

Civil Litigation

Ontario Court of Appeal upholds dismissal of motion to amend claim

By **Karunjit Singh**

(April 26, 2023, 4:35 PM EDT) -- The Ontario Court of Appeal has upheld a decision dismissing a motion by the owners of an apartment building to amend their statement of claim concerning an explosion that occurred in the building in 2010.

The owners claimed that the explosion led to the forced sale of the building, and sought to amend their claim to advance personal claims for damages and increase the prayer for relief from \$7.5 million to \$57.5 million.

In *Avedian v. Enbridge Gas Distribution Inc.*, 2023 ONCA 289, Justices Sarah E. Pepall, Gary Trotter and Ian V.B. Nordheimer upheld the motions judge's findings of presumed prejudice, finding the amendments were sought for a case that was previously listed and was to be again listed for trial with an expedited date.

"The addition of these new claims could change the nature of the evidence to be called and would, almost certainly, require amendments to, or new, expert reports on damages," the court found. "Those realities would cause further delay in a case that is already over a decade old."

The decision confirms that an amendment of pleading is not an absolute right and that such a request must be looked at in the context of the stage and the history of the litigation, said C. Kirk Boggs of Lerner LLP, counsel for the respondents, Alpha Delta Heating Contractor Inc. and Aubrey Leonard Dey.

"At its core, this is about fairness to the parties," he told Law360 Canada. "Last minute amendments that would result in the tilting of the playing field if the matter proceeded to trial with the amendment being granted or the trial being delayed will not be countenanced by the court." Boggs also acted as an agent for the counsel of respondents, TQB Heating and Air Conditioning and Brentol Bishop.

The appellant plaintiffs, Bedros (Peter) Avedian, Claudio Petti and Mario D'Orazio, owned, through their holding companies, a numbered company that owned the building in which an explosion occurred in 2010.

The original statement of claim was issued in July 2012. The building was sold in 2015 and the claims of the numbered company that owned the building were assigned to the appellants. The trial date for the action was set for February 2020. However, the trial did not proceed as a result of a motion for summary judgment that was subsequently appealed. The trial management process resulted in this motion to amend the appellants' statement of claim being brought in late 2021.

The other respondents to the motion were the defendants, Enbridge Gas Distribution Inc., Enbridge Solutions Inc., Enbridge Inc. and Lakeside Performance Gas Services Ltd.

The motions judge had dismissed the motion to amend the statement of claim, finding that the motion had been brought late, after the action had been set down for trial, and without a request for leave to do so.

The motions judge also concluded that the claims sought to be advanced through the amendments were different from the claims previously advanced in the action, and materially altered the factual framework and the evidence that would have to be called.

She found that prejudice to the defendants could be presumed from the delay in the amendments being sought, given that the action was ostensibly ready for trial. The motions judge also questioned whether the new claims had a proper legal foundation noting that the plaintiffs asserting personal losses were not even shareholders of the number company that owned the building.

The appellants contended that the motions judge erred in these findings, but the Court of Appeal rejected their argument, finding that the motion judge had properly considered all the relevant factors in reaching her decision.

"We agree with the motion judge's finding of presumed prejudice given that these amendments were sought for a case that was previously listed for trial and was to be again listed for trial with an expedited date," the court wrote in its reasons.

The court also agreed that it was difficult to see how the appellants could have a personal claim arising out of damages to an apartment building at a time when the building was owned by a company.

The questionable foundation for the claims was a proper matter for the motion judge to consider in terms of deciding whether the circumstances of the case justified allowing the amendments to be made, the court found.

Boggs said the decision reinforced that parties will not be able to ignore corporate structures they have created in relation to a piece of litigation.

Counsel for other parties were not immediately available for comment.

Counsel for the appellants was Christine G. Carter of Papazian Heisey Myers.

Jennifer O'Dell of Lerner's LLP also acted as counsel for Alpha Delta Heating Contractor Inc. and Aubrey Leonard Dey, and as agent for counsel for the respondents TQB Heating and Air Conditioning and Brentol Bishop.

Counsel for Enbridge Solutions Inc. were David Reiter and Brian Chung of Aird & Berlis LLP.

Counsel for Enbridge Gas Distribution Inc. and Lakeside Performance Gas Services Ltd. was James Norton of Zuber & Company LLP.

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