Speaker's Corner: Rule 51.06(2): An antidote to lengthy, expensive trials?

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As Supreme Court Chief Justice Beverley McLachlin and former Ontario chief justice Warren Winkler have famously lamented, the costs of going to trial pose a great disincentive to access to justice for many civil litigants. According to the 2013 *Canadian Lawyer* legal fees survey, the cost of taking a civil action through to a two-day trial in Ontario ranges from $15,831 to $47,977 with a seven-day trial ranging from a staggering $61,152 to $163,830. There is no sign of trial costs alleviating as 41 per cent of the law firms surveyed planned to raise fees.

With trial costs ballooning, some people have touted dispositive motions as providing an opportunity for speedier and more cost-effective resolutions. Such alternatives include Rule 21 motions to strike, Rule 20 summary judgment motions, and the lesser-known and deployed Rule 51.06 motions.

Rule 51.06(2) of the Rules of Civil Procedure provides that a party may move for full or partial judgment based on admissions made in a pleading or in response to a request to admit. It states: “Where an admission of the truth of a fact or the authenticity of a document is made by a party in a pleading or is made or deemed to be made by a party in response to a request to admit, any party may make a motion in the same proceeding to a judge for such order as the party may be entitled to on the admission without waiting for the determination of any question between the parties, and the judge may make such order as is just.” The court will deem a party to have made an admission when there is no response to a request to admit within 20 days of service or the response fails to observe the requirements set out in Rule 51.03(3).

A review of the jurisprudence suggests the courts do not readily grant motions under Rule 51.06(2), a fact that partly explains its infrequent use. The court will scrutinize the admissions relied on and satisfy itself that there are no serious questions of fact or law outstanding before granting such a motion.

In *8150184 Canada Corp. v. Rotisseries*, Justice Graeme Mew recapped the principles applicable on a Rule 51.06(2) motion:

- The admission must be clear and definite.
- The admission must be of such facts as to show the party is clearly entitled to the order asked for.
- The rule does not apply where there is any serious question of law to argue.
- The rule does not apply where there is a serious question of fact outstanding.
- The motion is based on admissions and proof of facts is not permitted.

The court should grant the motion only on a clear case and be careful not to take away the right to trial on *viva voce* evidence.

To succeed, the moving party must show there is a clear admission on the face of which it is impossible for the defendants to succeed.

The plaintiff in *Rotisseries* moved for judgment under Rule 51.06 at the start of the trial based on the defendants’ lack of response, and thus, deemed admission, to a request to admit. The action arose from a franchise agreement that did not comply with the Arthur Wishart Act. The contentious issue was damages.

The plaintiff served a broad request to admit touching on the franchise fee and other expenses incurred by the plaintiff, damages for misrepresentation, and the defendants’ breach of the duty of fair dealing. Mew awarded the plaintiff damages quantified in the request to admit and corroborated by appropriate documentation. There was no award for loss of profits and other amounts addressed by the request to admit that were merely estimates. As well, Mew declined to order damages for breach of the duty of fair dealing. In his view, “evaluation of such damages should be based on an evidentiary record developed through trial or (if applicable) some other more summary form of evidentiary hearing.”

As Mew alluded, a party can use Rule 51.06 in conjunction with or followed by a Rule 20 motion to obtain summary determination. For example, in a motor vehicle case, if the defendant admits to liability and certain losses claimed but not others, the plaintiff can obtain an order on the admissions on a Rule 51.06(2) motion and have the other issues summarily dealt with on a Rule 20 basis or at a shortened trial.

Given the top court’s liberal interpretation of Rule 20 in *Hryniak v. Mauldin*, it appears there is little difference between pursuing, together with a Rule 51.06 motion, a summary judgment motion and a trial. Many litigators may choose the former route over the latter for the simple fact that they have more experience with and are more comfortable with motions than trials. There is a difference, however, that becomes very apparent when the unsuccessful party has to determine where to go to appeal.

When the court grants a summary judgment motion, the judgment is final and the appeal is to the Court of Appeal. When it dismisses the motion, the order is generally interlocutory as there must still be a trial; accordingly, the appeal is to the Divisional Court with leave. Even if motions judges make factual findings and legal determinations in the course of the reasons for dismissing the Rule 20 motion, unless they explicitly say so in the formal order, their conclusions do not give rise to a plea of *res judicata* in subsequent proceedings. By contrast, findings of fact and conclusions of law made at trial have a binding effect.

Given the long wait times for summary judgment motion dates, litigants may be better off to pursue a shorter trial after narrowing the issues in dispute or, as in *Rotisseries*, set the action down for trial and move under Rule 51.06 at the beginning of the trial. The prospect of an impending trial date is often the best catalyst to get the parties to seriously consider settling. As Winkler once said, “real trial dates lead to settlements.”

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