The Parameters of Pre-Certification Document Discovery Cannot be Circumvented through an Improper Request to Inspect Documents

February 06, 2020

Background

Ontario's class actions law requires that the focus of criteria for certification involve documentary and oral discovery pre-certification. The onus remains with the party seeking documents to explain why they are relevant for the certification process. In the context of a pre-certification interlocutory motion, the Ontario Superior Court in *Harris v BMW Canada Inc. et al* recently examined the manner in which Rule 30.04(2) may be used as a distinct tool, although in limited circumstances, to compel documentary production in a class action.

Court Decision

In the case before the court, the plaintiff served a Request to Inspect Documents referred to in the defendants' pleadings. The demand was made after the pleadings closed and prior to the certification motion. The request, however, was denied. The court agreed with the defendants that the Request to Inspect constituted an improper request for unspecified documents or intangible things that were not documents or were not memorialized into a document.

The court rejected the plaintiff's submission that compliance with a Request to Inspect under Rule 30.04(2) is mandatory and that the court has no discretion to refuse enforcement, and held that the court retains such discretion under Rule 30.05 on the basis of "immateriality, irrelevance, prejudicial effect, overcoming probative value, disproportionality, untimeliness, and privilege" (para 53). In exercising its discretion to refuse production, the court highlighted that parties cannot use Rule 30.04(2) to circumvent the limitations around pre-certification discovery; the requesting party must discharge its onus of explaining why the documents requested are relevant to the issues on certification.

The Court ultimately refused to enforce the Request to Inspect because it was disproportionate and amounted to premature documentary discovery. The Court found

that the documents requested were not required to plead, as the pleadings had closed. The Court also remarked that the plaintiff did not require the documents for discovery and that many of the documents it sought to inspect were documents the plaintiff already had in his possession (with many of these being included in his motion material).

Outcome

In setting out the appropriate parameters of pre-certification discovery, the court commented favourably on the fact that the defendants had filed a Statement of Defence, which it described as a “rare occurrence” and helpful to the certification process. Once a defence has been filed, a court can consider whether the plaintiff requires a response to its Request to Inspect in order to plead a reply. If they are not required for it to plead, a party seeking to enforce a Request to Inspect in the context of a pending certification motion will need to explain the relevance of such requested documents to the issues for certification.

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