



eLaw - Litigation Update

June 2011 - No. 50

ISSN 1916-3932

*eLaw Litigation Update will not be published in July and August.
Watch for the next issue in your Inbox in September 2011.*

In This Issue

The Limits of Freedom of Expression: MBQB

Delay Cannot Prejudice the Interests of Unwitting Third Party: MBQB

Affidavit Drafting Requires Care: MBQB

Staying Up-to-Date on eDiscovery

Speak Now on Class Action Protocol

Recommended Reading

The Limits of Freedom of Expression: MBQB

In [*Nygård International Partnership v. Canadian Broadcasting Corporation*](#), 2011 MBQB 124, the court dismissed the CBC's appeal of a master's decision refusing to strike a statement of claim the CBC described as "libel chill" and argued was an unlawful interference with the right of freedom of expression. Relying on the recent SCC decision in [*R. v. National Post*](#), 2010 SCC 16, the court found that the CBC's assertions amounted "to a request for constitutional immunity from any litigation that might implicate their manner of gathering and disseminating information. Such a claim cannot be sustained under a blanket assertion of freedom of expression. It must be remembered that it is also of fundamental importance that litigants have a right to have a trial on the factual merits of an action." (para. 59)

Delay Cannot Prejudice the Interests of Unwitting Third Party: MBQB

A plaintiff cannot assume that no third parties exist just because none were disclosed in the statement of defence according to the court in [*Goodman v. R.M. of East St. Paul*](#), 2011 MBQB 111. The court refused the plaintiff's application for an extension of time to issue a claim against a new defendant, the contractor who installed the netting in the hockey arena where the plaintiff was injured. The plaintiff only learned the identity of the installer when the defendant municipality brought a motion to amend its defence, some four years after the statement of claim was issued. The court found that the plaintiff had not used reasonable diligence in ascertaining the facts of her case,

noting that, in an adversarial system, "there is a positive obligation on the part of a plaintiff to fully consider all of the potential defendants before the limitation period expires, and not simply engage in an incremental expansion of a list of new defendants that are mentioned from time to time during the litigation." (para. 17) The court also dismissed the defendant's motion to amend its defence, finding that it was "not open to the defendant to say that the plaintiff should bear the consequences of a delay to which the defendant contributed. It was the statement of defence of the defendant which gave to the plaintiff a false sense of security that there were no third parties with an interest in this matter upon which the defendant was going to rely." (para.34) As the court observes, one of the perils of delay in pursuing a claim "is that the older a claim gets, the tougher it may be to clean up a pleading because prejudice to the plaintiff may have resulted from relying on the issues articulated in the filed pleading."

Affidavit Drafting Requires Care: MBQB

Counsel could avoid the trap of including hearsay evidence in affidavits if they used more care and attention in the drafting process according to the court in [Carriere v. Coseco Insurance Company](#), 2011 MBQB 105. The decision is a good refresher on the subtleties of affidavit drafting. The court expunged several seemingly non-contentious sections of an affidavit because the information conveyed was not within the personal knowledge of the deponent and the source of the information and belief was not identified. Another section was expunged because it contained legal opinion which was improperly before the court by way of information and belief. The court commented: "If expert opinion is to be presented to the court it must be presented in the form of an affidavit of the expert who is subject to being tested on that evidence. This type of evidence cannot get before the court through the backdoor by a lay witness." (para. 20)

Staying Up-to-Date on eDiscovery

The Sedona Canada eDiscovery [case law digest](#) and [reading list](#) have both been updated recently, as noted in this [Slaw post](#) describing the changes. Broken links and older references have been weeded and several new sections have been added covering such current topics as social media and authentication of electronic evidence. Peg Duncan, curator of the digest and list, is now posting new links on Twitter as they arise.

Speak Now on Class Action Protocol

The Canadian Bar Association's [Task Force on Class Actions](#) is seeking input on its draft Judicial Protocol dealing with overlapping multijurisdictional class actions. The protocol would allow courts in different provinces to work together to coordinate competing class actions as they move toward hearing or settlement. The [protocol](#), [consultation paper](#), and [terms of reference](#) are all available on the task force website. Interested parties are invited to comment on the proposed changes by July 8, 2011.

Recommended Reading

These recent publications may be of interest to litigators:

- The articles [Dealing With the Self-Represented Litigant](#) and [Surviving Self-Represented Litigants](#) discuss how an increase in self-represented litigants is changing adversarial practice, and offer tips on how to "manage" such opponents.
- The *Lawyers Weekly* article [Tort law and the non-citizen](#) looks at the trend toward using tort law to address perceived deficiencies in the administrative law system.
- [Movin' on up: effective motion advocacy](#), another instalment in *Canadian Lawyer's* series on improving litigation skills, stresses the importance of proper preparation to success in motions practice and describes the key things to consider at each step in the process.

The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.