.593.2952 or lbrzezinski@blaney.com

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"Sweeping changes to the rules of court in Ontario... aim to make justice more accessible and make the time and cost involved in litigation more proportional to the issues at stake."

NEW RULES AIM TO MAKE COURT FASTER, CHEAPER, MORE ACCESSIBLE

Todd Robinson

Sweeping changes to the rules of court in Ontario (the *Rules of Civil Procedure*), which just took effect January 1, aim to make justice more accessible and make the time and cost involved in litigation more proportional to the issues at stake.

By requiring Ontario lawyers to work together *outside* the courtroom, the revised *Rules* also seek to minimize the culture of litigation that has been quickly taking over those courtrooms.

Although many of the changes are procedural, several are quite substantive and promise to have a dramatic impact on the conduct of litigation. Although a number of the amendments will add costs at the front end of a case, the payoff should be a more streamlined litigation process and thereby reduced client costs for the case as a whole.

The new *Rules* apply to all new and existing actions, with some minor exceptions. Here is an overview of some of the major changes:

Scope and Conduct of Discovery

Previously, documents and information that "relate" to a matter in issue have had to be produced in litigation. The amended rule requires that documents and information that are "*relevant*" to a matter in issue must be produced. The goal is to force parties to focus on the important documents and issues and to minimize, if not avoid, time-consuming, delay-producing and cost-generating practices such as "document dumping" (where boxes of documents are produced, most of which are connected to the matters at issue but are not relevant to them) or "fishing expeditions" (where parties seek extensive discovery on less important issues).

Also, a new "discovery plan" is required for all actions. This is basically a written plan made through consultation by all parties addressing the intended scope of discovery (documentary and oral), document production dates, timing and costs, the names of individuals to be presented for oral discovery, and "any other information promoting an expeditious and cost-effective discovery process." Discovery plans are intended to help expedite the litigation by obliging counsel to discuss and deliberate on the conduct and course of the action before it ever gets to court.

In addition, a time limit on oral discoveries is being introduced for ordinary actions (a maximum of seven hours per party), which will force

COMMERCIAL LITIGATION UPDATE

"The new rule aims to make it easier to obtain summary judgment, giving judges greater discretion to decide matters short of a trial."

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counsel to focus in on the key issues of the litigation when asking questions on discovery.

Summary Judgment

The *Rules* allow litigants to ask a judge to decide a matter (or an issue in the matter) without holding a full-blown trial in court with live-witness testimony. This is called summary judgment. Separate requirements previously existed for summary judgment under ordinary actions and summary judgement under simplified procedure actions. The distinction has been removed and now a single "test" for summary judgment applies to all actions governed by the *Rules*.

Under the former *Rules*, it was difficult to obtain summary judgment in an ordinary action. Also, a party that brought a summary judgment motion and was not successful was obliged to pay substantially all the costs of the opposite party/parties (known as "substantial indemnity costs"). Such a strict and adverse costs sanction, coupled with the stringent requirements to obtain summary judgment, caused great reluctance among counsel and clients to bring summary judgment motions.

The new rule aims to make it easier to obtain summary judgment, giving judges greater discretion to decide matters short of a trial. In addition, the costs sanction has been revised dramatically. Now, substantial indemnity costs *may* be awarded by the court, but only if a party has acted "unreasonably" or "in bad faith for the purpose of delay." Judges also now have discretion to order a mini-trial for any issue on which they need further clarification before deciding the summary judgment motion. These changes should lead to more summary judgment motions, which are an excellent way to resolve issues, or at least narrow them, quickly and cost-effectively.

Experts

Expert witnesses are used in cases with the intention that the court's deliberations will be informed by independent, professional opinion evidence and analysis. There has been a long-standing concern, however, that not all expert witnesses are, in fact, truly impartial. Under the amended *Rules,* experts now have a "duty" to provide fair, objective and non-partisan opinion evidence, and will be required to acknowledge that duty to the court, in writing, in their reports. Expert reports must also include instructions from counsel and full explanations of the expert's opinions with supporting reasons. When retaining and instructing experts, it is now very important for counsel and clients to be cautious and ensure that the objectivity of those experts is not, and does not appear, compromised.

Timeline Changes

There are a number of timeline changes under the new *Rules* that will see materials prepared, served, and filed much earlier. Notably, expert reports now need to be prepared and served *much* earlier (in advance of pre-trial). This will help make pre-trials more meaningful and give parties an opportunity to properly canvas settlement options with full knowledge of the issues. Also, the *Rules* provide further powers to the court to dismiss actions that linger in the judicial system for too long, which will encourage plaintiffs to move their actions forward in a timely manner.

"Settlement Counsel is litigation counsel that is engaged for the sole purpose of settling a case. His role is to develop and implement a strategy that results in early settlement."

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Ralph is also a qualified arbitrator, has acted as Settlement Counsel in complex multi-party disputes and been appointed Independent Counsel in multi-million dollar commercial litigation. He specializes in all aspects of environmental, regulatory, liability, risk management and compliance matters, together with all aspects of environmental, commercial and regulatory dispute resolution and advocacy. He serves clients in Spanish as well as English.

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Simplified Procedure

The *Rules of Civil Procedure* provide a more streamlined and cost-effective process known as simplified procedure. With the amendments made to the simplified rules, a greater number of actions will be brought under this procedure. Formerly, the simplified procedure was restricted to claims of $10,001 to $50,000 in value. The monetary jurisdiction is now claims of $25,001 to $100,000.

Among the features of the former simplified procedure were no oral discoveries, stricter timelines for the proceeding, and the availability of an abbreviated trial that uses affidavit evidence and only cross-examination for live evidence at trial (a "summary trial").

Now, some limited direct examination on affidavit evidence has been introduced for summary trials (*i.e.,* a lawyer can now examine her/his own witnesses instead of just cross-examining opposing witnesses). Also, limited oral discoveries (two hours per party) have been introduced to the simplified procedure, which will allow counsel and clients to better learn the positions of other parties prior to trial.

Small Claims Court

Because of the relatively small monetary jurisdiction of the Small Claims Court and the very limited costs recoverable at trial, litigants have often represented themselves in small claims cases or have been represented primarily by paralegals and law students. The monetary jurisdiction of the Small Claims Court has now increased from $10,000 to $25,000 in damages. This, inevitably, will lead to more represented parties in the courtroom, which, in turn, will invariably mean more lawyers. (Amendments to the *Rules of the Small Claims Court* are now in effect as well, but these are largely procedural, dealing predominantly with enforcement after a judgment is obtained.)

Overall, the amended *Rules* are intended to promote a more timely and cost-effective litigation process. We look forward to monitoring the impact of these changes and seeing whether they produce the desired outcome. ■

SETTLEMENT COUNSEL - ANOTHER APPROACH TO RESOLVING DISPUTES

Ralph Cuervo-Lorens

Introduction

Among clients, it is almost trite to say that litigation has been steadily losing ground as the tool of choice for resolving legal disputes. Uncertain in cost and outcome, and burdened by an increasingly complex web of rules, the value and appeal of litigation has been diminishing across a wide range of sectors, type of dispute and type of client. The wide-ranging development of various forms of alternative dispute resolution (mediation, arbitration, negotiation, etc.) has been an attempt to expand the dispute resolution tool kit. In this article we introduce a recent addition to that tool kit.

What is Settlement Counsel?

Settlement Counsel is litigation counsel that is engaged for the sole purpose of settling a case. His role is to develop and implement a strategy that results in early settlement. The Settlement Counsel role rests on the premise that litigation advocacy is not the same as settlement advocacy

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and that the task of settling a case is also not the same as the task of litigating it. While the objectives may be the same, the approaches, clearly, are not. Trying to pursue both roles at the same time, as the traditional litigation models try to do, risks a loss of both credibility and effectiveness.

How would it work?

Settlement Counsel does not participate in the litigation. She reports directly and exclusively to the client and in the context of a given dispute focuses on negotiation, mediation (formal or informal), risk analysis, strategic goal development and in the generation of suitable settlement structures. Settlement Counsel will be well versed in the client, its business, risk tolerance and long-term interests, and will have timely and direct access to key client decision-makers and resources.

Settlement Counsel can work with or without litigation counsel. He can be engaged as early as the first possibility of a dispute arises and can get to work on a resolution as early as that point. Settlement Counsel working on his own from the onset of a dispute, behind the scenes or at the forefront, could well find a quick, creative solution that avoids the significant time and costs that are often unavoidable in full-blown litigation.

If there *is* litigation counsel, Settlement Counsel takes the lead in any settlement process that is part of the litigation but is not constrained by it. Settlement Counsel can initiate or pursue settlement discussions at any point, including before any lawsuit starts, without the loss of credibility that might result if the litigator did it. If working in parallel with the litigator, the two-track approach allows each to exploit the best features of their respective roles.

There clearly could be cost implications for the client in the two-track approach, all the more so if the case does not settle early. One way to address this is to structure the retainer of Settlement Counsel to include an early success incentive. If litigation regularly goes with the client's business territory, the use of Settlement Counsel will likely save the client money in the long run as both client and Settlement Counsel develop familiarity and expertise in risk assessment and management and in workable outcomes for the client in different types of cases. Experience south of the border so far suggests that more cases settle sooner with the use of Settlement Counsel, resulting in savings which would not have been realized through the efforts of litigation counsel alone.

Settlement Counsel obviously needs to understand the merits and demerits of the case. The litigator therefore shares information with Settlement Counsel, but not the other way around. This is a key component of this scheme. To be most effective, the work of Settlement Counsel needs to remain confidential and outside the litigation process. (This is one of the main weaknesses of the standard model of the litigator who at one and the same time is trying to settle the case: there can be a basic inconsistency between trying to win and at the same time trying to compromise). The two roles must remain distinct and be seen to remain distinct. All settlement overtures would be referred to Settlement Counsel and handled by him. The information flow to Settlement Counsel would

"The greatest value of Settlement Counsel comes from the freedom to engage in a critical evaluation of the case at every stage of the case."

involve such things as case evaluation, identification of key issues (both legal and factual), the overall strategy for the case and the outcome of any interlocutory proceedings.

Why two tracks? Different task, different focus and different tools. The focus of Settlement Counsel is less on what happened and more on what the client would like to *see* happen. It is less rights-based and more interest-based. It is a free-ranging problem-solving exercise, unbound by what happened or by what can be proved. What can often take significant time and resources, ascertaining the historical facts and sorting out what the applicable law is or might be, is of lesser importance in this process. For settlement purposes, often it is facts different from those that one can get through the litigation process that are the ones that matter. (These "settlement facts" often are in fact hard, if not impossible, to get in the litigation process.) Settlement Counsel is more likely to get open and timely disclosure than through the standard litigation process. By virtue of this separation of functions, having Settlement Counsel involved also strengthens the ability of the litigator to just litigate, meaning the focus of all energy in obtaining the most favorable outcome for the client within the established rules of the game.

Advantages of Settlement Counsel

The greatest value of Settlement Counsel comes from the freedom to engage in a critical evaluation of the case at every stage of the case. Settlement Counsel is better able to avoid the dangers that often come from too close an identification with one's client (and with the case) that can be a feature of the litigator-as-"hired gun" model. Unhindered by procedural rules, precedent and a court process often at its institutional limits, Settlement Counsel is able to bring a different tone, a broader range of alternatives and a much broader frame of reference to any given dispute and to the exercise of judgment that is always involved in generating acceptable litigation outcomes for the client.

Settlement Counsel is free to get opposing counsel to the table at any point, free as he would be from the dynamics of the litigation process (timetables, motion outcomes, posturing, incomplete information, unexpected disclosure, case management rules, etc.). Willing to cut to the chase and without the need to posture, the single goal of Settlement Counsel is not a legal remedy rooted in precedent, but an early and particularized *business* solution to the case.

Conclusion

Not every case can or should be settled. But for those where settlement is practicable and appropriate, Settlement Counsel represents yet another tool at the disposal of the client and its counsel. With Settlement Counsel the interests of legal counsel and those of the client can be made to align themselves perfectly. Particularly if an early success fee is built into the retainer, there can be no opportunity for a conflict to arise between the interests of the client in resolving the case early and cheaply and those of litigation counsel in, for example, proving himself right, besting opposing counsel, garnering publicity or continuing to earn fees. And because settlement takes a lot less time than litigating, Settlement Counsel is able to handle a larger caseload for a client.

In the right cases, the use of Settlement Counsel can be a more effective and efficient way to manage the desire that is almost always present

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in all parties to litigation, whether stated or not: to obtain some measure of vindication while doing so in a manner that is cost- and time-effective and which limits damage to the company and its business to the greatest extent possible. ■

COURT UPHOLDS PROTECTIONS OF FIRST NATIONS IN COMMERCIAL DISPUTE

Domenico Magisano

Blaney McMurtry has a long-standing, respected record of committed counsel and service to Canadian Aboriginal communities. The following article concerns the firm's effort in court to secure statutory protections under the Indian Act for the Temagami First Nation in its dispute over fees with a professional service provider.

The *Indian Act* has been the source of numerous disputes, some of which have made their way to the Supreme Court of Canada. In *Borden Ladner Gervais* v. *Temagami First Nation,* the Ontario Superior Court of Justice was asked whether assets of an Indian Band situated on a reserve can be garnished under the Ontario *Rules of Civil Procedure* to pay fees owing to a professional service provider.

Background

Temagami First Nation (TFN) is a band under the *Indian Act*. During the late 1980s and early 1990s it retained Borden & Elliot (now Borden Ladner Gervais, or BLG) to help it with appeals and subsequent land claim negotiations involving the provincial and federal governments. At first, BLG's fees were paid by the government through a fund, but eventually the fund no longer paid the accounts. BLG asserted that it continued to act on behalf of TFN and in the process amassed an outstanding account of over $1.1 million.

The Litigation

In 1996 BLG began an action against TFN and Teme-Auguama Anishanabai (TAA). When it served the claim, BLG advised TFN that this was merely a procedural step and that BLG had no intention of enforcing on any judgment it might obtain. As a result, TFN and TAA did not defend the claim. Shortly thereafter, BLG noted both in default.

In 1999, BLG, TFN and TAA consented to an Order granting BLG a charge in the amount of their claim over any proceeds TFN or TAA might obtain through settlement of their land claims. The order concerned assets arising from land claims only, and not from any other sources. Nothing further occurred until 2003 when BLG sought and obtained default judgment against both TFN and TAA

The Garnishment

Consistent with the letter that accompanied its statement of claim in 1996, BLG did not take any steps to enforce its judgment for almost five years. However, in July 2008, BLG obtained on motion to the court (without notice to TFN) an order for a garnishment of funds payable to TFN by the Ontario First Nation General Partnership Inc. (OFNGP), which distributes monies from Casino Rama to Ontario bands. The funds at issue were situated in a bank account on a Reserve (specifically, the Six Nations of the Grand River Reserve). BLG issued and served its garnishment on the OFNGP.

COMMERCIAL LITIGATION UPDATE

Blaney McMurtry LLP lawyers Domenico Magisano and Catherine DiMarco were retained by TFN to set aside BLG's garnishment on the basis that the garnishment contravened section 89 of the Indian Act (the Section 89 argument) and that the garnishment was contrary to a settlement reached between BLG, TFN and TAA regarding payment of BLG's outstanding accounts (the settlement argument).

When the case came before the Honourable Madam Justice Lois Roberts, the settlement argument was adjourned so that counsel could argue whether BLG could act on its own behalf with respect to this issue. The Section 89 Argument proceeded before Madam Justice Roberts.

The Section 89 Argument

BLG did not dispute that the funds at issue were situated on a reserve. The main argument advanced by BLG was that a "debt" subject to garnishment under the Ontario *Rules of Civil Procedure* was not personal property as contemplated under the *Indian Act*.

Section 89 of the *Indian Act* states:

> The real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band

Rule 60.08(1) of the Ontario *Rules of Civil Procedure* states:

> A creditor under an order for the payment or recovery of money may enforce it by garnishment of debts payable to the debtor by other persons.

Recent case law interpreting section 89 of the *Indian Act* had consistently narrowed its scope. Accordingly, a decision adverse to TFN stood to have broad ramifications by further constricting the protections offered by section 89 to bands and band members.

After a two day hearing, Madam Justice Roberts held that section 89 of the *Indian Act* applied to funds held by the OFNGP. As a result she lifted BLG's garnishment. In finding in favor of TFN, the court held that debt is, in fact, a form of personal property that would be caught by section 89 of the Indian Act.

> [24] In my view, there can be no question that the funds sought to be garnished by Borden & Elliot, regardless of their origin, should be treated as the property of Temagami.

BLG has appealed Madam Justice Roberts's decision to the Ontario Court of Appeal.

Stay tuned. ■

EXPECT THE BEST

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