

Only My Trial Judge Can Judge Me: Pre-Trial Judge, Don't Judge My Summary Judgment Motion

Litigation | Litigation & Dispute Resolution | Wrongful Dismissal

9 November 2016

Most lawyers have taken for granted, or assumed it was trite, that the *Rules of Civil Procedure* expressly prohibit a pre-trial conference Judge from hearing a subsequent summary judgment motion in the same matter. Put simply, the *Rules* do not expressly prohibit this. In fact, neither Rule 50.09 or 50.10, contains language expressly prohibiting a pre-trial judge from presiding on a summary judgment motion.

The Court of Appeal, in a recent decision, *Royal Bank of Canada v. Hussain*, 2016 ONCA 637 (CanLII), finally confirmed and brought comfort to every litigator's, 'I told you so' notion. In this case, the appellants successfully challenged a summary judgment, which was heard and granted by the same pre-trial Judge in the action.

A closer look reveals that, Rule 50.09 states:

50.09 No communication shall be made to the judge or officer presiding at the hearing of the proceeding or a motion or reference in the proceeding with respect to any statement made at a pre-trial conference, except as disclosed in an order under rule 50.07 or in a pre-trial conference report under rule 50.08.

Further, Rule 50.10 states:

50.10 (1) A judge who conducts a pre-trial conference shall not preside at the trial of the action or the hearing of the application, except with the written consent of all parties.

(2) Subrule (1) does not prevent a judge before whom a proceeding has been called for hearing from holding a conference either before or during the hearing to consider any matter **that may assist in the just, most expeditious and least expensive disposition of the proceeding without disqualifying himself or herself from presiding at the hearing**.

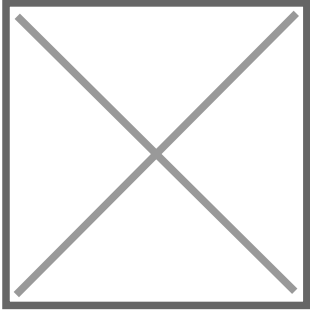
In fact, it appears that Rule 50.10(1) specifically mentions that a pre-trial judge cannot be a trial judge, but Rule 50.10(2) clarifies that it does not prohibit a hearing judge from holding conferences, and assisting in the least expensive disposition of the proceeding.

The Court acknowledged that neither Rule 50.09 or 50.10 contained language expressly prohibiting a pre-trial judge from hearing a summary judgment motion on the same matter. However, the Court stated that Rules 1.04(1) and (2), provided it with the ability to 'liberally construe' the Rules.

The Court confirmed that Rules 50.09 and 50.10 were designed to reassure that any information revealed in a pre-trial conference would not be used against them in a subsequent hearing, as the premise of a pre-trial conference was to solicit honest, open, full and frank settlement discussions. The Court asserted to decide otherwise, would undermine the integrity of the public confidence in the administration of justice. Beyond, bringing comfort to every litigator's, 'I told you so' notion, this decision furthered the appellate court's parental instincts. You can almost hear them saying, "just because the rule doesn't say you can't do it, doesn't mean you should do it".

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Dara Hirbod

Partner

416.865.4014

dhirbod@grllp.com

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com