Civil Litigation FOCUS

Alta. CA clarifies 'drop dead' rule

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In Alberta, the "drop dead" rule is one of the *Rules of Court* addressing applications for dismissal due to want of prosecution. Previously, there were conflicting authorities on whether a plaintiff was obligated to advance the action as a whole or against each individual defendant. A recent decision of the Alberta Court of Appeal clarifies the law on the "drop dead" rule.

New *Rules of Court* took effect in Alberta on Nov. 1, 2010. In *Apex Land Corp. v. Heikkila*, [2011] A.J. No. 265, the court ruled on an appeal brought pursuant to the old Rule 244.1. Written reasons were issued on March 17, well after the new *Rules of Court* had come into effect. The new "drop dead" rule, Rule 4.33, is worded differently from its predecessor, Rule 244.1— the new rule shortens the time limit required to demonstrate delay, from five years to two years.

The old rule calculated the delay period as starting from the time the last thing was done in an action that "materially advanced" it. The new rule revises the wording to read "significantly advanced." The new rule also states the court "must dismiss," in contrast to the old rule which stated "shall dismiss." Aside from the shortened time period, the changes do not appear to be substantive.

The old Rule 244.1(1) stated, "Subject to Rule 244.2, where five or more years have expired from the time that the last thing was done in an action that materially advances the action, the court shall, on the motion of a party to the action, dismiss that portion or part of the action that relates to the party bringing the motion."

The new Rule 4.33 states:

"If 2 or more years has passed after the last thing done that significantly advanced an action, the Court, on application, must dismiss the action as against the applicant."

In *Heikkila,* the respondent had been profoundly injured in 1994 while working on a construction project. The appellant owned the site and had hired a general contractor that had, in turn, hired contractors and subcontractors. The respondent commenced his action in 1994 and obtained the consent of the Workers' Compensation Board to sue certain defendants as they were neither an employer nor a worker as defined by workers' compensation legislation. A subsequent issue arose as to whether certain defendants were immune from the lawsuit as a result of being protected by workers' compensation legislation. This issue was the subject of numerous appeals and a judicial review, the result of which was that the sole remaining defendant was the appellant.

The appellant brought an application to dismiss the respondent's claim pursuant to Rules 244 and 244.1 on the basis that the respondent had failed to adequately prosecute his claim. This application was unsuccessful at Master's Chambers. The resulting appeals to the Court of Queen's Bench and the Court of Appeal were also dismissed.

Although it was not necessary to decide the appeal before them, the Court of Appeal used *Heikkila* as an opportunity to clarify two long-conflicting lines of authority regarding the interpretation of Rule 244.1.

The first line of authority held that a plaintiff must have done some "thing" to advance the action against the specific defendant at issue in the application within the relevant time period to successfully defend such an application. The second line of authority held that the thing need only advance the action as a whole.

The Court of Appeal unanimously held that the proper interpretation of Rule 244.1 "is represented by the second line of authority, namely that the thing need only materially advance the action as a whole."

The court stated, "The wording does not mean that the thing must materially advance the action against the individual Defendant bringing the Rule 244.1 application. Rule 244.1 describes the thing only as 'the last thing [that] was done that materially advances the action,' not 'the last thing [that] was done that materially advances the action against the party bringing the application to dismiss.'"

This decision confirms that if there is more than one plausible interpretation of a rule it will most often be decided in the manner that is most likely to preserve the right to litigate. It also makes clear that plaintiffs should be concerned with advancing their action as a whole, rather than advancing their action against each individual defendant.

While creative counsel will likely continue to make arguments in support of the putative requirement to advance an action against each defendant, the Alberta Court of Appeal's decision provides helpful analysis for defeating such applications. ■

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The uncertain boundary between complaints and lawsuits against police

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Under the Ontario *Police Services Act*, documents prepared as a result of a public complaint against a police officer are inadmissible in a civil action. In two recent decisions, the Divisional Court and the Court of Appeal have reached seemingly irreconcilable conclusions on the use that can be made of such information in the context of a lawsuit. The law is currently in an uncertain state, with potential implications for other areas in which administrative and court proceedings may overlap.

In *Penner v. Niagara (Police Services Board)*, [2010] O.J. No. 4046, the Ontario Court of Appeal considered whether findings made in a police disciplinary proceeding preclude re-litigating those same issues in a civil action. The plaintiff in that case had previously filed a complaint under the *Police Services Act* alleging that two officers unlawfully arrested him and that they used unnecessary force. Following a hearing which lasted several days and included testimony from a number of witnesses, the complaint was dismissed—based on specific findings that the officers had reasonable and probable grounds to arrest, and that they had not used unnecessary force. Those findings were ultimately upheld by the Divisional Court.

The defendants then brought a successful Rule 21 motion to strike the civil claim, which raised essentially the same allegations, on the ground of estoppel. The decision of the Court of Appeal, which upheld the striking of the claim, makes no reference to the *Police Services Act* provisions regarding inadmissibility.

Subsequently, in *Andrushko v. Ontario*, 2011 ONSC 1107, the Divisional Court heard an appeal, with leave, based on conflicting decisions at the Superior Court level interpreting the relevant provisions of the *Police Services Act*. *Andrushko* arose out of the refusal, at an examination for discovery, to produce a police officer's personnel file, including any complaints or disciplinary information. After reviewing the applicable *Police Services Act* provisions, the Divisional Court concluded that "confidentiality extends to both information and documents." In particular, the court held that both are subject to a "statutory privilege" which precludes their admissibility in a lawsuit.

In so holding, the court observed that both it and the Court of Appeal had previously reached the same conclusion regarding a similar provision contained in the Ontario *Regulated Health Professions Act*—holding that complaints against health professionals, and any related disciplinary information, are inadmissible in a civil action: *M.F. v. Sutherland*, [2000] O.J. No. 2522 (C.A.); *Middleton v. Sun Media Corp.*, [2006] O.J. No. 1640 (Div. Ct.).

In *Andrushko*, the refusal to produce the police officer's personnel file was therefore confirmed to have been proper. The decision does not refer to *Penner*.

The Supreme Court of Canada has now granted leave to appeal in *Penner*.

In the meantime, an element of seeming uncertainty has been introduced into this area of law. Can the doctrine of issue estoppel override "statutory privilege"? Does *Penner* have implica-

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Has Rule 20 transformed summary judgment motions?

MARC WHITELEY

> As the techniques and methods of motions and trial judges converge, the distinction between their roles may, for all practical purposes, be fading away.

It used to be straightforward: was or wasn't there a genuine issue of fact for trial? Some recent Ontario Superior Court decisions have now upset that paradigm — and raised the question of whether motions judges are supposed to resolve spurious factual disputes, or find the facts.

The uncertainty that has crept into the law centres around changes in the summary judgment provisions of the Ontario *Rules of Civil Procedure* as part of former Associate Chief Justice Coulter Osborne's civil justice reform recommendations. The amendments grant motions judges new tools to engage in the formerly prohibited exercises of weighing evidence, evaluating credibility and drawing reasonable inferences from the evidence.

What has become unclear is whether these changes were intended to simply aid motions judges in disposing of factually unsupported claims and defences, or transform the premise of summary judgment motions and even the role of trials and trial judges in Ontario. The two streams of law that have developed since the changes to the Rules took effect were recently canvassed by the Ontario Court of Appeal's Justice Karen Weiler in *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, [2011] O.J. No. 263.

In her reasons, Justice Weiler described, on the one hand, the interpretations of Justices David Brown and Sarah Pepall, who have embraced an expansive reading of the cumulative effect of the changes to Rule 20 in *Lawless v. Anderson*, [2010] O.J. No. 2017 and *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, [2010] O.J. No. 3987. Justice Brown remarked most recently in *Optech Inc. v. Sharma*, [2011] O.J. No. 377 that viva voce evidence called by a motions judge under Rule 20.04(2.2)'s mini-trial provision was not a forensic right of a party, "but a decision of the motions judge that seeing and hearing live witnesses would assist in performing the fact-finding exercise now available under Rule 20.04(2.1)."

Justice Weiler noted, on the other hand, in *Cuthbert v. TD Canada Trust*, [2010] O.J. No. 630, Justice Andromache Karakatsanis (as she then was) considered that while the analytical review and the availability of oral evidence had given motions judges new tools, it hadn't changed the focus of the inquiry, writing that it was "not the role of the motions judge to make findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment." In her opinion, the changes to the Rule didn't permit substituting "a summary trial for a summary judgment motion."

While *Bruno* didn't resolve the split in the lower court decisions, there are reasons to doubt the shift in summary judgment practice advocated by Justices Brown and Pepall was intended by the Civil Rules Committee. In fact, it appears that if the shift was intended, it resurrects an issue long thought to be buried. If motions judges were meant to have the ability to find facts, wouldn't the Civil Rules Committee have expressly drafted that jurisdiction into the Rules?

It's clear Justice Osborne didn't fault the "no genuine issue for trial" test in his report as the source of the perceived dissatisfaction with the former practice, nor did he disparage the absence of a fact-finding power. Instead, he highlighted the difficulties that had arisen from how the Court of Appeal had confined the scope of the analytical powers of the motions judge.

In light of these considerations, it's reasonable to suggest that motions judges hearing summary judgment motions shouldn't seek to read a power to find facts into the Rules.

At least since *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.*, [1998] O.J. No. 5291 (C.A.) it's been understood, with the exception of affirmative findings on specific points, that if there is no genuine issue requiring a trial, the incidental findings of summary judgment motions judges don't bind subsequent triers of fact.

After unsuccessfully moving for summary judgment, the defendant in *V.K. Mason* appealed out of fear that a trial court would consider itself bound by adverse findings made by the motions judge. In quashing the appeal, the court indicated the fear was unfounded, explaining that such findings were little more than explanations for the motions judge's ruling on whether there was a genuine issue for trial. The court's opinion highlights what has traditionally been at issue on a motion for summary judgment: the genuineness of factual disputes, not the adjudication of the facts themselves.

Given the current state of the law, practitioners bringing or defending summary judgment motions must now give serious consideration to the possibility of being bound by unexpected factual findings which other tribunals could treat as *res judicata*. The question is, will we see more appeals like the one brought in *V.K. Mason* where parties to a summary motion are concerned about the effect of incidental adverse findings of fact? It is too early to tell, but the issue is one with which practitioners will have to cope while the law remains uncertain.

For now, and as *Bruno* makes clear, it remains to be seen how the Court of Appeal will ultimately interpret the ends to which the new powers granted to motions judges can be directed. It seems clearer that, as the techniques and methods of motions and trial judges converge, the distinction between their roles may, for all practical purposes, be fading away. ■

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Allegations of misconduct require 'full particularity'

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tions for other statutory complaint processes which contain similar provisions?

Subject to clarification by the Supreme Court of Canada, there are other rules which apply to civil claimants seeking police complaint and disciplinary information. In *Mohamed v. Durham Police*, [2011] O.J. No. 1146, as in *Andrushko*, the plaintiff sought production of "any public complaint or discipline files" at the defendant police officers' examinations for discovery. Nothing was pleaded in this regard, however, and the plaintiff had no evidence suggesting that any complaint or discipline history existed.

The court held that, apart from the effect of the *Police Services Act* provisions, the questions were properly refused given the lack of a proper foundation in the statement of claim. As well, the court held, allegations of a history of misconduct cannot be pleaded in a "vague and general" manner. Rather, such allegations require "full particularity," "commensurate with their level of seriousness." The decision in *Mohamed* is currently under appeal.

Disclosure of complaint and disciplinary information is thus by no means automatic, even assuming it is admissible. Until that is clarified, the boundary between complaints and lawsuits against police will no doubt remain a fertile one for issues to arise. ■

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