Streamlining Litigation

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AS JOHN CAMPION of Gardiner Roberts LLP wrote in Lexpert ("Change Agent", June 2019):

"Time was once a friend of Justice. The process for the settlement of civil disputes was largely focused on the trial:

"Document production and oral discovery were largely manageable and brief. Trials were advanced by sophisticated barristers with civil and criminal experience. The trials were managed and heard before equally sophisticated judges who themselves had much experience in openings, closings, pleadings, evidence, cross examinations and motions with a skeptical oversight of tactical manoeuvres.

"Time is no longer a friend of Justice. The intimate connection was jilted into an adverse relationship. The judges in this divorce are the very public that the civil justice system was meant to serve. Excessive time delays caused by over-sophisticated processes and a complex system focused on documentary and oral discovery have brought the trial itself into disrepute. The public is not willing to bear the burden of lengthy time periods, unrealistic costs and unpredictable outcomes. Because of the failure to meet realistic time and cost limitations, lawyers are viewed as untrustworthy and self-serving. The barrister was a much trusted and admired part of the civil justice system 40 years ago. Judges were viewed with admiration and awe.

"As any litigator and litigant in the modern era will tell you, so much has changed for the negative that the civil justice system and the rule of law have fallen into disuse and disrepute."

Court systems across Canada are in much need of streamlining. The cost factor alone is obvious, let alone the access to justice imperative. And yet, lawyers would have it that there is much more to be done. To add momentum to the cause, *Lexpert* captured certain lawyers' best ideas for streamlining.

We started with Claire Wilkinson, who practises with Martin and Hillyer Associates in Burlington, Ont. She acts on Personal Injury and Insurance Litigation matters and assists survivors of sexual abuse. She is a past President of the Ontario Trial Lawyers Association (OTLA), and the Halton County Law Association. She also sits on the board of Mind Forward Brain Injury Services, and is an Ontario Governor for the American Association for Justice. Wilkinson wrote the following as part of her campaign website in her run for Law Society of Ontario Bencher:

"Access to justice continues to be a critical issue facing our Ontario court system. The backlog of cases is extensive, and judicial resources are being stretched thin. Ongoing efforts are being made by the administrators of the Ontario court system to embrace systems and procedures that will reduce trial time, and streamline the litigation process.

"The pilot project one judge model is an excellent example of thinking outside the box to try to address a very significant access to justice problem. In 2018 I was pleased to participate in the consultation group chaired by Ontario Court of Appeal Chief Justice Strathy that considered implementing this new and exciting concept in Ontario. The working group that was struck to more carefully consider this issue resulted in the pilot project of the one judge model that launched February 1, 2019. Participation in this pilot project is voluntary, and requires the consent of the regional senior judge overseeing the jurisdiction where the action was brought. The goal of the pilot project is to eliminate interlocutory motions, and move cases more swiftly through the litigation process.

"As President of OTLA, I was also involved in government consultations that addressed the need to increase the simplified procedure limits in Ontario, again, with a goal of streamlining litigation and reducing the length of trials and the costs associated with trials. The lack of judicial resources and the volume of litigation being managed by our judges is stretching our system to the point where litigation wait times have [become] dysfunctional in certain regions. We need to find innovative ways to deliver legal services, dispute resolution mechanisms, and ultimately adjudication of matters in dispute that cost less and are more efficient."

John Adair, of Adair Goldblatt Bieber LLP wrote: "The single biggest change I would like to see made in order to streamline civil litigation is for most civil motions to be heard in writing. Perhaps oral argument would occur only when the judge reading the materials believes it is required, which is similar to the U.S. model. Most of the 'run of the mill' civil motions (pleading amendments, discovery disputes — be they oral or documentary) are decided or very close to decided before counsel attend for oral argument in any event, so little would actually change in substance, but the delay caused by these motions could be reduced significantly. This would of course require the government to put additional resources into providing judges with the support they need to deal with more matters at any particular time (more judges, and more support in the form of clerks), but that is a small price to pay for meaningful change in the delay and cost of litigation."

Nadia Campion, a partner at Lax O'Sullivan Lisus Gottlieb LLP, offered this comment: "Litigation could be streamlined with more rigid adherence to case management timetables and the application of cost or other consequences to those parties who fail to comply with court-ordered or consensual timetables. Interestingly, a similar suggestion was made by the Law Commission of Ontario in its recent report recommending reforms in the class action sphere." [for more on the LCO's Class Action Report, see p. 37).

Edward Babin of Babin Bessner Spry offered these two recommendations:

- A move to single judge case management should continue to be encouraged. Our experience with the Commercial list has shown that this is the single best way to streamline civil litigation. A dedicated case management judge is in a far better position to deal with delays, production issues, scheduling and unnecessary motions.
- We should also continue to encourage the use of technology at all stages of the litigation process, for at least more complex cases. Again, our experience is that the use of such technology, both for discovery and at trial, can significantly streamline the process, from both the client and the court's perspective.

Finally, Lexpert brings you this column on streamlining contractual disputes, starting long before and continuing into the trial.

Canada: Streamlining Contractual Disputes With An Expert

BY RICHARD WONG AND PETER MAJOR QC

Carefully drafted alternative dispute resolution ("ADR") clauses can be tailored to parties' needs in solving disputes in a timely manner. Binding arbitration has commonly been implemented to limit the time and cost spent in court by providing finality to the dispute at issue. Similarly, limits on discovery can streamline issues and, in a recent Alberta Court of Queen's Bench case, the Court confirmed that a properly drafted contractual clause can provide selected experts with significant decision-making authority, including the ability to consider and resolve legal issues when fulfilling their mandate.

In Applied Industrial Technologies*, LP v Sirois*, 2018 ABQB 818 ("Applied") Applied Industrial Technologies, LP (the "Purchaser") was scheduled to purchase the shares of several companies known as the Reliance Group (the "Vendors") pursuant to a share purchase agreement ("SPA"). A term of the SPA provided that disputes over certain adjustments to the purchase price of the Vendors were to be determined by a nationally recognized accounting firm "as expert and not arbitrator," the expert's determination was to "be final and binding on all parties" and "not be subject to appeal, absent manifest error."

In this case, the Purchaser delivered a Closing Balance Sheet to the Vendors, who objected, thus engaging the expert determination process. The Vendors' objection included the argument that the relevant figures for Reliance USA (one of the Vendors) at April 30, 2014 in the Closing Balance Sheet and the Combined Target April 2014 Net Profits Statement must be converted to Canadian dollars from US dollars at the prevailing exchange rate at closing, rather than at par. The parties selected a mutually agreeable expert pursuant to the SPA and the expert determined that the currency conversion must be made at the prevailing currency exchange rate at the closing date.

The Purchaser applied to set aside the expert's decision arguing that the expert's professional qualifications (i.e., financial and not legal) meant that the expert could not decide questions of mixed fact and law including interpretation of the contract. As the expert was not an expert in law, the parties would not have intended that it answer legal matters and was confined to only ascertain accounting practices, assess compliance with generally accepted accounting principles, and compile financial information based on same.

The Vendors and McLennan Ross LLP's partner, Corbin Devlin, disagreed and were successful. In the reasons resulting in the dismissal of the Application, three issues the Court considered were whether an expert appointed under an expert determination clause in a share purchase agreement can decide questions of mixed fact and law, how the expert's decision should be reviewed and whether the expert in this case committed a manifest error.

Mixed Fact and Law

The Court recognized that the SPA provided the Vendors' representative an ability to object to "any item or aspect" of the Closing Balance Sheet or the Combined Target April 2014 Net Profits. The Court noted that the plain meaning of the phrase "any item or aspect" went far beyond calculations, compilations and accounting principles as argued by the Purchaser.

Additionally, the Court recognized that these were sophisticated parties engaging in a transaction worth more than $200,000,000, and that any reasonable party in the same position with legal advice would know that expert determination clauses often refer to compilations, calculations, appraisals or valuations rather than "any item or aspect" and that an aspect is even wider than an item. As such, the Court found that the parties must have known and should be presumed to have known there were issues of mixed law and fact that could arise in ascertaining the information or methods used in the Closing Balance Sheet that was provided.

Ultimately, considering the plain words of the contract and the contextual matters, the parties provided flexibility to design a suitable process to accommodate any specific matter in dispute, giving the expert broad discretion to determine the rules and procedures to be followed in the proceedings.

Standard of Review

Any time a court is reviewing the decision of another body, the review is expected to be performed in accordance with a recognized standard. Sometimes, that review known as the "correctness standard" enables a court to replace the other body's decision if the law was applied incorrectly. On other occasions, a court will apply a "deferential standard" and defer to the findings and conclusions exercised by the other body. Here the Court acknowledged that an expert determination is binding unless the expert departed from the contractual instructions in a material respect or the contract otherwise provides. However, that may not always be the case. The Court noted that parties can install a safety valve in the contract clauses to challenge the contractually binding nature of the expert's determination, if one is concerned that the expert's determination were to contain a "manifest error."

Since the SPA contained a "manifest error" clause, the Court concluded it could conduct a review that should be performed on a deferential standard for a variety of reasons. First, the review involved contractual interpretation, which is a question of mixed fact and law. If the same issue arose from the decision of a trial judge, that decision could only be interfered with in the case of a palpable and overriding error or the decision was unreasonable. Likewise, in Canadian appellate courts, the term manifest error has been equated with conclusions that are clearly wrong or palpable errors. Palpable errors are those that are

so obvious that they can easily been seen or known; readily or plainly seen. Secondly, if the same issue arose out of an arbitration, the appeal would be limited to questions of law, and the standard of review, except in limited circumstances, is one of deference if the arbiter's decision was reasonable. Thirdly, even in administrative law cases, a reviewing court must consider multiple criteria, as set out in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, to avoid imposing a correctness standard and undercutting the integrity of the process to be used.

In this case, the court found by its interpretation of the SPA that the parties' words did not simply except an "error." The parties chose to except only a "manifest error." The word "manifest" must have been intended to express a higher standard than simply looking to see whether some error is apparent from the papers. The parties' choice to include words of limitation implies deference to the expert's determination, especially as they did not insert a clause to bifurcate the review standard. Additionally, the Court concluded that in taking the plain language of the contract in its context, the parties' choice of the words "manifest error" indicates the parties wanted the opinion of a financial expert, not the Court, and a speedy process with some degree of finality.

No Manifest Error

This column does not leave room for explaining multiple reasons why the Court did not find that the expert committed a manifest error in arriving at its decision, but the analysis used reflected the Court's concern that deferential standards are critical for protecting the integrity of the decision-making process, respecting the expertise of the decision-maker, and recognizing that, in many questions, reasonable minds can differ over the outcome. The Court found that an error is manifest or obvious where it is unreasonable: The conclusion is outside the range in which experts could reasonably differ. If the conclusion is within the range and sufficiently intelligible in the context of any contractually required reasons, as it was here, an error is not "obvious" or manifest.

Richard Wong and Peter Major Q.C. practise at McLennan Ross LLP, in Edmonton.

Lawyer(s):
John A. Campion, Claire Wilkinson, John Adair, Nadia Campion, Edward J. Babin, Richard G.C. Wong, Corbin Devlin

Firm(s):
Gardiner Roberts LLP, Adair Goldblatt Bieber LLP, Babin Bessner Spry LLP, McLennan Ross LLP