Toronto Law Journal

SLAPPed! A One Year Post-Mortem Following *Platnick* and *Pointes Protection*

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In September 2020, the Supreme Court of Canada released two much-anticipated decisions which clarified the scope of anti-SLAPP legislation in Ontario.[1] As we approach the end of 2021, it is clear that anti-SLAPP motions (and appeals) continue to dominate the defamation landscape in Ontario.

Motion judges have adjudicated over twenty (20) anti-SLAPP motions since the Supreme Court decisions were released, and at least nine (9) appeals have dealt with the merits of anti-SLAPP motions, with many more in the queue that have been argued, taken under reserve, or otherwise scheduled.

Have the courts' interpretation and application of the legislation been consistently applied across the board?

This short article will focus on the courts' consideration of the harm allegedly suffered by plaintiffs, and when that harm is sufficiently serious to warrant the continuation of the litigation. As will be explored in further detail below, it appears that notwithstanding the cogent articulation of the test by the Supreme Court, judges across the province diverge on how to assess harm in the context of defamation claims for the purposes of anti-SLAPP motions.

THE LAW AND ITS OBJECTIVE

To recap, the "anti-SLAPP" amendments to the *CJA* were intended to provide a mechanism to weed out litigation of doubtful merit which unduly discourages and seeks to restrict free and open expression on matters of public interest.[2] On the other hand, a case should be allowed to proceed if the plaintiff appears likely to have suffered significant harm that outweighs the importance of encouraging debate and free expression.

A moving-party defendant bears the initial burden to satisfy the court on a balance of probabilities that the proceeding in question arises from an expression made by the defendant, and that the expression relates to a matter of public interest. If the defendant meets that threshold, the burden shifts to the plaintiff to satisfy the court that (i) there are grounds to believe that the proceeding has substantial merit, (ii) there are grounds to believe that there is no valid defence(s), and (iii) the harm suffered by the plaintiff as a result of the defendant's

[1] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 222 ("***Pointes Protection***"), and *Bent v. Platnick*, 2020 SCC 23 ("***Bent***")
[2] *Bernier v. Kinsella et al.*, 2021 ONSC 7451, citing with approval *704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685

expression is sufficiently serious that the public interest in permitting the plaintiff's action to proceed outweighs the public interest in protecting the defendant's expression.

It is the last prong of the test – s.137.1(4)(b) – that is said to be the "core" of the analysis and the "heart of the legislation".[3] Interestingly, a review of some cases since the Supreme Court decisions suggests that courts have taken different approaches in assessing harm at this early pre-screening stage during the anti-SLAPP motion process.

In particular, there appears to be divergence in the scope and strength of reliance on the presumption of damages (at-large) in defamation actions.

For example, recently the motion judge in *Bernier v Kinsella*[4] found as a fact that Mr. Bernier – the leader of the People's Party of Canada – would have difficulty proving that the defendant's allegations that Mr. Bernier was effectively a racist or xenophobic caused him reputational harm. The Court relied in part on the fact that there was widespread characterization of Mr. Bernier and the PPC using similar terms.

Notably, the motion judge in *Bernier* concluded the analysis of s.137.1(4)(b) by stating: "[i]n defamation actions, harm can be presumed, but that presumption does not apply in a motion under s. 137.1."

Plaintiffs' actions were similarly dismissed notwithstanding false and serious allegations that a Plaintiff was a disgraced neo-Nazi sympathizer,[5] and that a Plaintiff was connected to violent acts.[6] The motion judge in those cases found that relying upon the traditional principle that damages in a defamation action can be at-large, i.e., presumed, was insufficient, and that plaintiffs must lead evidence of harm or damage, especially when there could be other causes of the alleged reputational decline.

In the case of *Lemire v Burley*,[7] the motion judge noted that there is no minimum threshold to be met by the plaintiff in establishing harm, but the *magnitude* of the harm is relevant for a determination if the harm is sufficiently serious such that it outweighs the public interest in protecting the expression. Relying on *Pointes Protection,* the motion judge in *Lemire* ruled that a plaintiff is not required to prove harm or causation, but is required to provide evidence upon which the court can draw an inference of likelihood of the existence of the harm and the relevant causal link. The court noted that in a defamation action, harm is presumed, and the plaintiff is still required to support his claim for special damages, but the court is not required to make a definitive determination of harm or causation.[8]

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[3] *Pointes Protection* at paras 33, 62
[4] *Bernier v Kinsella*, 2021 ONSC 7451
[5] *Levant v Demelle*, 2021 ONSC 1074
[6] *Rebel News v. Al Jazeera Media*, 2021 ONSC 1035
[7] *Lemire v Burley* 2021 ONSC 5036
[8] *Lemire* at para. 144, citing with approval *Pointes Protection* at paras. 69 – 71

In *Lemire*, there were other potential causes of the harm that Mr. Lemire claims to have suffered. For that reason, he faced a significant challenge in establishing the seriousness of the harm that may be causally linked to Mr. Burley's expressions; the motion was allowed and the action dismissed.

These decisions appear to minimize the presumption of damages when there are other potential causes of harm, or at the very least demonstrate how the presumption could be overcome, even in instances with seemingly significant and damaging allegations that strike at the core of one's reputation.

These cases can be contrasted with others that support the opposite proposition – namely, that the gravity of some statements may be sufficient on their own at the early pre-screening stage to infer a likelihood of serious harm to one's reputation.

In *2504027 Ontario Inc. o/a S-Trip! v. Canadian Broadcasting Corporation (CBC) et al.*,[9] the motion judge considered the presumption of damages in defamation claims, albeit finding that the presumption was not enough to allow the action to proceed. The motion judge in that case considered whether a corporate plaintiff that was in the business of organizing trips was harmed by allegedly defamatory statements implying that students had easy access to alcohol, were subject to inadequate supervision by the plaintiff, and engaged in sexually suggestive activities organized by the plaintiff.

At first glance, these seem like quite damning statements that would impact the corporation's business activities. However, the motion judge relied on earlier jurisprudence supporting the principle that while harm can be presumed in a defamation action, the presumption is weaker in the case of a corporate plaintiff, because "a company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money."[10]

As in *Bernier*, the motion judge found that there were other sources that may have caused the plaintiff harm, and it was too difficult to isolate the harm the plaintiff stated it suffered from the expression with harm allegedly suffered through other sources. The court found that at best the plaintiff showed a weak case of harm, and had not met the prerequisite of showing that the harm was caused by the defendants' expression. The balance of the public interests at stake favoured free expression. The motion was allowed and the action dismissed.

Paul v. The Corporation of the Township of Madawaska Valley, 2021 ONSC 4996, is another recent decision where the motion judge allowed the action to proceed. In dismissing the anti-SLAPP motion, the motion judge considered in addition to alleged financial harm, damages "at large" in reliance on *Hill* that general damages are presumed from the publication of the libel, "even in the absence of any proof of actual loss."[11] The motion judge reiterated that it is not

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[9] *2504027 Ontario Inc. o/a S-Trip! v. Canadian Broadcasting Corporation (CBC) et al.*, 2021 ONSC 3471
[10] *Barrick Gold Corp. v. Lopehandia* (2004), 2004 CanLII 12938 (ON CA), 71 O.R. (3d) 416, at para. 49.
[11] ***Paul v. The Corporation of the Township of Madawaska Valley*, 2021 ONSC 4996 at para. 192**

the role of the Court on an anti-SLAPP motion to assess general damages. Rather, based on the evidence presented, there was a "sufficiently serious" claim by the Plaintiffs for general damages, which could amount to "more than nominal" damages and could serve as the basis for the Plaintiffs to proceed with their claim.

Brief Commentary and Conclusion

Since the pivotal Supreme Court decisions in *Pointes Protection* and *Bent* were released last September, at least thirteen (13) motions were granted in whole or in part, thereby eliminating Plaintiffs' claims that otherwise could have been substantially meritorious with no correspondingly valid defences. At least six (6) motions were dismissed. The Court of Appeal for Ontario has generally upheld the motion judges' determinations, overturning only four (4) anti-SLAPP lower-court decisions for a variety of different reasons.[12]

It appears that courts are still grappling with how to assess a plaintiff's alleged harm at such early stages in legal proceedings and weighing that harm against the harm of discouraging expressions on matters of public interest.

Some decisions have leaned heavily on the presumption of harm and damages 'at-large', while other decisions analyze more thoroughly whether the purported harm was actually caused by the expressions at-issue (as opposed to other factors), and whether there is actual evidence of tangible harm (reputational or monetary) that was caused by the offending party.

What is clear is that plaintiffs should consider the risk of pursuing litigation when the expression(s) at-issue even remotely engage matters of public interest. Defendants and their counsel focus right away on the viability of bringing anti-SLAPP motions, and with favourable cost consequences for moving parties under the legislation, even the dismissal of these motions significantly increase the high cost of prosecuting viable claims.

If the last year has been any indication, there is a strong presumption that the anti-SLAPP battleground will continue to play an important role as the anti-SLAPP jurisprudence continues to mature.

[12] Some appellate decisions rendered in the last year arose from motions argued and decided prior to the Supreme Court's release of *Pointes Protection* and *Bent*.

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New Estate Forms Coming to Ontario in 2022

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2022 is shaping up to be a formative year for estate practitioners in Ontario. In addition to the amendments to the *Succession Law Reform Act*, RSO 1990, c S.26 (the "***SLRA***") announced earlier this year, the estate administration procedures set out in the *Rules of Civil Procedure*, RRO 1990, Reg 194 (the "***Rules***") will also be amended as of January 1, 2022.

One of the biggest changes being ushered in with the updates to Rules 74, 74.1 and 75 are new estate forms. The new court forms were released in October of 2021 and can be accessed online on the Ontario Court Forms website, although they will not be required when applying for certificates of appointment of estate trustee with or without a will (more frequently referred to as "probate") until January 4, 2022. While it may take some time for practitioners to adjust to using the new forms, in the long term, we expect them to improve the process of applying for probate. Having been re-formatted and simplified, the new forms are more direct and appear to be more user-friendly. We are optimistic that they will make the process of preparing an application for probate less demanding and more accessible.

Fewer Probate Forms and Rules

In total, 23 new estate forms are being introduced to replace 56 of the current forms. This marked reduction in the number of forms was achieved by creating essentially one form for each component of a probate application, ranging from the preparation of an application for a certificate of appointment (Form 74A) to the preparation of court orders (74I). Previously applicants had to choose from a variety of forms for most stages of the process, depending on a variety of factors, including:

- whether a deceased person executed a will or not;
- if the deceased did execute a will, whether it dealt with limited assets; and
- whether the applicant was a corporation or an individual.

One of the forms currently required for applying for probate has also been eliminated - the Notice of Application (Forms 74.07 and 74.17). This reduction in the number of forms to choose from should streamline the process, making it simpler and more straight forward.

In addition to the reduction in forms, there will also be fewer rules to consult when applying for a certificate of appointment. Starting on January 1, 2022, when the estate *Rules* are amended by Ontario Regulation 709/21, both Rules 74.04 and 74.05 will be revoked. These Rules set out the procedure for bringing an initial application for a certificate of appointment - Rule 74.04 currently applies to applications with a will and Rule 74.05 applies when there is no will. A new version of Rule 74.04 will take their place and govern all applications for a certificate of appointment of estate trustee.

The paperwork for seeking a certificate of appointment after the probate process has already commenced has also been streamlined. The requisite form, Form 74J, will take the place of six different forms and will cover applications to appoint a succeeding estate trustee, the nominee of a foreign estate trustee, and an estate trustee during litigation, in addition to confirmation of an appointment.

Forms Keep Pace with Legislative Changes

Changes to the new probate forms, particularly Form 74A, also reflect the recent amendments to the *SLRA*. Effective January 1, 2022, marriage will no longer automatically revoke a pre-existing will in Ontario, and provisions in a will for the benefit of one's spouse by marriage will no longer apply if a couple is separated at the time of death (as defined under new section 43.1 of the *SLRA*), unless a contrary intention is expressed by the deceased. As a result, Form 74A seeks more personal information about deceased persons related to marriage and separation, but this additional information is not particularly invasive and should not be onerous for those applying for probate to obtain for the purposes of the application. Also, if lawyers or paralegals assist clients in executing a will remotely using audio-visual communication technology, those professionals will need to swear an affidavit confirming that they are licensed by the Law Society, thereby establishing that those wills comply with the requirements for remote execution set out in subsection 4(3) of the *SLRA*, as amended earlier this year. Our precedent Affidavit of Execution that includes a statement that the witness to a will executed remotely is a licensee of the Law Society is available here.

New Forms Encourage the Use of Online Tools and Resources

Other minor tweaks to the forms are helpful and reflect the current digital age. For example, the new forms for a small estate certificate direct applicants to more free online resources than the previous forms did. The notice provided by the Registrar when a will or codicil is deposited with the court also references additional online resources. This is a positive development, as directing Ontarians to online resources with useful information about the probate process should improve transparency, and make the process easier to navigate for lawyers and applicant estate trustees alike.

Also, on Form 74A, the application for a certificate of appointment, applicants are now provided with a space to enter estate beneficiaries' email addresses. This is a logical update, given that application materials may now be served on beneficiaries *via* email under Rule 74.04(7)(b), and can also be served this way after the new Rule 74.04 comes into force in January. Similarly, Form 75.1, Notice of Objection, will also include a field for entering the email address of either the objector or counsel for the objector.

New Notice of Objection Requests Details

Form 75.1, Notice of Objection, has been updated to provide objectors to the appointment of an estate trustee with a greater opportunity to specify not only the grounds upon which they object, but to also provide details. Asking would-be objectors for this additional information

could help weed out inappropriate objections at an early stage. The Ontario Superior Court of Justice held in 2020 that a Notice of Objection that is based solely on suspicion, rather than evidence, may be struck out on the basis that it is frivolous and vexatious: see *Dessisa and Wolde v. Demisie*, 2020 ONSC 641. Requiring a Notice of Objection to provide more detail about why a person is objecting to the issuance of probate may help elucidate whether or not there is merit to an objection earlier on in the process.

Forms Will Prioritize Service on Government Bodies Representing Beneficiaries

The new forms also appear to focus on ensuring that probate applications reach government entities, especially the Office of the Children's Lawyer, and are easier for those entities to process. An applicant will be required to confirm on Form 74A that notice of the application has been served on the Children's Lawyer if an unborn child or unascertained person may have an interest in an estate. While the requirement to serve such notice on the Children's Lawyer was incorporated into the *Rules* in the 1990s under Rule 74.04(5), the previous forms did not remind applicants of this requirement. Additionally, applications for a small estate certificate now require applicants to set out the value of a beneficiary's interest in the estate if that beneficiary is a minor or an incapable adult and service is required on the Office of the Public Guardian and Trustee or the Children's Lawyer regarding that beneficiary's interest. While these changes may appear relatively minor, they are noteworthy and commendable in that they are expected to make it easier for the government to protect the interests of vulnerable beneficiaries – specifically, minors, incapable adults, unborn children, and unascertained persons.

Conclusion

We welcome the new estate forms, particularly how they streamline and simplify the Rule 74 probate process. The current forms can be complicated - not just for the public, but even for seasoned estate practitioners. It can be easy to overlook or miss a requirement or make a mistake, even if an application for probate is carefully prepared, given the plethora of forms to choose from. Hopefully the new forms will make the probate process more straightforward and user-friendly for all Ontarians.

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"I'm Not Dead Yet" – Monty Python
Rules of Evidence Make a Comeback in Civil Cases

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Counsel litigating civil cases know that the rules of evidence tend to be applied less strictly in civil, as compared to criminal, matters. Some counsel go as far as to urge, and some judges agree, that virtually anything may be admitted in civil matters. Non-compliance with the rules of evidence is then considered as relevant to weight only. On motions, affidavits replete with opinion and argument are sometimes sworn by fact witnesses, or even by counsel, under the justification of merely setting out "the background". In the lead up to trial, judges urge counsel to agree on joint books of documents, which then are entered as exhibits, sometimes without specification as to whether each document is admissible and, if so, for what purpose.

A practical approach to admissibility is of course necessary for the due functioning of the justice system. An already stretched system would collapse if counsel were to object as a matter of course to every document or were to refuse to cooperate in compiling joint books. However, Ontario courts, in three recent cases, have emphasized that pragmatism does not justify disregarding important rules of evidence.

In *Girao v Cunningham*, the court was seized of an appeal in an automobile accident case. As the Court of Appeal noted:

> On the eve of trial, the defence dropped a massive and selectively redacted 16 volume "Joint Trial Brief" on the appellant, who has substantial difficulty with the English language, something of which the defence was well aware. The content of the Brief can be summarized as falling into several categories: medical records, notes, and reports; employment, educational, and tax records; and documents relating to the collision and insurance claims. The Brief became the basis of the trial record in an unfair way that was inconsistent with the trial practice directions of this court.[2]

The trial judge's approach, it would appear, "was to simply accept all the volumes" and to mark them as numbered exhibits.[3] On appeal, it became apparent that many of the documents in the brief ought not to have been admitted.

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[1] The views I express in this article are mine alone. I am not in any way speaking for the Ministry of the Attorney General. I am grateful for the assistance of student-at-law Kevin Szeto of the Crown Law Office, Civil.

[2] 2020 ONSC 260 at para. 21.

[3] *Id.* at para. 29.

The Court recognized that "[i]t is quite usual in civil actions for counsel to prepare an agreed trial document brief containing documents that are admitted as authentic and admissible". However, because it is not unusual "for counsel to differ on the precise basis on which a document in the brief is being tendered or whether it was to have been included" […], "it is the trial judge's responsibility to get the requisite clarity when the documents are made exhibits, especially concerning a document's hearsay content".[4]

The Court went on to provide a useful guide to counsel and trial courts, holding that "[c]ounsel and the court should have addressed the following questions, which arise in every case, in considering how the documents in the joint book of documents are to be treated for trial purposes":

1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?

2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?

3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?

4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?

5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?

6. Does any party object to a document in the document book, if it has not been prepared jointly? [5]

[4] *Id*. at paras. 25-26. Citing *1162740 Ontario Ltd. v. Pingue*, 2017 ONCA 52, 135 O.R. (3d) 792 at para. 40.

[5] *Id*. at para. 33.

The Court also pointed out that:

> It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings.[6]

And finally, the Court noted that problems arise "because the parties have not turned their minds to the issues in sufficient detail before the document book is tendered as an exhibit. This must change as a matter of ordinary civil trial practice".[7]

Bruno v. Dacosta was another case in which a joint brief was admitted into evidence without sufficient analysis. The Court of Appeal, after addressing the grounds of appeal, discussed this issue under the heading "Some Trial Practice Notes". The Court noted that: "[t]here were errors made in the admission and use of the joint document book that further frustrated appellate review and that should not happen in other cases" and that, although the Court had released the *Girao* decision, "… this situation presents an opportunity for further reflection on trial practice".[8]

The Court began that reflection by emphasizing that "[t]he most obvious point, which nonetheless bears emphasis, is that any agreement between counsel as to the admissibility of documents is not automatically binding on the trial judge, who remains at all times the gatekeeper of the evidence".[9]

At trial, the parties had agreed as follows:

> The documents contained in the Joint Document Brief are relevant, authentic and the dates of the documents are accurately reflected on their face. Neither of the parties are to be considered as having accepted the truth of the contents of all of the documents. Further, both parties reserve their rights to challenge what is stated in the documents, lead further evidence which may or may not be inconsistent with the documents and argue as to the interpretation and weight to be given to the documents.[10]

With respect to that agreement, the Court of Appeal held:

> This agreement was not helpful to the trial judge because of its ambiguity, which he should have probed immediately and carefully with some obvious questions,

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[6] *Id*. at para. 34.

[7] *Id*. at para. 35. Counsel should also have regard to the important discussion in the case about the differences between s. 35 and s. 52 *Evidence Act* notices. See para. 42-48 of the decision.

[8] 2020 ONCA 602 at paras. 53-54.

[9] *Id*. at para. 55.

[10] *Id*. at para. 56.

> among them: If a document is not challenged, is its hearsay content deemed to be admitted? If not "all" documents, then which?
>
> The approach taken by counsel and permitted by the trial judge only invited further contention, which inevitably emerged.[11]

The Court of Appeal condemned the lack of precision that accompanied the admission of the joint brief, in the most emphatic terms:

> This case highlights the deplorable tendency in civil cases of admitting evidence subject only to the weight to be afforded by the trial judge: "Seduced by this trend towards [evidentiary] flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight": *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2016 FCA 161, per Stratas J.A. at para. 83. This is legal heresy, as Stratas J.A. noted, citing *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 59. I agree with his trenchant comments.[12]

In another recent decision, *Polgampalage v. Devani*, Justice Myers made clear that evidentiary rigour should be brought to bear not only at trials, but on motions too.

> The Court was seized of a change of venue motion. In support of the motion, the plaintiff filed an affidavit from a law student at the plaintiff's firm. The affidavit contained opinion and argument as to the merits of the change of venue motion - the latter of which, the court held, "at best" belonged in a factum, not in an affidavit.[13] The affiant recited facts and events that could not have been within the affiant's knowledge, with no specification as to the source of the information. The affiant attached exhibits containing hearsay for the truth of the hearsay found therein. In key instances, the affiant used that most common means of obfuscation: the passive voice. As Justice Myers noted: "[w]hile things happened, I am not told who did them or for what purpose".[14]

Citing the Court of Appeal's decision in *Bruno*, Justice Myers made his views clear:

> I find it very disappointing that a principal allowed a student-at-law to swear and submit the affidavit that is before me. Closer supervision was required.
>
> The pandemic has been a difficult time for everyone. I have special empathy for students and young lawyers who may be deprived of close contact with mentors

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[11] *Id.* at paras. 57-58.

[12] *Id.* at para. 65. As was the case in Girao, the Court also provided helpful clarification as to the proper scope of s. 35 notices: see paras. 61-62.

[13] 2021 ONSC 1157 at para. 34.

[14] *Id.* at para. 10.

> and senior peers to assist with their training. Partners, employers, and mentors may not even realize how much their juniors are suffering from the lack of ready access to more experienced colleagues whether for formal training, informal feedback, or even serendipitous educational opportunities that may arise from casual chats in office corridors.
>
> But all students and lawyers also have independent duties to scrutinize with great care every word to which they put their names. During the pandemic in particular, juniors need to insist that they receive full instructions and that their work product is properly reviewed. As difficult as it may be at times, junior lawyers and students alike must guard against allowing employers, clients, or anyone to put their integrity or reputations at risk by inadequate instructions or releasing inadequately reviewed material under their names.[15]

No one, and no doubt judges least of all, enjoys having to slog through objections to affidavit evidence filed on motions. The temptation is to allow all affidavit evidence to be admitted, subject to argument about weight. That approach, however, can lead to added costs to the parties and to confusion at the argument of the motion itself.

For instance, a party files an affidavit addressing at length issues that are irrelevant to the motion and impermissibly arguing that certain inferences must be drawn from the facts. Assume that, were the court to comment adversely on the irrelevant issues, those comments could affect the respondent's position in the litigation going forward. The respondent faces a dilemma: should the respondent put faith in the court to accord no weight to the irrelevant evidence, or must the respondent hedge by reluctantly, and at considerable expense, filing responding evidence on the irrelevant issues? On cross, can the respondent confidently ignore those issues, or should the respondent cross-examine on them "just in case", perhaps turning a one-hour cross-examination into one that may last a full day or more? At trial, this dilemma would not arise as the irrelevant evidence would elicit an immediate objection and timely ruling. On motions, sometimes, an evidentiary objection and early ruling, while tedious for all concerned, is in the interests of justice.[16]

The Court of Appeal, and Justice Myers, are, by these decisions, reminding counsel and judges that the Court's gatekeeper function is not limited to criminal cases. Nor is it limited to trials. That reminder is welcome.

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[15] *Id.* at paras. 40-42.

[16] See, for example, *Guitierrez v. The Watchtower Bible and Tract Society of Canada*, 2019 ONSC 3069; *Holder v. Wray*, 2018 ONSC 6133; *Hunt v. Stassen*, 2019 ONSC 4466.

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Not Such a Beautiful Thing for Franchisee: Harvey's Franchisee Denied Interlocutory Injunction

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Introduction

In *FPMG Hospitality Inc. v. Recipe Unlimited Corporation*, 2021 ONSC 7156 (**"*FPMG*"**), the Superior court of Ontario provided further guidance on the applicable threshold for step one of the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (**"*RJR-MacDonald*"**), in the context of a franchisee's attempt to compel a franchisor to renew an expired franchise agreement.

Background Facts

FPMG Hospitality Inc. (the **"Franchisee"**) operated a Harvey's restaurant in Brantford, Ontario (the **"Brantford Harvey's"**) pursuant to a written franchise agreement (the **"Agreement"**) with Recipe Unlimited Corporation (the **"Franchisor"**) that was set to expire on August 31, 2021. The Agreement did not contain a right to renew. For greater clarity, Schedule A to the Agreement stated: "The Franchisee shall not have any option to renew the Agreement following the Expiry Date." The foregoing was acknowledged by both the Franchisee, and its principal, Okan Zeytinoglu (**"Okan"**).

Okan also owns a Harvey's restaurant in Sarnia, Ontario (the **"Sarnia Harvey's"**). The Sarnia Harvey's franchise agreement included a right to renew upon the expiration of the initial 10-year term.

Between October 22, 2020, and June 18, 2021, the Franchisor provided the Franchisee with numerous reminders of the Agreement's pending expiry and of its plans to not enter into a new franchise agreement for the Brantford Harvey's, although the Franchisor did inform Okan of their intention to work with him to renew the Sarnia Harvey's franchise agreement.

On August 30, 2021, the day before the Agreement expired, the Franchisee commenced a proceeding which requested various relief, including that the Franchisor extend the term of the Agreement for another 10 years, and for awards of damages for negligent misrepresentation, breach of contract, breach of the duty of good faith, breach of the duty of fair dealing, and breach of the *Arthur Wishart Act (Franchise Disclosure*), 2000 S.O. 2003 c. 3 (the **"*AWA*"**). Contemporaneously with the proceeding, the Franchisee brought a motion for an interlocutory injunction asserting that it was entitled to an extension of the Agreement for another 10-year term based on the Franchisor's conduct. Not surprisingly, the Franchisor disagreed and maintained that there was no right of renewal and the Agreement expired.

The Applicable Threshold: Prohibitory or Mandatory Injunction

To obtain an interlocutory injunction and permit the Franchisee to remain in possession of the Brantford Harvey's until the adjudication of its claim, the Franchisee was required to meet the three-part test in *RJR-MacDonald*, which included proving:

(1) There is a serious question to be tried (or, in exceptional cases, the plaintiff has a strong *prima facie* case);

(2) Irreparable harm, that cannot be compensated by monetary damages, will be suffered if the injunction is not granted; and

(3) The balance of convenience favours granting the injunction.

In analyzing the threshold for step one, it is important to understand the difference between a mandatory injunction and a prohibitory injunction. The former requires that the defendant take action whereas the latter prohibits the defendant from taking action. The import of this distinction is that a higher threshold of a strong *prima facie* case is imposed on an applicant if its request is for the defendant to act positively. More specifically, "the applicant must show it is clearly right and that there is a high degree of assurance the applicant will succeed in obtaining a permanent injunction at trial."

The court cited *674834 Ontario Ltd. (c.o.b. Coffee Delight) v. Culligan of Canada Ltd.*, (2007) 28 B.L.R. (4th) 281 ("***Culligan***"), in its analysis to determine the type of request sought by the Franchisee. Since the Franchisee's relief was in the form of a mandatory injunction, the court held that the applicable threshold for step one of the test in *RJR-MacDonald* was that the Franchisee meet the higher threshold i.e., that it had a strong *prima facie* case. The court contrasted *FPMG* with *Culligan* on this pertinent fact, as the franchise agreement in *Culligan* was still in existence when terminated by the franchisor which required the franchisee in that case to meet the lower standard of there being a serious issue to be tried.

Lack of a Strong *Prima Facie* Case

The court found the Franchisee did not establish a strong *prima facie* case for any of its causes of action for the following reasons:

(1) with respect to its negligent misrepresentation claim against the Franchisor, the court stated that:

  (a) the evidence was clear that Okan was fully informed of the Agreement's expiration with no right to renew;

  (b) the Franchisee never informed the Franchisor, prior to the commencement of the action, about the alleged representation regarding the option to renew, making the assertion not plausible; and

(c) the Agreement contained an entire agreement clause which made it clear that there were no representations or statements not contained in the agreement that formed part of the Agreement;

2) with respect to the claims for breach of the duties of fair dealing and good faith, the court too found the Franchisee's position to be weak. Citing *TDL Group Ltd. v. 1060284 Ontario Ltd.,* [2000] O.J. No. 1239 and *6646107 Canada v. The TDL*, 2019 ONSC 2240, the court affirmed that a franchisor's refusal to renew does not constitute a breach of the duties of good faith and fair dealing where there is no contractual right to renew; and

3) with regard to the claim that the Franchisor failed to provide the proper disclosure document required by s. 5 of the *AWA,* the court held that there was a lack of sufficiency as the evidence given by both parties was too uncertain to consider.

In addition to the causes of action plead by the Franchisee, the court considered the remedies it sought at this step of the test. In the court's opinion, the chances of the Franchisee succeeding on a request for a final mandatory injunction compelling the Franchisor to enter into a contract was extremely remote. Therefore, the court reasoned that it was not appropriate to grant injunctive relief on an interlocutory basis when there was a very remote possibility the Franchisee would obtain that relief at trial.

Ultimately, the court concluded the Franchisee did not meet the required threshold and based on this alone, dismissed its motion.

Will FPMG Suffer Irreparable Harm?

In the event the Franchisee would have been able to meet the threshold at step one, the court analyzed the Franchisee's position that damages would not adequately compensate for the destruction of its business. In this respect, the Franchisee submitted that Okan would lose all the money he invested into the Brantford Harvey's if it would not be able to remain in possession. In response, the court again emphasized the Franchisee's awareness of the Brantford Harvey's lifespan, and considering this actuality, whatever investments Okan made were done with the expectation of the operation coming to an end on August 31, 2021. With that, the court found the Franchisee was unable to meet the threshold at step two.

The Balance of Convenience

The court went even further to find that even if the Franchisee was able to meet the thresholds at step one and step two, the balance of convenience in any case did not work in its favour. On this point, if the Franchisee were permitted to continue operating the Brantford Harvey's until the adjudication of its claim, the Franchisor would be forced into a relationship against its will even though the Franchisee had no right to continue its operations beyond August 31, 2021.

Practice Takeaways

There are a handful of (sometimes, overlooked) takeaways to be appreciated by the court's decision in *FPMG*.

First, with respect to the court's final remarks when analyzing the Franchisee's entitlement to injunctive relief, it concluded "any right of the Franchisee expired on the face of the Agreement, as of August 31, 2021." This statement precisely sums up the court's rationale in dismissing the Franchisee's motion. The court stood firmly by the contents of the Agreement, as it then was (expired), when analyzing the test under *RJR-MacDonald* and considering the applicable threshold set out in *Culligan*.

Second, the court's frequent reference to the Sarnia Harvey's franchise agreement demonstrates the importance of spelling out the terms of the franchise agreement. It was clear from the court's emphasis in highlighting the Franchisor's intention to renew the Sarnia Harvey's, that there could be no ambiguity in its plans to not renew the Brantford Harvey's with the Franchisee as set forth in the Agreement.

In *FPMG* the court, continuing a long line of cases which have held a franchise agreement is "a written document which is fulsome and complete on its face" and that anything outside of the document's bounds is not part of the arrangements. In other words, the contract says what it says.

Finally, although not part of the written decision, the authors suspect that there may have been other reasons why the Franchisor did not wish to afford the Franchisee the grant of a renewal right, perhaps attributable to the Franchisee not properly operating the Harvey's system and/or the existence of numerous defaults. In the face of this conduct (which again is conjecture on the part of the authors), contrast what the result might have been if the Franchisor had attempted to terminate the Agreement for breach, in which case the Franchisee might have had more success in its motion for prohibitory injunctive relief (obviously depending on the breadth and depth of the evidence as to the various breaches). The lesson for franchisors and their counsel is that sometimes it is easier to wait until the franchise agreement expires, rather than to terminate during the term of the agreement.