Test for Further Discovery After Setting Action Down for Trial

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May 2020

A party who sets an action down for trial or consents to an action being placed on a trial list is generally not permitted to conduct an examination for discovery of an opposing party. Leave of the court is required under rule 48.04(1) of the *Rules of Civil Procedure*, unless the opposing party consents.

There are two lines of authority with respect to the test for leave. This was noted in the recent decision of *J.A.L. Developments v. Residences of Springhill Inc.*, 2020 ONSC 2222.

For many years, the test for leave was whether there was a substantial or unexpected change in circumstances such that a refusal to grant leave would be manifestly unjust.

Subsequently, a broader test developed, which requires the court to consider whether granting leave is in the interests of justice. Referring to recent decisions of the court, Master Short indicated that it is desirable to apply this more flexible test.

Master Short stated that the court should consider all of the circumstances of the matter and make an order that is just in the circumstances of each particular case. He said that this approach is consistent with rule 1.04(1) of the *Rules of Civil Procedure*, which requires the rules to be "liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".

Master Short noted the importance of pre-trial production and discovery for reasons of efficiency and basic fairness. He indicated that full pre-trial disclosure promotes the early resolution of disputes and leads to efficiencies at trial. He also stated that trials should be decided on their merits and should not involve "surprise and trial by ambush".

Therefore, if a party who sets an action down for trial or consents to an action being placed on a trial list can show that a discovery or a further discovery is necessary in the interests of justice, it will likely be permitted to conduct the discovery. The court is moving away from the “substantial and unexpected change in circumstances” test.