Federal Court of Appeal

Cour d'appel fédérale

Memorandum

TO/ À: Justice Stratas

FROM/DE: Tim Barrett
(613) 944-4729

DATE : May 9, 2012

RE/OBJET: **Subcommittee on Global Review**

1. Issue

[1] Rule 3 of the *Federal Courts Rules*, SOR/98-106 establishes guiding principles for interpreting and applying the Rules. It says that,

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	**3.** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible..

[2] The Subcommittee on Global Review is interested in how judges and prothonotaries (hereinafter "courts") apply this Rule. In particular, do courts use this Rule to apply the principle of proportionality to proceedings? Is Rule 3 used to control abusive or sharp practice?

[3] Some other jurisdictions in Canada have rules regarding proportionality. For example, article 4.2 of Quebec's *Code of Civil Procedure* requires that parties ensure that the proceedings they choose are "proportionate, in terms of the costs and the time required, to the nature and ultimate purpose" and complexity of the dispute. Rule 1.04(1.1) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 requires courts to "make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."

[4] Below is a summary of relevant reported decisions of prothonotaries, federal court judges and the Federal Court of Appeal over the last ten years (i.e. from 2002 to present).

2. Analysis

a. Overview

[5] It appears that courts have never used Rule 3 to apply the principle of proportionality to proceedings.

[6] However, courts have found Rule 3 pertinent to controlling "abusive" practices at discovery. Disallowing such practices helps ensure the "just, most expeditious and least expensive determination" of the proceedings.

[7] That said, the court's jurisdiction to control abusive practices, including at discovery, does not come from Rule 3 alone. Courts can deal with abuses and sharp

practice using other Rules and through its exercise of discretion. For example, Rule 221(1)(f) specifically allows courts, on motion, to strike a pleading or anything in a pleading if it is "an abuse of the process of the Court."

[8] The cases summarized below illustrate how courts have used Rule 3 to control practices that interfere with the "just, most expeditious and least expensive determination of every proceedings on its merits." In some cases, courts characterize these practices as "abusive."

[9] Unless otherwise noted, these judgments conform to the basic principle that Rule 3 does not modify or override other Rules. Rule 3 is a guide to interpreting the rules and does not confer substantive jurisdiction: see, for example, *Merck & Co. v. Apotex Inc.*, 2003 FCA 438 at paragraph 13, Strayer J.A.

b. Jurisprudence

i. Guide exercise of discretion in determining discovery obligations

[10] A court may disallow conduct at discovery that is abusive. Courts must protect against abuses "so as to ensure the just, most expeditious and least expensive resolution of the proceedings": *AstraZeneca Canada Inc. v. Apotex Inc.*, 2008 FC 1301 at paragraph 18, Hughes J.; *GSC Technologies Corp. v. Pelican International Inc.*, 2009 FC 223 at paragraph 11, de Montigny J.

[11] However, the Federal Court of Appeal has affirmed “the overriding discretion of a prothonotary or judge to control abuses of the discovery process” without reference to Rule 3: *Apotex Inc. v. Bristol-Myers Squibb Company*, 2007 FCA 379 at paragraph 30, Sharlow J.A.

[12] Rule 3 also guides in streamlining the discovery process. See for example, *Haylock v. The Ship "Norway"*, 2003 FC 932, Hargrave P. (order permitting written discovery to save “both time and money”); *Victory Cycle Ltd. v. Polaris Industries Inc.*, 2007 FC 466, Kelen J. (sufficient facts plead for defendant to understand case to be met; examination of the plaintiff prior to the filing of defence therefore not necessary and contrary to Rule 3).

[13] However, the interests of expeditiousness and cost minimization do not override the right for parties to have legally relevant questions answered on discovery. Rule 3 is not intended to ensure the “just, most expeditious and least expensive resolution” of the discovery, but of the proceeding: *Apotex Inc. v. Merck & Co.*, *supra* at paragraph 13; *AstraZeneca*, *supra* at paragraph 18.

ii. Sanction parties where there is delay and excessive cost

[14] Courts may draw upon Rule 3 in exercising their discretion to sanction a party, or parties, whose conduct impedes the “just, most expeditious and least expensive” resolution of the proceeding. See, for example, *Nourhaghighi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1365, O’Reilly J. (vexatious litigant; order

requiring that parties seek leave to bring any future interlocutory motions); *Day v. Canada (Attorney General)*, 2004 FC 1003, Hargrave P. (delay by applicant in moving proceedings forward; to promote efficient resolution of dispute, respondent not required to bring a motion to strike for delay; instead, Prothonotary ordering interim status review under Rule 385(2)); *MGM Well Service, Inc. v. Mega Lift Incorporated*, 2007 FC 1134, Hugessen J. (court opines that "the conduct of [the defendant] and its solicitors herein has been devious and not in accordance with the spirit of the *Rules* generally and of Rule 3 in particular; costs to plaintiff); *Bill v. Thomas, 2007 FC 1152*, Noël J. (*Electoral Code* of First Nation leading to excessive litigation; Court "invokes" Rule 3, concluding that *Code* should be abolished or amended); *Twinn v. Poitras*, 2011 FCA 310, Stratas J.A. (costs do not follow result on motion because the need for the motion prompted by mistakes and oversights which drove up costs).