

KEEPING CURRENT

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Defamation action against Law Society Treasurer transferred from Small Claims to Superior Court (*Horvat v. Goldstein*)

By Isabel Yoo

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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Litigants seeking damages in an amount of \$35,000 or less may bring their claim in the Small Claims Court, which generally provides a faster and cost-effective forum for simple legal disputes. Litigants who are seeking more than \$35,000 may still commence an action in Small Claims Court, but they must waive recovery for any amount over the \$35,000 limit. Otherwise, they should pursue their claim in Superior Court. Occasionally, a party may commence an action in Small Claims Court and then realize that their claim for damages is higher than the amount they initially anticipated, or that the action is too complex for the simplified rules that govern proceedings in the Small Claims Court. In such circumstances, the party may seek a transfer of their action from the Small Claims Court to the Superior Court of Justice.

In *Horvat v. Goldstein*, [2024 ONSC 486](#) (CanLII), the Ontario Superior Court of Justice permitted a transfer of a matter from the Small Claims Court to the Superior Court. The applicants were the Law Society of Ontario (“**LSO**”) and its

Treasurer. The respondent was, at the time of the underlying events, a benchner of the LSO.

The underlying issues began when the Ontario Bar Association posted a tweet announcing the appointment of a racialized woman for the Association’s “Innovator in Residence” position. The purpose of the appointment was to assist in accelerating the careers of Indigenous and racialized lawyers. In a responding tweet, the respondent said: “Good job @OBALawyers you’ve “accelerated” the career growth of one minority hire. Tick that box off.Next??”

Following the respondent’s tweet, the Treasurer posted a statement on the LSO website stating that the respondent’s comments were not representative of the LSO, and that as Treasurer, she was “concerned about any conduct that does not reflect [the LSO’s] values, principles and commitment to equity, diversity, and inclusion in Ontario’s legal professions”. She reiterated that all benchers are expected to abide by the *Bencher Code of Conduct*.

The respondent asserted that the Treasurer's statement was libelous and served the Treasurer with a Notice of Libel. He then commenced a claim against the Treasurer and the LSO in Small Claims Court, claiming \$35,000 (the monetary limit) in damages. In the claim, he argued that the Treasurer abused her position, acted in bad faith and with malice and with a purpose of "enhancing her political fortunes". He also argued that the Treasurer made her statement knowing that it was false and in reckless disregard for the truth.

The Treasurer and LSO defended the claim, asserting the defences of truth, fair comment, and qualified privilege. They also claimed Treasurer's immunity from civil liability pursuant to [section 9](#) of the [Law Society Act, R.S.O. 1990 c. L.8](#). This section provides immunity to the Treasurer or any bencher or official of the LSO for any acts done in good faith in the performance of their duties.

The applicants then sought a transfer of the action to the Superior Court of Justice, arguing that the matter was too complicated for the Small Claims Court's simplified rules.

The court first outlined the principles for transferring a matter to the Superior Court of Justice. Such a transfer, which is discretionary, should be rare and should not be done if the issues are capable of being justly and fairly resolved in the Small Claims Court.

As set out in *Segura Mosquera v. Rogers Communications Inc.*, [2021 ONCA 876](#) at paragraph [12](#), the onus rests on the party seeking the transfer to satisfy the court that the transfer should be granted based on a consideration of the factors:

- (i) The complexity of the litigation.
- (ii) The role and importance of pre-trial discovery and expert evidence.

- (iii) Whether the case raises issues of general importance.
- (iv) The desire for a just and fair determination.

First, the respondent argued that the matter was simple, as it was solely focused on whether the Treasurer libeled him. The court held that, in reality, the matter was far more complex as one of the defences claimed by the applicants required a review and interpretation of the *Governance Practices and Policies of the LSO*, the *Bencher Code of Conduct*, and a review of the duties of the Treasurer.

Second, the applicant argued that the absence of pretrial discovery was a major impediment to the proper trial of the matter. In Small Claims Court, oral discovery is not available, and documentary discovery is limited to production of the documents on which a party will rely. Conversely, in Superior Court, documentary discovery extends to *all* relevant documents, regardless of whether a party will rely on them. In his claim, the respondent spoke of his history of issues with the Treasurer. A consideration of this history would go beyond the review of the single, allegedly libelous, statement of the Treasurer. In order to review the history properly, the additional step of discovery would ensure that the matter was considered as justly and fairly as possible.

Third, both parties agreed that the matter raised issues of general importance. The case engaged the debate over the proper role of the LSO and the interpretation of the LSO's *Governance Policies and Bencher Code of Conduct* – all matters that had yet to be adjudicated before the courts. The court held that the statutory mandate of the Small Claims Court is to "hear and determine [matters] in a summary way" rather than to adjudicate actions which involved serious issues of public importance.

Fourth, the respondent argued that a transfer to the Superior Court of Justice would take much

longer and be more expensive than proceeding in the Small Claims Court. On the motion before the court, the applicants had submitted a bill of costs of over \$46,000 – more than the entire value of his claim. The respondent argued that he was a practitioner in a two-person firm while the applicants had available the financial resources from the LSO's income earned from the annual fees of all of Ontario's lawyers and paralegals. While the court agreed that this argument had merit and raised legitimate public concerns, those concerns could be reduced.

In the result, the court granted the transfer and imposed some creative terms in an attempt to equalize the playing field for the parties:

- If the matter is transferred to Superior Court, the applicants could not pursue an anti-SLAPP motion (an anti-SLAPP motion cannot be brought in the Small Claims Court).
- If the applicants are ultimately successful, the costs of the action would be limited to those available in Small Claims Court. In Small Claims Court, the costs of the action are limited to 15% of the amount claimed.
- If the respondent is ultimately successful, he is entitled to claim costs in an amount not limited by the maximum available in Small Claims Court, but in an amount he would be ordinarily entitled to in the Superior Court of Justice.

The court held that this was the best way to permit the complexities of the matter to be determined in a fair and judicious manner, while not imposing significant cost consequences on the respondent. Since it was the applicants who wanted the transfer, if the respondent was ultimately successful, he should not be limited to the costs of a Small Claims Court proceeding

when the additional costs he incurred are those that arise out of procedures that the applicants wanted. Conversely, the applicants will incur irrecoverable costs if they are successful in the Superior Court.

The final outcome of this litigation remains to be determined.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [Isabel Yoo](mailto:iyoo@grllp.com), at 416.865.6655 or iyoo@grllp.com.

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