Toronto Law Journal

Ontario's New Rule 48.14: Have we thrown the baby out with the bath water?

By Stephen Simpson, Bennett Gastle Professional Corporation

Few would dispute that change was needed. The old Rule 48.14, according to the Court of Appeal for Ontario, enabled the court to control the pace of litigation and ensure that disputes were resolved in a time-effective manner. But it filled our courts with status hearings and motions to extend time or set aside administrative dismissals. Moreover, LawPRO consistently reported upward trends in claims arising from administrative dismissals. Instead of streamlining actions, Rule 48.14 spawned a new batch of litigation. It compounded the very delay it was brought in to reduce.

Yet the changes to the Rule seem to have gone too far. While it likely eliminated the need for most status hearings and related motions, it also adopted a hands-off approach to the pace of litigation.

The new Rule 48.14 has been amended out of existence for most actions. The time to bring a matter to trial has more than doubled. Plaintiffs can leave actions dormant for more than four years. Trials may be heard five to seven years from the event in question. Technically, a plaintiff could commence an action, attend law school, be called to the Bar, and then prosecute her claim within the prescribed time.

But let's not get ahead of ourselves; the sky is not falling. The new Rule 48.14 allows any party to request a status hearing at any time. Defendants may set the action down for trial at any time (particularly if the merits of the claim are dubious). Motions for delay under Rule 24 may still be brought.

The Rules have tools capable of pushing a matter forward. But those tools require one of the litigants to bring the matter before the court. Plaintiffs who adopt a dilatory pace to litigation no longer face a realistic risk of dismissal. Why would a defendant bring a matter before the court for delay in the first four years when Rule 48.14 affords the plaintiff five years to prosecute? The amendment has shifted the litigation risk of delay from the plaintiff to the defendant.

What we need to know is what purpose a status hearing will serve now. Does the plaintiff still bear the onus of explaining why the action should continue? Will Rule 24 motions be informed by the new five-year allowance under Rule 48.14?

Until those questions are answered, defendants will be well-served to craft detailed discovery plans and timetables. Timely oral discoveries are no longer a given under the *Rules*. Parties

should reserve as many rights as possible at the outset and decide how to enforce those rights later, if necessary.

The new Rule 48.14 does not enable the court to control the pace of litigation or ensure that disputes are resolved in a time-effective manner. If additional time was required to accommodate inherent delays in a lawsuit, then those inherent delays should have been streamlined. If additional time was required to accommodate the backlog for court dates, then the backlog should have been addressed. A hands-off approach does little to advance the goals of Rule 48.14. In that regard, one might justifiably ask whether we have thrown the baby out with the bath water.

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Is Uniqueness of Land A Requirement for Injunctive Relief?

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Since the Supreme Court decision in *Semelhago v. Paramadevan,* [1996] 2 SCR 415 it has been widely accepted that specific performance for the sale of land is not presumed because it "cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy " (at par. 21).

As a result, where there is an alleged breach of contract and a remedy other than damages is sought in the context of real estate, one of the issues live before the Court is uniqueness of the property. To show a good case the plaintiff must show that damages will not suffice.

This view has meant that uniqueness has been an issue in real estate cases where an injunction is sought.

That said the Court of Appeal recently released a decision that suggests that where real estate is in play special considerations will apply and damages will be presumed not to be sufficient. In *1465152 Ontario Limited v. Amexon Development Inc.*, 2015 ONCA 86 the Court reviewed *Pointe East Windsor Limited v. Windsor (City)*, 2014 ONCA 467, 374 D.L.R. (4th) 380. *Pointe East Windsor Limited v. Windsor (City)* unsurprisingly, held that equitable relief, such as a permanent injunction, is only available where damages are an inadequate remedy for the harm suffered.

Despite *Pointe East Windsor Limited v. Windsor (City)*, the Court in *1465152 Ontario Limited v. Amexon Development Inc.*, *held* that where an injunction is sought there is a strong inclination towards preserving a property right – something functionally the same as a presumption that damages will be an inadequate remedy for a loss of real property rights. The Court holds:

> [23] As the law in Ontario currently stands, different considerations apply in the latter circumstance, as was explained in Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (consulted on 30 January 2015), (Toronto: Canada Law Book, 2014), at 4.10 and 4.20:
>
> > Where the plaintiff complains of an interference with property rights, injunctive relief is strongly favored. This is especially so in the case of direct infringement in the nature of trespass.
> > …
> > The reason for the primacy of injunctive relief is that an injunction more accurately reflects the substantive definition of property than does a damages award. It is the very essence of the concept of property that the owner should

> not be deprived without consent. An injunction brings to bear coercive powers to vindicate that right. Compensatory damages for a continuous and wrongful interference with a property interest offers only limited protection in that the plaintiff is, in effect, deprived of property without consent at an objectively determined price. Special justification is required for damages rather than an injunction if the principle of autonomous control over property is to be preserved. A damages award rather than an injunction permits the defendant to carry on interfering with the plaintiff's property. [Footnotes omitted.]

As a practical matter the law on when land is unique enough to support equitable relief is now uncertain. Counsel would be best advised to adduce evidence of uniqueness when available but counsel responding to a claim for equitable relief may not be able to succeed merely upon showing the land is non-unique.

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Antitrust, but Verify: The Supreme Court of Canada's Clarification of the Efficiencies Exception to Anti-Competitive Mergers in *Tervita Corp. v. Canada (Commissioner of Competition)*

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In *Tervita Corp. v. Canada (Commissioner of Competition),*[1] the Supreme Court of Canada examined for the first time a unique feature of Canadian merger review: the efficiencies exception to anti-competitive mergers under s. 96 of the *Competition Act*.[2] The Court's decision is even more interesting than it may at first appear. Not only will the decision be of considerable interest to competition law practitioners and commentators, the decision also raises a number of provocative points about statutory interpretation and judicial review. While this article focuses primarily on the Court's approach to merger review, it also highlights these broader dimensions of the Court's decision.

Background Facts

Tervita Corp. (formerly CCS Corp.) operates secure landfills for the disposal of hazardous waste generated by oil and gas operations. In the northeastern region of British Columbia, Tervita holds two of the four permits issued for such landfills. Of the two remaining permits, one was issued to an Aboriginal community and has not yet (as of this writing) been developed; the other – the Babkirk site – is at the heart of this case.

The Babkirk site was held by Babkirk Land Services Inc., a wholly-owned subsidiary of Complete Environmental Inc., which in turn was owned and controlled by a consortium of investors. In July 2010, the investors-*cum*-vendors agreed to sell the site to Tervita Corp.

The transaction closed on January 7, 2011. Prior to closing, however, the Commissioner of Competition informed the parties that she opposed the transaction on the ground that it was likely to *substantially prevent* competition in secure landfill services in northeastern British Columbia. After closing, the Commissioner asked the Competition Tribunal to order, under s. 92 of the *Competition Act*, that the transaction be dissolved or, in the alternative, that Tervita Corp. divest itself of the Babkirk site.

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[1] *Tervita Corp. v. Canada (Commissioner of Competition),* 2015 SCC 3 ["*SCC Decision*"]. The title of this article – "Antitrust, but Verify" – is a play on the "Trust but Verify" slogan used during the Cold War to describe the basis for transparency in political relationships.
[2] *Competition Act,* R.S.C. 1985, c. C-34.

The Competition Tribunal's Decision

The Tribunal found that under s. 92 of the Act the merger would likely substantially prevent competition in the relevant market. The Tribunal further found that Tervita Corp. failed to establish the efficiencies exception under s. 96.[3]

Rather, the Tribunal concluded that the efficiencies accruing from the merger were not greater than – and would not offset – its anti-competitive effects, and it ordered Tervita Corp. to divest the Babkirk site.[4]

The critical issue in this case is how to weigh anti-competitive effects against accrued efficiencies. The Tribunal found that the Commissioner failed to meet her burden to demonstrate the extent of the quantifiable anti-competitive effects: the Commissioner's expert economist estimated that a price decrease of 10% would be precluded by the merger, but provided no estimate of the volume having regard to the elasticity of demand. Tervita Corp. was thus unable to show that the merger's total efficiencies were greater than its adverse, anti-competitive effects.[5]

The Tribunal did find, however, that the merger would have *qualitative* anti-competitive effects – namely, environmental effects related to price reduction on site clean-up and "value propositions."[6]

Notably, in his concurring reasons, Chief Justice Crampton held that, in the absence of quantifications of anti-competitive effects that are ordinarily quantifiable, the Tribunal is still able to accord this factor some *qualitative* weight.[7]

The Federal Court of Appeal's Decision

The Federal Court of Appeal upheld the Tribunal's conclusion that the merger would likely substantially prevent competition. The Court disagreed with the Tribunal, however, that the Commissioner could discharge her burden under s. 92 by proving quantifiable anti-competitive effects through a reply expert report setting out a "rough estimate" of the deadweight loss arising from the merger.

In an interesting twist, the Court also found in its own fresh assessment of the merger that the quantifiable anti-competitive effects that the Commissioner failed to quantify should be accorded an "undetermined" weight, as opposed to a weight of zero.[8]

The Court concluded that an anti-competitive merger cannot be saved under s. 96 if only marginal efficiency gains accrue from it.[9] The Court explained that this conclusion

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[3] Prior to the Supreme Court of Canada's decision in the case at bar, the only judicial consideration of the efficiencies defence under s. 96 of the Act was the *Superior Propane* line of cases. See *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185, rev'g (2000), 7 C.P.R. (4th) 385, leave to appeal refused, [2001] 2 S.C.R. xiii.
[4] *Canada (Commissioner of Competition) v. Tervita Corp.*, [2012] C.C.T.D. No. 14.
[5] *Id.*, at para. 246.
[6] *Id.*, at paras. 306-307.
[7] *Id.*, at para. 408.
[8] *Tervita Corporation v. Commissioner of Competition*, 2013 FCA 28, at paras. 167-168.
[9] *Id.*, at paras. 170-172.

was strengthened because “a pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger.”[10]

The Supreme Court of Canada’s Decision: Antitrust, but Quantify

Writing for the majority of the Court, Justice Rothstein aptly stated the ostensible paradox at the heart of this case as follows:

> It may seem paradoxical to hold that the Tribunal was correct in finding a likely substantial prevention of competition [under s. 92], only to then conduct the s. 96 balancing test and find zero anti-competitive effects.[11]

On this reading of the *Competition Act’s* merger review provisions, Justice Rothstein suggested that the balancing test under s. 96 be framed as a two-step inquiry. At step one, the quantifiable efficiencies of the merger at issue are weighed against its quantifiable anti-competitive effects. Where the quantified anti-competitive effects outweigh the quantified efficiencies, step one will *usually* be dispositive. At step two, the qualitative anti-competitive effects should be weighed against the qualitative efficiencies, whereupon a final determination is made as to whether the total efficiencies offset the total anti-competitive effects of the merger in question.[12]

The majority of the Court concluded that the quantifiable anti-competitive effects that were not quantified by the Commissioner be assigned a weight of zero. Because Tervita Corp. successfully quantified “overhead” efficiency gains, it met the “greater than and offset requirement” under s. 96.[13] The Court reversed the Federal Court of Appeal’s decision and set aside the Tribunal’s divestiture order.

Justice Rothstein’s proposed “as *objective* as is reasonably possible”[14] approach failed, however, to convince Justice Karakatsanis, who wrote a strongly-worded dissent. Justice Karakatsanis rejected Justice Rothstein’s artificial hierarchy between quantitative and qualitative effects, onto which he grafted the hierarchy between objectivity and subjectivity. Justice Karakatsanis argued instead for analytic *holism*:

> The s. 96 framework enables the *expert* Tribunal to *holistically assess* the *entirety of the evidence before it*, rather than artificially bifurcating the analysis of qualitative and quantitative effects that may, in some cases, more helpfully analyzed together. Such a test allows the Tribunal to reach an objective and reasonable determination regarding the s. 96 defence by minimizing subjective considerations, but without limiting itself to solely mathematical considerations. This

[10] *Id.*, at para. 173.
[11] *SCC Decision, supra*, at para. 166.
[12] *Id.*, at para. 147.
[13] *Id.*, at para. 165.
[14] *Id.*, at para. 150 [emphasis original].

> approach provides more flexibility to achieve the purposes of the Act.[15]

According to Justice Karakatsanis, s. 96 furnishes the Tribunal with the flexibility to meet all of the purposes of the Act, including what she calls the "*primary purpose* 'to maintain and encourage competition in Canada' (s. 1.1)."[16]

That, however, is not entirely accurate. The purposes of the Act are many, and there is no authority for Justice Karakatsanis' elevation of maintaining and encouraging competition as the primary purpose, especially when the immediately following and dependent clause of the first sentence of s. 1.1 of the Act reads "in order to promote the *efficiency* and adaptability of the Canadian economy".[17]

An arguably stronger dissent would have emphasized the *Competition Act's* overarching objective of *balancing* competition and efficiency, rather than artificially elevating competition at the expense of efficiency. More specifically, Justice Karakatsanis could have argued that s. 96 must be read in light of s. 92, which would allow the qualitative anti-competitive effects marshaled in support of a likely substantial prevention of competition under s. 92 to be imported into the balancing analysis set out in s. 96.

An even stronger dissenting argument would have further questioned the purchase of the dichotomy – let alone the inequality – between not only quantitative versus qualitative measurements (after all, conceptualizations of quantitative measurements depend on qualitative assumptions, preferences, and decisions), but also the dichotomy of subjective versus objective analysis (for the closely related reason that what is legally "objective" depends on myriad "subjective" determinations). Is it not well past due to begin grounding decisions in more epistemologically accurate – and humble – considerations such as transparency and reasonableness?

Conclusion: Objectivity, But on What Standard of Review?

This brings us to the fascinating dissent of Justice Abella on the sole issue of the applicable standard of review. Justice Rothstein found that the presumption of reasonableness was rebutted in this case, such that questions of law arising out of the Competition Tribunal's "home statute" (the *Competition Act*) are reviewable on a standard of correctness, while questions of mixed fact and law are reviewed for reasonableness.[18]

Justice Abella was nonplussed by the majority's rebuttal of the reasonableness presumption, arguing that the Court's decision in the pre-*Dunsmuir* case of *Pezim v. British Columbia (Superintendent of Brokers)* "introduced a new edifice for the review of specialized tribunals" whereby

> judges and lawyers engaging in judicial review proceedings came to believe, rightly and reasonably, that the jurisprudence

[15] *Id.,* at para. 191 [emphasis added].
[16] *Id.,* at para. 195 [emphasis added].
[17] *Competition Act, supra,* s. 1.1 [emphasis added].
[18] *SCC Decision, supra,* at paras. 39-40.

> of this Court had developed into a presumption that regardless of the presence or absence of either a right of appeal or a privative clause … [that] when a tribunal is interpreting its home statute, reasonableness applies. *I am at a loss to see why we would chip away – again*[19] *– at this precedential certainty.*[20]

In a revealing, possibly *Dunsmuirian* slip, Justice Abella admitted that she is "aware that it is *increasingly difficult to discern the demarcations between a reasonableness and correctness analysis*, but until those lines are completely erased, I think it is worth protecting the existing principles as much as possible."[21]

Another possibility, however, would have been to follow this logic to its inevitable conclusion – namely, that the demarcations between reasonableness and correctness review are artificial at best and should be "completely erased" in favour of a single standard of strict judicial scrutiny. The case at bar offers a compelling demonstration of such artificiality, as the majority of the Court, despite holding that questions of mixed fact and law attract the more deferential reasonableness standard of review, nonetheless found that the Tribunal's acceptance of qualitative anti-competitive effects was *incorrect and in error*, notwithstanding the fact that the *Competition Act* is silent on this issue. In other words, the majority of the Court was unable to sustain the distinction between reasonableness and correctness even within the confines of a single decision.

Another justification of a unified standard of strict judicial scrutiny is suggested (unwittingly) by the opening lines of the Court's decision in *Alberta Teachers' Association*: "Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are *assumed* to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals."[22]

But do they really? According to Trebilcock and Iacobucci, the Competition Tribunal has not lived up to its legislative assumptions:

> [T]he presence of lay experts on the Tribunal presumably is designed to ensure, in part, some flexibility in applying competition law precepts to idiosyncratic business transactions or practices and to reflect changes in the nature of the domestic economy, the international economic environment, technology, and theoretical thinking.

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[19] See *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada,* [2012] 2 S.C.R. 283.
[20] *SCC Decision, supra,* at para. 170 [emphasis added].
[21] *Id,* at para. 171 [emphasis added].
[22] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* [2011] 3 S.C.R. 654, at para. 1 [emphasis added].

> In fact, the experience with the Competition Tribunal since its creation in 1986 has, in many respects, proven otherwise.[23]

Trebilcock and Iacobucci conclude that "the Competition Tribunal has become a *minor institutional player* in the competition policy process relative to the Competition Bureau."[24] Recognition – however tacit – of this reality likely informed the majority's decision in *Tervita Corp.* to rebut the presumption of reasonableness and review the Competition Tribunal's decision on a correctness standard.

But perhaps the strongest argument in favour of a single, stringent standard of judicial review is that it will make both administrative bodies *and* reviewing courts more accountable, for it will force reviewing courts to rigorously justify their disagreements with administrative bodies. Given the increasingly tenuous assumptions both of superior substantive expertise[25] and administrative independence in Canada,[26] such a standard may well prove a crucial step in reforming our broken and arguably unlawful administrative process.[27]

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[23] Michael J. Trebilcock and Edward M. Iacobucci, "Designing Competition Law Institutions" (2002) 25(3) World Competition 361, at p. 373.

[24] *Id.*, at p. 374 [emphasis added].

[25] For an additional analysis of this issue in the context of Canadian competition law, see Jason MacLean, "Going Down the Illinois Brick Road (if the Hanover Shoe Fits)? Economic Complexity and Judicial Competence in the Context of Canadian Competition Law's Possible Futures (Part One)" (2013) 6(2) Global Competition Litigation Review 85; and Jason MacLean, "Hanover Shoe, Retreaded: Economic Complexity, Judicial Competence and Procedural Purity in Canadian Competition Law (Part Two)" (2014) 7(2) Global Competition Litigation Review 79.

[26] See Ron Ellis, *Unjust by Design: Canada's Administrative Justice* (Vancouver: UBC Press, 2013); see also Jason MacLean, "No Deference Without Independence: *Ernst v. Alberta (Energy Resources Conservation Board*), (November 2014) Toronto Law Journal.

[27] See e.g. Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

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Case Comment on Iannarella v Corbett

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The Court of Appeal released an important decision for all lawyers practicing in the field of civil litigation and personal injury, in particular. *Iannarella v Corbett*[1] clarifies the onus of proof regarding liability in a rear-end collision and reinforces the ongoing disclosure obligations of surveillance throughout the litigation process.

Factual Background

This appeal arises from a rear-end collision that occurred on Highway 427 at night in a snowstorm. The respondent, Stephen Corbett, was driving a concrete mixer when a snow squall led to "whiteout" conditions. Corbett lost visibility and slammed on the brakes but did not have time to avoid a collision with the appellant, Andrea Iannarella, who was directly in front of him. As a result of this accident, the appellant claimed he suffered a rotator cuff injury to his left shoulder. Despite two surgeries to repair the injury, Iannarella reported suffering from chronic pain and was unable to return to work. Following the conclusion of a 15 day trial, the jury found that the respondent had not been driving negligently and the action was dismissed on the ground of liability.

The Onus for Liability

Where a rear-end collision has occurred, the onus is on the defendant to prove that he or she could not have avoided the accident through the exercise of reasonable care. This is often expressed by trial judges through a standard charge. The relevant portion reads:

> Generally speaking, when one car runs into another from behind, in the absence of any excuse for a such a collision, the driver of the rear car must satisfy you that the collision did not occur as a result of his negligence.

Iannarella's trial counsel unsuccessfully sought a directed verdict on liability on this issue because the defendant/respondent had not demonstrated a lack of negligence on its part. In rejecting this argument, the trial judge characterized the accident as "nearer an emergent situation than an inevitable accident situation."[2] The trial judge advised the jury that in an emergent situation "the plaintiff has the burden of establishing on a balance of probabilities

[1] 2015 ONCA 110.
[2] *Ibid* at para 15.

all of the facts necessary to prove the following issues, that he was injured and that the negligence of the defendant driver was the effective cause of his injuries."[3] In concluding his charge to the jury on liability he stated: "The onus of establishing an emergency situation, and in measuring his conduct within it, isn't onus upon the defendant."[4] On the basis of this charge, the jury found that the respondent was not liable for the accident.

The Court of Appeal firmly rejected the trial judge's deviation from the standard charge, noted above. The Court also made one slight modification to the recommended standard charge by deleting the words "*in the absence of any excuse for such a collision*". The Court confirmed that once the plaintiff has proven that a rear-end collision has occurred, the evidentiary burden shifts from the plaintiff to the defendant, who must then show that he or she was not negligent. This is applicable in all rear-end collision cases, including an emergency situation, as was alleged in this case. On the basis of the evidence regarding liability at trial, the Court substituted a finding of liability against the respondent driver since he did not demonstrate that he had properly adjusted his driving to the weather conditions.

Disclosure of Surveillance

Counsel for the respondents arranged to have surveillance conducted on Iannarella on multiple occasions following the commencement of litigation. At trial, the judge permitted counsel to play the surveillance video, cross-examine the appellant on its contents and make the video an exhibit, despite the fact that the respondents had not disclosed its existence in an affidavit of documents nor had they provided particulars as required by the *Rules of Civil Procedure*. The appellants took the position that the trial judge erred by refusing their pre-trial request to order production of an affidavit of documents or particulars of surveillance, in permitting the respondents to use the surveillance evidence despite their failure to properly disclose it and in failing to properly instruct the jury on the proper use of the surveillance evidence in their deliberations. In finding that the trial judge had erred in admitting this evidence, the Court of Appeal emphasized the importance of promoting settlement and interpreting the *Rules* as they operate in conjunction with one another rather than discretely.

The *Rules* clearly outline the production obligations of counsel and the requirement to produce an affidavit of documents in Rules 30.02 and 30.03, respectively. The consequences for failing to comply with these requirements are found in Rule 30.08(1)(a). This rule prescribes that where a document is favourable to the party's case, it may not be utilized at trial, except with leave of the court. Rule 30.09 provides an exception for privileged documents that have not been disclosed to be used solely to impeach the testimony of a witness. The case law reaffirms that surveillance can only be used as substantive evidence when privilege has been waived and, if it has not, it can only be used for impeachment purposes.

[3] *Ibid* at para 16.
[4] *Ibid* at para 17.

The Court held that even in situations where an affidavit of documents has not been requested, one must be provided to comply with the *Rules*. Parties must disclose the existence of any surveillance in a Schedule B to an affidavit of documents as a privileged document. The plaintiff may then seek particulars of the surveillance. While the films themselves remain privileged, the facts disclosed by the films do not.

The respondents attempted to shield themselves from these obligations by relying on rule 48.04, which prevents either party from bringing any motion or form of discovery once a matter has been set down for trial without leave of the court. Counsel argued that the appellants were not entitled to an affidavit of documents or surveillance particulars because they had waived their right to examinations for discovery and had not sought an affidavit of documents until after the matter was set down for trial.

The Court of Appeal rejected this argument on a strict reading of the *Rules*. Rule 31.03(1) provides that while a party "*may*" conduct an examination for discovery, Rule 30.03(1) requires that a party "*shall*" serve an affidavit of documents. The production of an affidavit of documents, including a Schedule B is mandatory. They further relied on 48.04(1), which indicates that this rule does not relieve any party from its obligation under 30.07 to disclose documents subsequently discovered or not previously disclosed in an affidavit of documents. The *Rules* do not provide parties with an exception to disclosure of surveillance where it has not provided an affidavit of documents. Non-compliance with the *Rules* should not be rewarded. The Court also made clear that in the wake of the Supreme Court's decision in *Hyrniak v Mauldin*[5] promoting efficiency in the litigation process that this ruling does not mean that the requirement to produce an affidavit of documents cannot be waived but that this waiver should be explicit.

In determining that the surveillance should have been provided, the Court indicated that the trial judge should have properly considered how this case might have developed if the respondents had complied with the *Rules*. They emphasized that the *Rules* are designed to require complete disclosure so as to avoid trial by ambush, which is what occurred in this case.

The Court rejected the use of the surveillance evidence as it was utilized for the truth of its contents rather than for impeachment of testimony, as purported by counsel for the respondents. Even if the Court had accepted this submission, it would have still rejected the respondents' position that the evidence was admissible on the basis of the exception outlined in Rule 30.09. The Court emphasized the importance of interpreting the *Rules* in conjunction with one another. The use of surveillance to impeach the testimony of a witness is only permitted where a party has asserted a claim of privilege. Rule 30.03 requires this assertion to be made in an affidavit of documents, which serves to link the Rules in order to require adequate disclosure. The Court held that this link was severed to the appellant's prejudice and, as a result, the evidence should have been rejected, even for the use of impeachment.

[5] 2014 SCC 7.

Lessons Learned from the Court of Appeal

Given the strong statement from the Ontario Court of Appeal regarding the actions of the trial judge in this decision, civil litigators - and personal injury defence lawyers especially - should take note of the bright line lessons here. Specifically, the following should be taken away:

- The onus for liability in a rear-end collision lies with the defendant driver. It is his/her obligation to demonstrate that the accident was not caused by their negligence and in the absence of such evidence they will be deemed at-fault.
- An affidavit of documents is required under the *Rules,* even where one has not been requested by opposing counsel. While this requirement may be waived, it must be done explicitly. A waiver of other aspects of the litigation process (i.e. examinations for discovery) does not mean that other disclosure obligations do not have to be fulfilled.
- If the existence of surveillance has not been disclosed properly in an affidavit of documents then it will not be properly admitted at trial *for any purpose*. Surveillance evidence can only be used to impeach the testimony of a witness and even then, it can only be used if privilege has been asserted by counsel and its existence has been disclosed via affidavit of documents.
- The underlying purpose of the *Rules* should be considered in all situations. No rule exists in a vacuum and counsel should consider both the interplay of the Rules with each other, as well as the underlying objectives of full disclosure and prompt settlement embodied in them. When in doubt, tactics that will result in 'trial by ambush' should be avoided at all costs!