KEEPING CURRENT

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"Enough is Enough" – frustration expressed by Ontario Courts over litigation misconduct during the pandemic

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At the time of this writing, it has been almost a year since civil litigation was routinely conducted in a physical courtroom. While parties and their counsel are working under difficult conditions, recent decisions of the Ontario Superior Court of Justice have expressed considerable frustration with the failure of counsel to follow procedural rules, including various *Notices to the Profession* released during the pandemic, which are being treated like guidelines rather than requirements. Justices have not shied away from orders striking offending affidavits, refusing motions, and imposing cost sanctions for improper conduct of litigants and their counsel, while making stern comments in written endorsements when circumstances warrant.

Technologies such as Zoom have effectively revolutionized the Justice system in the past year, moving it from the 19th century to the 21st in a matter of months, but these same technologies have opened up serious concerns about the integrity of the process. Now more than ever, the courts must be entitled to rely on the integrity of lawyers for the system to function.

Undoubtedly, the lack of personal interaction and the need to practice over video link has taken its toll on the profession with many lawyers and judges experiencing 'Zoomout'. In ***713949 Ontario Limited v Hudson's Bay Company ULC***, 2021 ONSC 621 (CanLII), Justice F.L. Myers noted that the Court "takes very seriously issues of health and wellness of practitioners, members of the judiciary, and court staff during the pandemic," and declined to schedule a weekend hearing sought by a party on the basis that the matter was not truly urgent enough for counsel to put themselves (or their juniors) into an unhealthy state. The decision was likely intended to send a clear message to parties and their counsel to take a hard look at whether or not a matter was truly urgent before seeking court intervention for scheduling or other procedural matters and to take into account the extraordinary circumstances in which everyone is operating.

Videoconferencing via Zoom and similar platforms for out-of-court cross-examinations and examinations for discovery has become the norm in

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the pandemic and was directed as a procedure early on by Justice Myers, who dismissed the resistance of counsel to the practice by stating "It's 2020": ***Arconti v. Smith***, 2020 ONSC 2782 (CanLII) at para. 19. While the decision noted the potential for abuse of the technology by a party "who might be so inclined," Justice Myers did not believe that such abuse should be presumed.

Fortunately, there appear to have been few reported incidents of mischief during videoconference examinations until ***Kaushal v. Vasudeva***, 2021 ONSC 440 (CanLII). In that case, counsel for the party being examined permitted the witness's wife and daughter to secretly attend during the videoconference cross-examination off camera and failed to disclose their presence in the room. The family members fed the witness answers during the proceedings with hand signals and facial gestures. The examining counsel, upon discovering that the witness likely had some improper assistance with his examination, brought a motion to strike the witness's evidence. This egregious conduct of technological 'oath helping' poses a serious problem for the integrity of the judicial process. The Honourable Madam Justice Gilmore granted the order sought and recognized that this was an appropriate case to send a message to the parties (para. 65):

> I find that the Respondent's misconduct in this matter amounts to an abuse of process of this Court and the affidavit in his Responding Record must be struck. The Court must send a strong message that interference in the fact-finding process by abusing or taking advantage of a virtual examination will not be tolerated. In a broader sense, this type of misconduct strikes at the very heart of the integrity of the fact-finding process such that general deterrence is also a factor.

In ***Paul v. Veta***, 2020 ONSC 6839 (CanLII), Justice Myers refused to grant an application for an urgent hearing due to moving counsel's failure to adhere to a *Notice to the Profession* issued during the pandemic. Counsel had submitted incomplete documents which made the motion unnecessarily difficult for the Court to address (para. 29): "Judges receive numerous motions in writing (or "basket motions" as they are commonly called). It does not take very long to read a properly prepared basket motion. It is far more difficult and time consuming for a judge to deal with a poorly prepared basket motion." The decision outlined a roadmap for counsel to follow in submitting written motions in subsequent matters.

It appears that Justice Myers's roadmap was not followed by counsel who submitted a motion for an unopposed order transferring an action from Windsor to Toronto in ***Polgampalage v Devani***, 2021 ONSC 1157 (CanLII). Justice Myers wrote a strong rebuke to a lawyer who permitted an articling student to swear an improper and poorly drafted affidavit in support of the motion, as the affidavit did not contain any evidence to support why the action should be moved, but instead asserted a number of findings of law more appropriate for a factum. Justice Myers was critical of the motion material and included in his endorsement a general comment to lawyers on their role as mentors to students and young lawyers, and the need to ensure that work product does not suffer as a result of practicing remotely from home:

> [41] The pandemic has been a difficult time for everyone. I have special empathy for students and young lawyers who may

be deprived of close contact with mentors and senior peers to assist with their training. Partners, employers, and mentors may not even realize how much their juniors are suffering from the lack of ready access to more experienced colleagues whether for formal training, informal feedback, or even serendipitous educational opportunities that may arise from casual chats in office corridors.

[42] But all students and lawyers also have independent duties to scrutinize with great care every word to which they put their names. During the pandemic in particular, juniors need to insist that they receive full instructions and that their work product is properly reviewed. As difficult as it may be at times, junior lawyers and students alike must guard against allowing employers, clients, or anyone to put their integrity or reputations at risk by inadequate instructions or releasing inadequately reviewed material under their names.

Poor drafting of affidavits was also noted as a general concern by the Honourable Justice Penny in a recent Divisional Court case, ***30 Bay ORC Holdings Inc. et al. v. City of Toronto***, 2021 ONSC 251 (CanLII): "I would say with some regret that it seems to be the rare affidavit these days that strictly adheres to the facts; attempts at argument, summarizing, spinning the facts, and drawing inferences is not at all uncommon."

Early on in the pandemic, the Honourable Mr. Justice A. Pazaratz noted that "nonsense as usual" in contested matrimonial proceedings was likely here to stay notwithstanding the existential crisis: ***Dhaliwal v. Dhaliwal***, 2020 ONSC 3971 (CanLII). This certainly appeared to be case in ***Kane v Kane***, 2021 ONSC 1189 (CanLII), in which the Court imposed a substantial cost award in rebuke of counsel's conduct in ignoring the affidavit page limit rule, attempting to argue issues exceeding the time scheduled for the motion, and making allegations approaching fraud without any compelling evidence.

Justice Pazaratz returned to his earlier assessment of "nonsense" in ***Berta v. Berta***, 2021 ONSC 605 (CanLII), in a scathing assessment of the conduct of litigants:

[41] The COVID pandemic has left our court resources strained as never before. Even working at maximum efficiency, our reduced capacity in family court means that every day more and more families are left waiting for access to justice. In many of those delayed cases, the well-being and circumstances of children and vulnerable people are at stake.

[42] I'm not sure why we tolerated as much litigation nonsense as we used to. But that's not an option anymore.

[43] We can no longer permit or tolerate an inefficient or cavalier approach toward judicial resources. We can no longer overlook or gloss over oppressive, reckless or malicious behaviour.

Two related endorsements in ***Schieder v. Gajewczyk***, 2021 ONSC 640 (CanLII)

demonstrate the Court's frustration with the "culture of unreasonableness" which appears have taken over some members of the legal profession by refusing to adhere to procedural rules or general professionalism. The Honourable Mr. Justice Jarvis had strong words for counsel for failing to adhere procedural requirements established in a previous Order: "the responsibility for this rests entirely with counsel. They are expected to know the court's practice, to obey Practice Notices and to ensure that their client's material is Order-compliant." As a consequence, the parties' upcoming motions were vacated. Jarvis J. also hinted strongly that neither counsel should charge their clients fees for their work.

In a subsequent endorsement in the same matter, 2021 ONSC 635 (CanLII), the Honourable Madam Justice A. Himel took issue with a number of prevalent but improper tactics used by litigators that were "indicative of the culture of unreasonableness that plagues the Court," including:

- Ignoring line spacing and font size rules to "comply" with page limits, or alternatively just ignoring page limits;
- Bringing "urgent" motions which are not urgent or attempting to squeeze long motions into a one hour slot;
- seeking last minute adjournments based on information known weeks in advance and failing to promptly notify the Court when matters have been settled;
- Using the Court's resources to play the "delay, delay, delay game";
- playing "good cop, bad cop" with the judge delivering the unfavourable opinion rather than the client's legal advisor.

With an implicit judicial 'sigh', Justice Himel concluded with the following comments:

> [12] It seems that, for some counsel, the days of valuing one's reputation over success in any particular file may be gone. Given the current state of rapid transformation of the Court, coupled with additional unspecified future changes, that is unfortunate.
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> [13] Civility inside and outside of the courtroom, and respect for colleagues and the Court, are vitally important to the successful functioning of the Family Justice system.
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> [14] Enough is enough.

Whether parties and their litigation counsel take heed of Justice Himel's pointed decision while the pandemic conditions continue, and thereafter, remains to be seen.

Contact us

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