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LITIGATION NOTES

Legal Decisions and Developments in Canada

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Culture Shift

The Supreme Court of Canada provides a roadmap for the effective use of summary judgment procedures.

The Supreme Court of Canada recently recognized the necessity of streamlining access to justice in Canada. The Court said;

"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 when they are wronged or defend themselves when they are sued, and cannot afford to go to trial...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…"

One tool for enhancing access to justice is the summary judgment motion, which can provide a cheaper, faster alternative to a full trial. Ontario's summary judgment procedure is contained in Rule 20, which permits a party to move for summary judgment to grant or dismiss all or part of a claim. Rule 20 was amended in 2010, following the recommendations of the Osborne Report. Rule 20.04 (2.1) now provides that a judge hearing a summary judgment motion "... may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial: 1. Weighing the evidence; 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence."

This case involved investments made by a group of American investors, led by Fred Mauldin (the Mauldin Group), in a Canadian company, Tropos Capital ("Tropos"), which traded in bonds and debt instruments. Robert Hryniak was the principal of Tropos and Gregory Peebles, formerly of Cassels Brock & Blackwell ("Cassels Brock"), was legal counsel to Hryniak and Tropos.

In June of 2001, the Mauldin Group wired US$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank and the money disappeared.

The Mauldin Group sued Hryniak, Peebles and Cassels Brock for fraud and brought a motion for summary judgment. The motions judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He concluded that a trial was not required against Hryniak. However, he found that the claim against Peebles involved issues with respect to credibility and required a trial. Consequently, he dismissed the motion for summary judgment against Peebles, as well as against Cassels Brock, since the claim against the firm was based on the theory that it was vicariously liable for Peebles' conduct.

Hryniak appealed to the Court of Appeal for Ontario. The Court of Appeal concluded that because of its factual complexity and voluminous record, the Mauldin Group action was the type of action for which a trial is generally required. "There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings".

However, in spite of having concluded that the case was not appropriate for summary judgment, the Court of Appeal was satisfied that Hryniak had committed the tort of civil fraud against the Mauldin Group, and dismissed his appeal.

Hryniak appealed to the Supreme Court of Canada. The Supreme Court dismissed the appeal, but said that it differed in part on the Court of Appeal's interpretation of Rule 20:

"In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the 'full appreciation' of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial."

The Court then went on to outline its views on how the Summary Judgment rule should be applied.

The Roadmap

The Court advocated a "roadmap" approach

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to summary judgment motions:

"1. On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers.

2. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a).

3. If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole."

When is There no Genuine Issue Requiring a Trial?

Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). "There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result."

The Interest of Justice

The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

The Court of Appeal said that it would not be in the interest of justice to proceed by way of summary judgment if a full appreciation of the evidence and issues that is required to make dispositive findings can only be achieved by way of a trial.

The Supreme Court agreed that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, but said that such an appreciation is not only available at trial:

" Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high... On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding."

The Power to Hear Oral Evidence

Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence. The Court of Appeal suggested the motion judge should only exercise this power when oral evidence: (1) can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) is likely to have a significant impact on whether the summary judgment motion is granted; and (3) is on an issue that is narrow and discrete.

The Supreme Court said that this was useful guidance but that they are not absolute rules. The Court said:

1. "This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure."

2. "Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence."

3. "The power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability.... In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial."

Controlling the Scope of a Summary Judgment Motion

"The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed."

Salvaging a Failed Summary Judgment Motion

"Failed, or even partially successful, summary judgment motions add...to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction… The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit."

Summary Trial

"The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent…the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2)."

Remaining seized

"Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the

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case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue."

This case was one of four cases heard by the Court of Appeal for Ontario in 2011 and reported as *Combined Air Mechanical v. Flesch* (Litigation Notes, December 2011). That case seemed to put a damper on the high expectations for easier access to summary judgment arising from the amendments to Rule 20. The Supreme Court has now fanned the embers.

Hryniak v. Mauldin, 2014 SCC 7 (CanLII)

Class Action Certified in Mall Collapse Case

Ontario's Superior Court certifies a class action and says that negligent inspection can give rise to a cause of action.

On February 13, 2014, the Superior Court of Justice for Ontario certified a class action, arising from the collapse of the rooftop parking deck at the Algo Centre Mall in Elliot Lake, Ontario. The collapse occurred on June 23, 2012 and killed two people and injured dozens of others.

The proposed class action was commenced by Elaine Quinte and John Quinte and the corporation which operated the restaurant which they owned in the mall, known as Hungry Jack's. The *Class Proceedings Act* ("CPA") of the Province of Ontario requires that the following five criteria be met before a class action can be certified:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class;

(c) the claims of the class members raise common issues of fact or law;

(d) a class proceeding would be the preferable procedure; and

(e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

The Court reviewed each of these criteria in turn:

(a) Cause of Action

The test under the *Class Proceedings Act* is that a claim should be permitted to proceed unless it is "plain and obvious" that it cannot succeed. The Court observed that this is a low hurdle which was easily cleared in this case. Indeed, all defendants except the Province of Ontario agreed that this criterion was met. The Province of Ontario argued that the pleading did not disclose a reasonable cause of action in negligence against the Province because there is no private law duty of care owed by Ontario to the plaintiffs based on the facts as pleaded.

In this case, the evidence to date suggests that the cause of the collapse was the corrosion of a steel beam which supported the roof. The corrosion was attributable to many years of leaking. Ontario Ministry of Labour inspectors performed over 130 inspections of the mall between 1981 and the date of the collapse. In doing so, they allegedly received numerous complaints about the leaking problems with the roof of the mall and they neglected to take any steps to have the problems rectified.

The Court reviewed the "negligent inspection" cases and said that "…unlike policy-based decisions of a government that may be immune from suit, the adequacy or quality of the Ministry of Labour's inspections of the Mall is an 'operational' issue that can give rise to civil liability". Furthermore, the Court pointed out that "…actual identification of a serious and specific danger is not a condition precedent to holding the inspector liable". The Court quoted from the Supreme Court of Canada decision in *Ingles v. Tutkaluk Construction Ltd.* where it was stated that an inspector "…will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied." The Court concluded that the claim for "negligent inspection" as against Ontario may not prevail on the merits, but for the purposes of the *Class Proceedings Act* the low "cause of action" hurdle was met.

(b) Identifiable Class:

The Court observed that class definition is important "…because it describes the persons entitled to relief, those who will be bound by the decision and those who are entitled to notice of certification. Class membership must be determinable by stated, objective criteria. And, there must be a rational relationship between the class and the common issues".

In this case the proposed class consisted of all individuals or businesses (except the defendants) who: (1) were occupants in the mall at the time of the collapse, or were the occupants' parents, spouses, children and siblings; and (2) were tenants in the mall at the time of the collapse; or (3) were employed in the mall at the time of the collapse (even if they were not working on the day of the collapse).

The defendants took issue with the class definition, arguing that it was overly broad because it includes potential claimants whose class action claims may be statute-barred if they chose to pursue claims under the *Employment Standards Act, 2000* ("ESA") or to receive benefits under the *Workplace Safety and Insurance Board Act, 1997* ("WSIA").

The Court said that this submission failed on at least five bases:

1. There was no evidence that any of the potential class members have elected either of these statutory routes.

2. Even if potential class members elect to receive ESA or WSIA benefits, that will not exhaust the damage claims. Claims by persons employed in the mall, for example, could include claims for personal injuries or unpaid wages, but also a claim that their place of employment was destroyed and that they have been deprived of the ability to earn an income. Thus, even if certain causes of action or heads of damage were barred by statute, a class member might have other viable claims and should not therefore be excluded from the class.

3. Even if certain class members are barred under the WSIA from asserting certain caus-

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es of action in their personal capacity, the *Workplace Safety and Insurance Board* ("WSIB") could bring a subrogated action. Narrowing the class on the basis of potential WSIA exclusions would have the effect of arbitrarily excluding potential subrogated claims of the WSIB.

4. Adding the "statutorily-barred" exclusions to the class definition would inject a merit-based test for class membership which is impermissible under the case law.

5. It would needlessly complicate the class definition with technical-legal terms that would not be easily understood by the average class member. "A class definition that requires a class member to seek legal advice as to whether or not they are in the class is 'anathema' to the text and spirit of the CPA".

(c) Common Issues:

The common issues were identified as being duty of care, causation and damages. On this criterion, Ontario argued that the hurdle was not cleared as against the Province because there was "no evidentiary basis for establishing the existence of the threshold common issue of whether a private law duty of care is owed by Ontario to the plaintiffs".

The Court stated that Ontario had misunderstood the common issue requirement. The issue to be decided is not "whether there is some basis in fact for the claim itself" but "whether these questions are common to all the class members."

The Court said that it was satisfied that the mall collapse was a "single-incident mass tort event that had a tragic but common impact, in terms of deaths, injuries and economic losses. There is ample evidence (not to mention common sense) that provides me with 'some assurance' that there are common questions (such as what happened? and who's to blame?) that are 'capable of resolution on a common basis'."

(c) Preferability:

The Court was satisfied that this was "precisely the kind of case for which the class action vehicle was designed". Ontario, however, argued that the no-fault compensation scheme provided under the WSIA for class members who fall within the employee category would be fairer and more efficient and thus a more preferable procedure.

The Court concluded that Ontario's submission in this regard was misguided for a number of reasons. The WSIA claims procedure is elective and if implemented as a preferable procedure would "effectively remove the statutory right of class members to choose between the statutory mechanism and this class proceeding". Secondly, there was no evidence as to the number of employees that were injured in the collapse or whether any of them have elected to pursue benefits under the WSIA. Furthermore, Ontario's submission would limit the claims of people working in the mall and who sustained injuries to whatever is recoverable under the WSIA and deny them the opportunity to pursue other claims or other heads of damage. This was unfair and "frankly doesn't make sense". Finally, the existence of a WSIA election would not extinguish the claim but merely put it in the control of the WSIB. In other words, claims that were statute-barred could still be pursued by the WSIB by way of subrogation.

(d) Suitable Representative Plaintiff:

The court was satisfied that John and Elaine Quinte and their restaurant Hungry Jack's were suitable representative plaintiffs. They "fall within the class definition, they understand the duties required of a representative plaintiff and they do not have a conflict of interest with other class members. They have also produced a workable litigation plan that provides a reasonable road-map of both the common issues trial and the individual damage assessments".

The class action was certified and costs were awarded to the plaintiffs.

Quinte v. Eastwood Mall, 2014 ONSC 249 (CanLII)

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