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Blaney McMurtry
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Commercial Litigation Update

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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:

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"The idea was that cases that had no merit, either on the plaintiff's side or the defendant's side, could be weeded out by the court at an early stage..."

ONTARIO'S NEW RULES FOR SIMPLER, FASTER, LOWER-COST RESOLUTION OF COMMERCIAL DISPUTES RAISE CONCERNS AT THE COURT OF APPEAL

John Polyzogopoulos

The *Rules of Civil Procedure* in Ontario require courts to apply and interpret the rules of court in a way that helps the parties secure the "just, most expeditious and least expensive determination of every civil proceeding on its merits".

Yet anyone who has been involved in a lawsuit knows that it can often take years to get the case to trial and cost many tens, if not hundreds, of thousands of dollars to get there.

This article summarizes the latest efforts of the judicial system to make the litigation process faster and more affordable.

Rule 20, the Summary Judgment rule, was initially introduced with wholesale amendments to the *Rules of Civil Procedure* in 1985. It allows a party to bring a motion to the court for judgment on its claim, or judgment dismissing the claim, on the basis that there was no genuine issue for trial. The idea was that cases that had no merit, either on the plaintiff's side or the defendant's side, could be weeded out by the court at an early stage, allowing the parties to secure a just, expeditious and less expensive determination on the merits. The procedure involved a motion whereby a paper record (affidavits and transcripts of cross-examinations) would be put before the judge and he or she would decide the case without the need to spend the time and expense of a full-blown trial with live witnesses.

While it may have been an attractive idea in theory, the courts wanted to assure that the process would be fair to the parties and that they would not be precluded from telling their whole story. Through a long line of cases at the Court of Appeal level, the law developed such that in deciding whether or not there was a genuine issue for trial, a judge was not permitted to make findings of credibility or draw inferences from certain evidence or the lack of evidence. This basically allowed a party to deflect a motion for summary judgment if it could raise an issue of credibility that might have a chance of success.

The result was that it was difficult to succeed on a motion for summary judgment, forcing parties to go to trial or settle unmeritorious cases because of the sheer cost of trying a case. It also left parties who had brought a motion for summary judgment, and failed, with a large legal bill (for both their lawyer and the other side's lawyer) and put them farther behind in getting the matter resolved than if they had not brought the motion in the first place.

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"...before [judges] grant summary judgment they must be confident that they have just as good an appreciation of the evidence and issues having read the documentary record as they would have if they had sat through a one week or one month trial hearing live witnesses."

John Polyzogopoulos is a partner in Blaney McMurtry's commercial litigation group. His practice covers a wide variety of commercial matters. He acts for parties in oppression remedy and partnership disputes and for debtors and receivers/trustees in insolvency proceedings and all other aspects of debtor-creditor and banking law. He is experienced in handling injunction cases, including obtaining Mareva injunctions that freeze assets that are about to be removed from Ontario to avoid creditors, Anton Piller orders that authorize the private search and seizure of documents that are relevant to cases but are about to be destroyed, and injunctions preventing employees and others from breaching their non-competition obligations.

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In an effort to reverse the line of cases that restricted the powers of a judge deciding a motion for summary judgment, the rules were amended effective January 1, 2010, and judges were specifically given the power when reviewing the written record to "weigh the evidence", "evaluate credibility" of a witness and "draw any reasonable inference from the evidence". It was expected that this would make it easier for judges to grant summary judgment in many cases where their hands had been tied previously. This would allow a larger number of weak cases to be weeded out at an early stage, saving the parties and the court system a lot of time and money.

In a recent decision by a five-judge panel of the Court of Appeal (it's usually three judges) in a case called *Combined Air*, however, the scope of the new rule changes has been limited.

The Court of Appeal has created a new test called the "full appreciation" test. The court has said that in deciding whether to use their powers to weigh evidence, assess credibility and draw inferences from the evidence, motions judges are required to ask the following question: "Can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?"

In trying to explain what is meant by "full appreciation", the court indicated that in "cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process". It suggested that cases that were more appropriate for summary judgment were document-driven cases with limited testimonial evidence or cases that had very limited contentious factual issues that could be determined following hearing from perhaps only one or two live witnesses at the motion on very discrete issues.

In my view, the result of this decision will be to inhibit judges from using the powers that the new rules gave them in deciding motions for summary judgment. Rather than tell judges to look at all the evidence and determine whether they have a reasonable appreciation of all the evidence and issues to be able to render judgment, thereby promoting the intent of the rule amendments to allow for a speedy and cost-effective resolution where possible, the Court of Appeal has told judges that before they grant summary judgment they must be confident that they have just as good an appreciation of the evidence and issues having read the documentary record as they would have if they had sat through a one week or one month trial hearing live witnesses. My expectation is that such instances will be rare and motions for summary judgment will continue to be considered too risky to be worthwhile in many cases.

It remains to be seen whether the Supreme Court of Canada will choose to look at the *Combined Air* decision. Meanwhile, it will be interesting to see how motions judges interpret the guidance given to them by the Court of Appeal. ■

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"While the implied duty of parties to negotiate in 'good faith' has been entertained in Canadian jurisprudence, the common law generally has not recognized an independent duty between arm's length parties to negotiate in good faith in ordinary commercial transactions."

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DEAL OR NO DEAL: DO YOU HAVE A DUTY TO NEGOTIATE IN GOOD FAITH?

Sarah S. Subhan

The following scenario may be familiar to you: You have been negotiating an important deal. A letter of intent or some other preliminary agreement has been signed. You have exchanged numerous drafts of the agreement with the other side. Then, negotiations break down, you withdraw from the deal and the other party sues your company for breaching the preliminary agreement. The question then becomes, did the preliminary agreement constitute a contract at law and will a law suit for breach of contract succeed?

It is quite common for parties to enter into some form of a negotiating or preliminary agreement, whether it takes the form of a letter of intent or a memorandum of understanding. Common standard terms in such preliminary agreements include that the agreement is "non-binding", that the deal is subject to certain conditions precedent (conditions that must be met for the deal to close), such as the execution of definitive agreements with specific terms, and a clause that the parties "agree to negotiate in good faith".

If the preliminary agreement stated specifically that it was "non-binding" or contained unfulfilled conditions precedent, the court would have a difficult time finding that there was an enforceable contract, and the breach of contract claim would likely fail. It will not matter that the preliminary agreement contained an enforceable duty to negotiate in good faith clause to reach a definitive agreement --- if there is no contract, there is no breach of contract. This is in contrast to some American jurisdictions, such as Illinois, that have established a separate cause of action for breach of the duty to negotiate in good faith. Similarly, under New York law, agreements to negotiate in good faith are enforceable if the parties have reached an agreement on the fundamental terms and have expressed an intent to work together to finalize an agreement.

While the implied duty of parties to negotiate in "good faith" has been entertained in Canadian jurisprudence, the common law generally has not recognized an independent duty between arm's length parties to negotiate in good faith in ordinary commercial transactions. However, if there are certain special or unique contracts resulting in a special relationship, or there is an existing contract where the parties' prior conduct may be relied upon, then there may be a duty to negotiate in good faith.

Special relationships that have given rise to a duty of good faith include, but are not limited to, employment contracts, the relationships of franchisor and franchisee or insurer and insured, fiduciary relationships contracts, classic tendering situations and specific cases relating to some requests for proposal.

Given the present state of Canadian law, we make three suggestions to clients involved in negotiations:

(1) Take care before signing any type of negotiation agreement. You may find yourself bound to something before you are ready;

(2) An agreement to negotiate in good faith can be a powerful tool to settling the parameters of a proposed transaction and establishing a

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duty to work toward contract completion, so think carefully about the language of the agreement and use an objective standard (e.g. fair market value) to establish good faith, and

(3) Incorporate a deposit or a "kill fee" into your negotiation agreement that establishes specifically when the negotiation agreement ends.

As with many areas of the law, no matter the jurisdiction, the key to success lies in foresight and careful drafting. ■

EXPECT THE BEST

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