

Civil Litigation

Address issues of venue and procedure early in litigation

By **Emily Vereshchak**

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(October 27, 2021, 11:39 AM EDT) -- *Granville v. Blue Cross Life Insurance Company of Canada*, 2021 ONSC 6728, provides a cautionary tale for parties to address issues of transfer and governing procedure at the outset of the litigation.

In *Granville*, the plaintiff sought leave to transfer his action from regular procedure to Simplified Procedure. In the alternative, the plaintiff sought to transfer the action from the Superior Court of Justice to the small claims court. Associate Justice Robert Frank dismissed the entirety of the plaintiff's motion.

Overview of the facts

The plaintiff sought damages from the defendant arising from a denial of the plaintiff's claim for long-term disability benefits. The plaintiff sought a declaration that he was entitled to such benefits and judgment for the amount due, in addition to a total of \$4 million for breach of duty to act in good faith, punitive and exemplary damages and aggravated damages.

The Statement of Claim was issued on March 10, 2016, and the plaintiff was examined for discovery on April 24, 2018. A defence was delivered in April of 2018. The defendant's sworn Affidavit of Documents was served in December of 2019, though a draft copy had been provided in February of 2019. The defendant was examined for discovery in December of 2019.

In April of 2019, the plaintiff suggested to the defendant that the action ought to be moved to the small claims court. The defendant suggested that it would be agreeable to transfer the action, on the condition that the plaintiff paid the defendant's costs of \$7,500. The plaintiff refused.

On the motion, the plaintiff argued that it was not unreasonable to have started and continued the action in Superior Court at the time the claim was issued. The plaintiff submitted that he did not have the benefit of knowing the defendant's position, and did not know the viability of his damages claim, until he received the Statement of Defence in April of 2018 and the defendant's Affidavit of Documents in December of 2019.

The defendant argued that the plaintiff had the necessary information to determine the proper venue for the claim, as the defendant sent a copy of its claims file to the plaintiff in June of 2015, before the action was commenced. Further, an unsworn Affidavit of Documents was provided to the plaintiff in February of 2019.

In addition, the defendant argued that transfer to Simplified Procedure or small claims court would be prejudicial, as the trial would then proceed without a jury.

Analysis

The matter was brought before Associate Justice Frank. He reviewed Rule 76 of the *Rules of Civil Procedure*, which requires that an action that is not commenced under Rule 76 can be continued under Rule 76 if:

(a) the consent of all the parties is filed;

- (b) no consent is filed but,
- (i) the plaintiff's pleading is amended under Rule 26 to comply with subrule (1), and
- (ii) all other claims, counterclaims, crossclaims and third party claims comply with this Rule; or
- (c) a Jury Notice delivered in accordance with subrule 76.02.1(2) is struck out.

Associate Justice Frank noted that the plaintiff had yet to provide a proposed amended draft pleading that complied with Rule 76. Furthermore, a fundamental impediment to the relief sought was that the defendant had served a Jury Notice.

As the subject action was commenced prior to 2020, it was commenced when jury trials were still permitted under Rule 76. As such, the court reviewed the transitional provisions applicable to actions commenced before Jan. 1, 2020.

In reviewing the case law, Associate Justice Frank reviewed the decision in *Lightfoot v. Hodgins*, 2021 ONSC 1950, which stated that for actions that pre-date Jan. 1, 2020 where a Jury Notice has been served, deciding whether to grant leave to amend the action to continue under Rule 76 required the court to determine whether the Jury Notice ought to be struck, as this was a natural consequence of such motion.

As the Rules require that a motion to strike a Jury Notice must be made to a judge, Associate Justice Frank noted that he did not have jurisdiction to make an order to continue the action under Rule 76. However, he stated that even if he were to exercise his discretion, he would decline the plaintiff's request to continue the action under Rule 76 for the same reasons he would not transfer the action to small claims court.

Associate Justice Frank noted that numerous steps had already been taken in the litigation which would not have been necessary under the *Small Claims Court Rules* (including examinations for discovery and the exchange of Affidavits of Documents).

While the plaintiff argued that the initial decision to commence and continue the action in Superior Court was reasonable, as he only realized that the action ought to be transferred following completion of the examinations for discovery and review of the defendant's productions, Associate Justice Frank was not convinced that there had been a material change in circumstances following the issuance of the claim that would justify the transfer to the small claims court.

Further, he accepted the defendant's submission that the court should not award the transfer where the plaintiff consciously started an action claiming \$4 million in damages and a declaration of entitlement to benefits, and then sought to substantially reduce the amount of damages without demonstrating that he had inadvertently chosen the wrong court. He noted that the plaintiff's position was inconsistent with the circumstances of the litigation, as the plaintiff proceeded through pleadings, production of documents and examinations for discovery, forcing the defendants to incur legal costs.

In addition, Associate Justice Frank noted that transferring to small claims court would deprive the defendant of his right to have the action tried by a jury, and that the defendant would be prejudiced because it had conducted its litigation strategy on the basis that the action would be tried by a jury (which included gathering surveillance evidence).

Conclusion

Associate Justice Frank dismissed the plaintiff's motion. He stated that it had come far too late and was an attempt by the plaintiff to shield himself from a possible adverse costs award. The parties were invited to make submissions on costs.

Granville serves as a warning for counsel to address issues of venue and procedure early in the litigation, even though sworn Affidavits of Documents may not have been delivered and examinations for discovery not completed.

Furthermore, counsel should be attuned to the jurisdiction of an associate justice where Jury Notices are involved. Where a party seeks to have an action transferred from regular procedure to Simplified Procedure and a Jury Notice has been delivered, such a motion ought to be brought before a judge.

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