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Challenging the Bringing of Subsequent Actions: MBCA

The motions judge erred when "relying solely upon Rule 25.06(7), a rule of pleading, to strike the (secondary) statement of claim without giving consideration to the delay in bringing the motion to strike and the rationale for commencing the separate action" according to the court in [*Heymanns' Construction \(1998\) Ltd. v. Sunrise School Division*](#), 2012 MBCA 45. Rule 25.11 (c) gives the court jurisdiction to strike a pleading that is an abuse of process, but on such motions the court should consider the impact of s. 94 of *The Court of Queen's Bench Act*, which prohibits multiplicity of proceedings. In this case, the plaintiff's rationale for commencing a subsequent action involving the same issues and parties (see paras. 47 and 48) was not an abuse of process, and its statement of claim should not have been struck.

Threshold Low for Part II Leave Applications: MBQB

The evidentiary threshold for determining an application for leave under Part II of *The Limitation of Actions Act* (to begin an action after the limitation has expired but within 12 months from when the applicant knew or ought to have known the material facts on which the action is based) is different than the evidentiary threshold at the trial on the merits said the court in [Orzechowski v. Bass](#), 2012 MBQB 159. The court rejected the doctor's argument that, given the factual disputes and credibility issues underlying the application, a trial was necessary to determine whether the patient had met the test for leave under Part II. The court granted leave to the applicant to begin her action against the doctor who performed the surgery she alleged was unnecessary, but dismissed her proposed action against the pathologists for lack of evidence.

Reprehensible Conduct Deserving of Rebuke: MBQB

The court took the exceptional step of ordering costs on a solicitor-client basis against the government in [Judges of the Provincial Court of Manitoba v. The Queen](#), 2012 MBQB 153. In its [earlier decision](#) the court found that the government had offered no legitimate or constitutionally adequate reasons for rejecting the recommendations of the Judicial Compensation Committee concerning salary increases, and had failed, in an abject manner, to respect the process for resolving (these) issues..."

The court rejected the government's argument that the misconduct underlying an award of solicitor-client costs must have occurred during the course of the litigation, finding:

...where a court concludes that in circumstances leading up to the commencement of litigation, a party has conducted itself in a manner that can be described as reprehensible, scandalous, or outrageous such that it is deserving of reproof or rebuke, it is open to the court to make an award of costs against that party on a solicitor-cost basis.

Practice Direction on Affidavits

The Court of Queen's Bench issued a [practice direction concerning affidavits](#) effective May 25, 2012. It addresses formatting and presentation requirements.

New on the Research Front

CanLII and Lancaster House (a Canadian legal publisher) [announced](#) the launch of an open access [eText on Wrongful Dismissal and Employment Law \(1st edition\)](#) on May 4, 2012. The text is an excellent resource for lawyers and the public "to efficiently navigate the thousands of cases on the CanLII website that bear upon the subject of employment law and wrongful dismissal in order to uncover leading and influential decisions." It provides text, commentary and links explaining hundreds of employment-related topics and cases and it will be updated two to four times annually. The first update is scheduled for July 2012.

And, according to this [Slaw post](#), the online version of the [Ontario Reports](#), formerly available free to LSUC members only, may now be accessible to all

without charge.

Recent Publications

Litigators may be interested in these online articles:

- [Equitable Remedy of Discovery Supports an Order to Reveal Identity of Cyber Bullies](#) - internet anonymity was dealt a blow in a recent UK case in which the court ordered Facebook to reveal the identity of individuals who had targeted a woman by creating a fake profile of her on the site. The author of this Slaw article advises Canadian victims seeking to pursue individuals responsible for internet defamation to have a good look at the UK Brookes decision.
- [Saumier and Bagg on "Forum Selection Clauses Before Canadian Courts"](#) - this Trial Warrior post links to a scholarly article on forum selection clauses recently made available free of charge on [SSRN](#).
- [Commissioning Affidavits by Video or Skype](#) - this Slaw post discusses what the requirement to be "in the presence" of the person commissioning an affidavit means in the virtual world. Can a commissioner be in the presence of a deponent by video link or Skype? If so, what safeguards are required?

Personal Injury Damages Update: LSM

Université Laval law professor Daniel Gardner will review what's new in Canadian personal injury damages in the upcoming program, [Current Trends in Personal Injury Damages in Canada](#), which takes place on June 20, 2012, from 9:00 to 11:00 a.m. at the Law Society classroom. Professor Gardner's areas of expertise are third party liability, automobile insurance, assessment of physical harm, contracts and consumer protection and he writes and lectures widely on these topics. Don't miss this opportunity to hear how a similar no-fault scheme operates in another jurisdiction where reforms are in progress.

Legal Research Webcast: MBA

[Labour & Employment Law Research - Tips & Tricks](#) - this webcast will let you compare your research skills with those of lawyers in other Canadian jurisdictions. In additions, attendees will receive a hand-out comparing the various online databases and their coverage of Manitoba labour and employment law decisions. Preregister by June 15, 2012 for this Legal Research section program, which takes place from noon to 1:30 p.m. on June 19, 2012.

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