

Getting Out Early: Motion Techniques for Early Resolution of Claims

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What is a Motion?

- A motion is an oral or written application requesting a court to make a specific ruling or order in favour of the applicant
- There are a variety of motions available to litigants, and they can be brought at any time during the litigation
 - Motions are strategically important, and can sometimes result in the dismissal of the action early on in the litigation process
 - Even if the action is not dismissed, motions can be used to gain a tactical advantage

Which motions can be used for early dismissal of an action?

- Rule 2.1: Vexatious litigants
- Rule 15.04(8): Dismissal for counsel getting off the record
- Rule 20: Summary judgment
- Rule 21: Determination of an issue before trial
- Rule 24: Dismissal of an action for delay
- Rule 56: Security for costs

Rule 20: Summary Judgment

- Summary judgment is a judgment rendered by a court “summarily”, i.e. without a full trial
 - Party to an action may make a motion for summary judgment where the other party can produce no or insufficient evidence to support the allegations made in its statement of claim or statement of defence
 - Granting of summary judgment disposes of claims or defences that cannot be proved, without need for a full trial with oral evidence

Test: no genuine issue requiring trial

- In deciding whether or not there is a genuine issue for trial, the judge may:
 - may weigh the evidence
 - evaluate the credibility of a deponent
 - draw any reasonable inference from the evidence, unless it is in the interests of justice for such powers to be exercised only at trial
 - order oral evidence be presented by one or more parties

Hryniak v. Mauldin, 2014 SCC 7

- Civil fraud action in which SCC increased availability of summary judgment in Canada
 - SCC: amendments to the Rules designed to transform R. 20 “from a means to weed out unmeritorious claims to a significant alternative model of adjudication”
 - SCC called for “culture shift”, described summary judgment as an opportunity to design new model of adjudication that reflects “modern reality”

Where trial is necessary...

- Court may still make orders to expedite the proceeding, such as:
 - specifying the material facts not in dispute
 - defining issues to be tried
 - ordering that the action proceed to trial expeditiously

Rule 20: Costs

- Court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if:
 - the party acted unreasonably by making or responding to the motion, or
 - if the party acted in bad faith for the purpose of delay

Rule 21: Determination of an issue before trial

- Further mechanism to summarily dispose of an action by:
 - having questions of law determined prior to trial, or
 - by striking out a pleading on the basis that it discloses no reasonable cause of action or defences
- Test: Is it “plain and obvious” that the claim cannot succeed?

Difference between Rule 20 and Rule 21

- Rule 20 deals with issues of **fact**
 - whether there is a factual dispute between the parties
 - whether there is evidence to support a party's claim or defence
- Rule 21 deals with issues of **law**
- That is why evidence is mandatory for a Rule 20 motion, but prohibited or restricted on a Rule 21 motion

Determination of an issue of law – r. 21.01(1)(a)

- Party may move before a judge for the determination, before trial, of a question of law raised in a pleading
 - Particularly effective where the pleadings disclose a discrete question of law that can be isolated from the contested issues of fact
 - Evidence admissible on this motion only with leave or consent
 - Judge may make an order or grant a judgment “where the determination of the question may dispose of all or part of the action, substantially shorten the trial, or result in the saving of substantial costs”

No reasonable cause of action or defence – r.21.01(1)(b)

- Any party may move before a judge to strike out a pleading on the ground that it discloses no reasonable case of action or defence
 - On such a motion, the only issue is the sufficiency in law of the pleading attacked
 - The facts alleged in the impugned pleading are assumed to be true

Rule 24: Dismissal of action for delay

- A defendant who is not in default under the Rules or under any order of the court may move to have an action dismissed for delay where the plaintiff has failed to:
 - serve the statement of claim on all the defendants within the prescribed time;
 - set the action down for trial within six months after the close of pleadings
 - deliver a notice of readiness for pre-trial conference

Rule 56: Security for Costs

- Court may direct that a party be required to post security for costs during the course of the proceeding as a term of continuing with the prosecution of a proceeding (r.56.01).
 - When the plaintiff posts the amount of money or other security ordered by the court, the defendant will be assured that there will be funds available to compensate the defendant if the plaintiff is ordered to pay the defendant's costs

Rule 56 continued...

- A defendant or respondent may make a motion for an order for security for costs where:
 - plaintiff ordinarily resident outside Ontario
 - plaintiff has another proceeding for the same relief pending in Ontario or elsewhere
 - defendant has an order against plaintiff for costs in the same or another proceeding that remains unpaid
 - plaintiff is a corporation, and there is reason to believe that it has insufficient assets in Ontario to pay the costs of the defendant
 - there is good reason to believe that the action is frivolous and vexatious and the plaintiff has insufficient assets in Ontario to pay the costs of the defendant

Rule 15.04(08): Dismissal for counsel getting off the record

- Under rule 15.04, lawyers can make a motion to for removal as lawyer of record when
 - the lawyer faces an inability to obtain instructions from the client
 - there is a breakdown in the relationship, or
 - the client fails to pay the lawyer's fees
- If the client then does not appoint a new lawyer or serve a notice of intention to act in person, the court may dismiss the client's proceeding or strike out his or her defence

Rule 2.1: Vexatious litigation

- Mechanism for dealing with “vexatious litigants”: individuals who repeatedly commence meritless proceedings or use the court system to harass or subdue opponents
- Once declared a “vexatious litigant”, the individual must obtain leave of the court before instituting proceedings

Rule 2.1 vs. Rule 20: *Prince v. TD Canada Trust Bank*

- Court warned that rule 2.1 applies “only in the clearest of cases in which the lack of merit in the claim is apparent on the face of the pleadings and where there is a superadded basis to be concerned about abuse of the court’s processes”
- Rule 20 applies to all cases
- If a case is truly frivolous or just lacking in merit, it should be dealt with summarily by rule 20, especially where self-represented parties are involved
- Motions for summary judgment that give self-represented plaintiffs an opportunity to be heard on the merits are procedurally more appropriate