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BARRISTERS & SOLICITORS

Minutes

To: CBA Civil Litigation North Section

From: Samuel Edmondson

Date: **February 14, 2018**

Re: February Meeting Minutes
Preparation of Application Materials
Speaker: Naheed Bardai, MLT-Aikins

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1. Administrative Update (distributed separately from these Minutes)
2. Speaker

Speaker

Naheed spoke regarding preparation of application materials. He began his presentation with some comments made by Chief Justice Popescul.

1. Just because you *can* bring an application does not mean that you *should*. Many applications are for matters such that the application does not meaningfully move the litigation forward, or which are disproportionate to the remedy sought.
2. All application materials should be focused on the real issues. Inclusion of unnecessary, superfluous evidence and argument wastes the time of the judge preparing for chambers or rendering a decision on facts and evidence which isn't important.
3. When bringing and application for a discretionary remedy, keep in mind the objective of persuading the judge as to *why* they should exercise their discretion to grant the remedy sought.
4. When preparing briefs, focus on the real issues. On applications for common remedies, a brief may not be required. Where a brief is submitted, it is only necessary to provide necessary cases (ie. the leading case) on the test for a common remedy – not provide a survey on the development of the law surrounding the remedy sought. Keep your focus to the areas where the law is *not* clear.
5. In a brief, pay attention to areas where the Court may benefit from an explanation of the issues. For example, why specific evidence is important in the application, and how the specific evidence matters to determination of the application.

Naheed turned to the considerations he focuses on in preparing application materials.

1. The key questions are:
    a. What are you trying to achieve in bringing the application; and
    b. Why do you want that objective.

2. Before starting to prepare materials, determine the legal test for the remedy you are seeking. Focus *all* of your materials on making out the elements of the legal test.
3. Less can be more. Focus on the evidence and law specific to the test.
4. Put yourself in the shoes of the judge – what does the judge *need* to know.

Addressing specific aspects of an application:

A. Application/Motion
    a. Identify the rule, or legislation under which the Court has jurisdiction or authority to grant the remedy you seek. The "inherent jurisdiction of the Court" should be a last resort.
B. Evidence (Affidavit)
    a. Keep the facts focused on evidence necessary for meeting the legal test.
    b. Where there is a discretionary remedy sought, focus on why exercising discretion is *fair*.
C. Brief
    a. Keep your brief focused on the law, and the specific evidence which satisfies each element of the legal test
D. Oral advocacy
    a. Whether or not your style is to prepare detailed submissions, be prepared to adapt on your feet.
    b. Do not bind yourself to a script. If a judge raises an issue you would be addressing later in your submissions, deal with it then rather than saying you'll address it later.
    c. If a judge is asking questions, it is a signal that the answer is important to them. If it's important to the judge, it should be important to you.
    d. When referring to evidence, to the extent possible pinpoint where the judge can find the evidence you are referring to – Affidavit of John Doe, page 4, paragraph 21, or Affidavit of Jane Smith, page 3 of Exhibit E.
    e. Reply submissions are *not* an opportunity to restate your case or have the last word. Proper reply is to respond to things which you could not have anticipated. If you have thoroughly prepared for the hearing, there should not be anything truly unanticipated in the submissions of other parties.
    f. Advocacy in chambers depends on skills that pervade litigation (chambers, discoveries, examination of witnesses in *viva voce* testimony, appellate advocacy):
        i. Preparing and knowing the law and evidence;
        ii. Listening – to the judge, opposing counsel, witness testimony, etc.
        iii. Adapting your submissions to address questions from the bench, or evidence from a witness

Response materials focus on the *same* considerations as preparing your own application materials

1. What is the legal test
2. What evidence is necessary to meet (or defeat) each element of the test
3. What evidence will assist the judge in deciding in your favour

The group had some discussion:

1. Balancing extra/superfluous evidence in affidavits, particularly when seeking discretionary remedies:
    a. Background and context may be relevant and necessary, particularly when addressing what is "fair" when requesting a discretionary remedy, or in interpreting the evidence.
2. Scope of relevance of records in an Affidavit of Documents
    a. In some instances there will be an enormous volume of records. In some instances it may be appropriate to canvas with opposing counsel as to the sufficiency of particular search criteria in a records search, or whether agreement is possible regarding limiting the scope or type of documents which will be disclosed in the litigation.
    b. In assessing whether something is "relevant", keep in mind the size of the action (quantum of damages) – would full disclosure be disproportionate to the action. Often times only a small number of documents will *actually* matter, and agreement between counsel as to the scope or type of documents may save a lot of time and expense in the disclosure process.
    c. Relevance is determined on the pleadings. A record is only relevant and disclosable if it is relevant to a fact or matter put in issue in the pleadings.
    d. As an aside, it can be appropriate to tell your client that you will not permit them to swear an Affidavit of Documents that you believe to be incomplete.
    e. Disclosure is an *ongoing* obligation. Disclose new records as they come to your attention.
3. Costs
    a. The consensus seemed to be that the application should almost always *seek* costs. The Rules provide a default to Column 1 of the Tariff.
    b. In submissions, you may or may not choose to speak to costs. Partly this will depend on your read of the Court.
    c. Seeking costs may be pointless where the opposing party would clearly be unable to pay.
    d. In submissions, you may not want to speak to costs if you are unsure where the judge will decide on the application proper – setting out a request for $5,000 in costs if you are successful could signal to the judge that $5,000 in costs is appropriate if you are not.
    e. If a client demands that you seek costs, and make submissions on costs, "My instructions are to …." satisfies your obligation to your client.
4. Striking affidavit materials
    a. This is very rare in civil litigation. It is much more common to make submissions in Court – that the judge knows what is and is not admissible, and can consider the evidence accordingly; that even if admitted, a judge can lend appropriate weight to evidence which may be of questionable admissibility.