EMPLOYMENT LAW CONFERENCE – 2005

You're Fired – Selected Issues on Employment Law Summary Trials

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Selected Employment Law 18A Issues

CONTENTS

EMPLOYMENT LAW and SUMMARY TRIALS UNDER RULE 18A

I. INTRODUCTION

The summary trial Rule 18A came into force in 1983. Since that date it has become a staple of the litigation process in all areas of litigation practice. The Rule permits the presentation of a trial through the use of affidavit evidence and other non viva voce evidence, in a manner that is intended to be consistent with the principles of Rule 1(5), to facilitate the just, speedy and inexpensive determination of proceedings.

The use of the Rule 18A process is often particularly appropriate and therefore prevalent in employment law litigation. There are many reasons for this. Chief among them is that the economic value of much employment litigation falls into a range in which processes that substitute for a full blown trial, with all the expense that a trial entails, are more suitable. Frequently, the matters in a straightforward wrongful dismissal are appropriate for decision on Rule 18A. However, it is clear that the Rule 18A process is not for every employment related claim. Particularly when the pleadings disclose claims that are related to the employment relationship but raise issues of bad faith, malice, defamatory statements, or intentional tortious acts, counsel need to think strategically about the use of 18A and examine the case law carefully before departing down the 18A road.

Another new factor must be considered in weighing the option of an 18A summary trial. On March 30, 2005 the Ministry of the Attorney General announced the introduction of Rule 68 in the Supreme Court Rules as part of its review pursuant to the *Justice Modernization Statutes Amendment Act,* 2004. This is a pilot project which is intended to expedite litigation and make the process less expensive and time consuming when the economic value of the claim is $100,000 or less. Rule 68 accompanies certain complementary changes to Small Claims Court jurisdiction. The new Rule 68 will be effective in selected registries September 1, 2005. The addition of Rule 68 adds another dimension to the strategic considerations counsel need to consider before choosing the 18A path, and more details on the draft rule are provided below.

This paper is intended to highlight some of the important issues that arise when considering the appropriateness of Rule 18A in employment law cases, as well as some of the procedural issues that arise. For a more exhaustive treatment of the Rule 18A, readers should also reference the recent February 2005 CLE Publication – "18A Applications – 2005 Update"

II. STRATEGIC ISSUES

A. Strategic Choices

The legal issue of "appropriateness" as set out in the leading case, *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.,* [1989] B.C.J. No. 1003, 36 B.C.L.R. (2d) 202 (C.A.), is of obvious significance to the employment lawyer considering advancing a case by way of 18A. However, the question of suitability for 18A entails a judgment about broader strategic questions of suitability, of the other options available through the Rules, and the possible consequences for the case in bringing on an 18A application.

For example, parties in an employment claim have alternatives that may be more appropriate than Rule 18A to the circumstances of their case.

B. Rule 18

Rule 18 is an application for summary judgment. It is available to a party after an Appearance has been filed. Its use is restricted to conditions in which the Defendant cannot raise a triable issue, or cannot raise a triable issue except as to amount, or where the there is no merit to the whole or a part of the Plaintiff's claim. The standard for such an application is a high one, as the Court is loath to dismiss a defence or claim without an opportunity to fully canvass the facts. The test regarding a Rule 18 summary judgment application was succinctly summarized by Lambert J.A. in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd. et al.* (1984), 55 B.C.L.R. 137 (C.A.) at 138-139:

> In essence, if the defendant is bound to lose, the Application should be granted, but if he is not bound to lose, then the application should be dismissed.

The rule has been recently applied in *Padgett v. Saxena* [2002] B.C.J. No. 1961 (S.C.). In that case, the Plaintiff succeed in having dismissed a defence to a wrongful dismissal action which alleged, among other things, fraud, deceit, forgery, and other wrongdoing. Holmes J. concluded that that aspect of the Defence should be dismissed because "the stringent requirements of Rule 18 had been met" and the defences were bound to fail.

Employment lawyers faced with a clear and straightforward case, particularly early on in the proceedings, should consider Rule 18 as an alternative to Rule 18A where the claim or defence is "bound to fail" or the party is confident that it can demonstrate that the claim or defence discloses no "bona fide triable issue." For example, where an issue of unpaid wages arises, or the termination provision in a contract of employment specifies an amount due and owing upon termination, or the Plaintiff can frame the claim in debt, then the claim may be more amenable to an application under Rule 18: *Robertson v. John M. Babcock Insurance Agencies* [1983] B.C.J. No. 1560 (C.A.). Under proper circumstances, a claim for dismissal without notice or payment in lieu of notice can be dismissed under rule 18, for example, where continued employment required compliance with a statutory regime: *Bouvier v. Shorthouse* [2002] B.C.J. No. 2491 (S.C.). However, certain cases, such as constructive dismissal, that are fact driven will by that fact not be suitable: see *Lesiuk v. B.C. Forest Products* [1984] B.C.J. No. 274 (S.C.); (1984) 6 C.C.E.L. 98.

C. Rule 66 – Fast Track Litigation

Fast Track Rule 66 is a regime which permits a party to place an action under an expedited procedure if the trial of the action can be heard in 2 court days or less. It thus provides a venue for faster and less expensive litigation. Rule 66 is an appropriate alternative to the summary trial process under Rule 18A when a litigant is faced with a fairly straightforward claim involving some item of contested evidence that cannot be resolved by affidavit, or issues of witness credibility. But Rule 66 has its own restrictions – litigants are not permitted to examine for discovery longer than 2 hours without the leave of the Court or by consent. Furthermore, disclosure of documents must be made with the delivery of the Statement of Claim and Defence, which accelerates the document disclosure process in a manner that is probably inappropriate for more document intensive cases. Also, subject to special circumstances, costs recovery is restricted by under Rule 66. A claim may be "de-fast tracked" if it can be shown that it is clearly not suitable for the Rule.

For example, in *Osmachenko v. North West Life Assurance Co. of Canada* [1999] B.C.J. No. 2454, the Defendant was faced with a wrongful dismissal claim involving voluminous documents and a requirement for discovery probably beyond the 2 hour time limit. The Master removed the proceeding from Rule 66. Notably, the Court expressly stated that the decision did not preclude either party from bringing an application under Rule 18A at a subsequent date if appropriate.

D. Rule 68 – Expedited Litigation Project Rule

As alluded to above, effective September 1, 2005, Rule 68 will add another process to expedite litigation in Supreme Court. Rule 68 is intended to present a more streamlined litigation process for cases of $100,000 or less, that will not bear the expense of the full blown litigation process. The expectation is that the cost of litigation can thereby remain proportionate to the value of the amount in dispute. The Backgrounder from the Ministry of the Attorney General and the draft Rule 68 set out the key features as follows:

- examination for discovery will not be allowed unless both parties consent or the court orders, and in any event will be limited to two hours, unless special circumstances can be shown to the Court

- Contested interlocutory applications will not be allowed before a case management conference or a trial management conference has been held.

- At a case management conference a judge or master may make orders aimed at narrowing the issues in dispute and readying the case for trial.

- Pre-trial document disclosure will be simplified and expedited by limiting the type and quantity of documents that must be listed and produced before trial and requiring that copies of the listed documents be shared with all other parties.

- Jury trials will not be allowed.

- New obligations are imposed on parties to engage in an early and more comprehensive exchange of information. For example, parties are required to exchange lists of witnesses and a written summary of the evidence that they expect each of their witnesses will give at trial.

- Trial management conferences conducted by a judge will be held between 15 and 30 days before trial.

- At least 7 days prior to a trial management conference, parties are required to exchange comprehensive trial briefs which summarize the issues and their positions, provide a list of witnesses and summarize their evidence.

- At a trial management conference a judge may impose time limits on the direct and cross-examination of witnesses, as well as on opening statements and final submissions.

Effective Sept. 1, 2005, the province will also implement key changes to the Provincial (Small Claims) Court in British Columbia including increasing the monetary limit from $10,000 to $25,000. The $25,000 threshold is expected to be on a trial basis, with the possibility of an increase to $50,000 if the Small Claims process manages to accommodate the increase. The increase is intended to provide more balance between the cost of the procedure and the amount of the claim.

Together, these complementary processes are intended to improve access to the court system for civil claims where the monetary value at stake precludes the more elaborate Supreme Court process currently available. Because many employment related claims fall within the monetary thresholds within the new rules, it is likely that the two changes will alter the complexion of employment law practice in significant ways. On the one hand, improvements in the efficiency with which claims can be brought to trial will make the settlement of employment claims more difficult, particularly

early on. Also, it can be predicted that employment trials under the new Rule 68 will become more frequent. On the other hand, the change to the Small Claims court limits may result in a clash between counsel for Defendant employers and lay litigant plaintiffs – the former compelled into the jurisdiction by their clients because the increased value of the claim will warrant representation by counsel, and the latter because the simplicity of the process will make it easier to pursue a claim without representation.

In either event, one consequence of the advent of these new steps may be less reliance on Rule 18A applications. Rule 68(10), (11) and (12) set out that absent certain limited circumstances, a party to an "expedited action" subject to Rule 68 will not be permitted to bring an application before a case management or trial management conference has been held, or without leave of the Court. Although the prohibition does not apply to certain preliminary applications (Rule 18, Rule 19(24), or any application brought by consent, it will apply to Rule 18A applications. Thus, it appears that the circumstances in which a litigant may proceed with an application under Rule 18A in the new Rule 68 regime are restricted.

E. Other Alternatives to Rule 18A

The above are the more useful and effective tools which employment lawyers may use as alternatives to Rule 18A in appropriate circumstances. However, there are others: under Rule 33, the parties or the court may state a special case, based on agreed facts, law, or mixed fact and law, to determine an issue in the proceeding and under Rule 34, the parties may seek a determination of a point of law. Although the circumstances do not often permit the use of these tools in employment law litigation, the availability of the settlement conference process, including non-binding mini-trials (Rule 35), or mandatory mediation pursuant to the *Notice to Mediate Regulation* B.C. Reg. 3/2001, are very effective methods in appropriate circumstances, and should be considered when an 18A is not the optimal tool.

F. Other Strategic Considerations

By its nature, an application under Rule 18A requires the applicant to put all required evidence to make out its case in the forms permitted by Rule 18A(3). An applicant's materials are most compelling when they put forth the evidence in a clear and succinct manner. However, if the court refuses to decide an application on Rule 18A, for reasons of appropriateness or otherwise, the applicant must realize that there are two significant and potentially detrimental consequences. First, the applicant will have provided its case in the litigation or a part of it to the other side in a tidy package, and at a stage in the proceeding prior to trial. Second, at any subsequent trial, the opposing party will have the advantage of written statements of fact from the applicant's own witnesses on which it can cross-examine. These strategic risks to the 18A application make it imperative to consider issues of appropriateness carefully prior to commencing a Rule 18A application.

III. APPROPRIATENESS FOR 18A

A. The General Rule – Inspiration Management

The issue of appropriateness is the first step in determining whether to proceed with an 18A application for summary trial, as well as in determining how to defend such an application.

The leading case on appropriateness remains *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, [1989] B.C.J. No. 1003, 36 B.C.L.R. (2d) 202 (C.A.). Although the Court of Appeal's judgment does not involve an analysis of the appropriateness of an 18A application in the employment context, the court, in this decision, provides a very detailed analysis of the test a trial

judge should undertake in deciding whether the Rule 18A procedure is appropriate for the resolution of the issues involved.

The action involved a claim that the Defendant had wrongfully sold shares of the Plaintiff that had not been pledged as security for a loan the Plaintiff had with the Defendant. The Defendant claimed that all the securities in the Plaintiff's accounts were collateral for the loan, and the Plaintiff denied this. Clearly, the terms of the loan agreement were crucial to the outcome of this case, as were the conflicting versions of events as between the Plaintiff and the Defendant.

The Court set out that a decision on appropriateness is a matter of considerable discretion. The factors a Court may weigh in determining suitability for Rule 18A were set out by McEachern C.J.B.C. as follows:

> In deciding whether it will be unjust to give judgment, the chambers judge is entitled to consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

The presence of conflicting affidavits will not prevent resolution of a trial under Rule 18A. While a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits, even if he prefers one version to another, it may be possible to determine the issue based on other admissible evidence, or to order further processes available under Rule 18A to find the necessary facts, such as cross-examination on affidavits: *Inspiration Management Ltd. V. McDermid St. Lawrence Ltd.,* [1989] B.C.J. No. 1003, 36 B.C.L.R. (2d) 202 (C.A.); *Placer Development Limited v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.) and *Coast Wholesale Appliances Ltd. v. Armistead* (1993), 77 B.C.L.R. (2d) 267 (C.A.).

As will be seen, all the *Inspiration Management* factors for suitability have been considered in the employment law setting.

B. The Amount Involved and Cost of Trial

One important factor will be the economic value of the claim, and the court will weigh this factor against the cost, in time and money, of proceeding to trial. In employment law cases, this factor guides many litigants to the 18A process even if there are issues of credibility and conflicts in evidence that make the summary trial a less than perfect process.

For example, in *Alibhai v. Royal Bank of Canada* [2004] B.C.J. No. 2165, the Plaintiff employee was a first level manager with 18 years service who earned less than $30,000 per year. After being downsized for her position and not finding an alternative position internally within the Bank, she sued the Bank for wrongful dismissal and her supervisor for various tort claims. The Court questioned the appropriateness of proceeding under Rule 18A, but proceeded to decide the case among other reasons, because the amount in issue was not large and because the costs of proceeding to trial would be exorbitant in relations to any possible award.

This reasoning was supported by the court of appeal in *MacMillan v. Kaiser Equipment Ltd.*, [2004] B.C.J. No. 969 (C.A). This was an appeal from a 5 day long 18A, concerning the interpretation of an employment contract and other related tortious claims. The Court stated that despite the contest on affidavit evidence, the trial judge was correct to determine the case, not least because a conventional trial would have involved lengthy proceedings and prohibitive cost.

The cost of proceeding to trial was also a factor in determining that a decision on a summary trial was appropriate in *Widney* v. *Nor-Pac Marketing, Division of Cap-Ron Trading Ltd.*, [1999]

B.C.J. No. 1325 (S.C.), a wrongful dismissal claim. The relevant evidence would not have improved or varied significantly at a trial, the facts were not complex and any conflicts were capable of being resolved. The judge stated that "… the cost of a trial is unwarranted having regard to the nature of the evidence the witnesses would give and the fact that their evidence is fully and satisfactorily advanced by means of affidavits and extracts from the plaintiff's examination for discovery".

The economic circumstances of the Plaintiff will also sometimes be a factor that the Court will weigh in an employment law case. The fact that the Plaintiff was destitute was considered as one reason to grant judgment on 18A in *Baker v. British Columbia Insurance Co.* (1992) 41 C.C.E.L. 107 (S.C.).

The cases suggest that the Court is willing to weigh the cost of a trial and the amount involved as factors against the evidence that is presented, even where employment law summary trial cases raise for resolution more complicated claims alleging for example, tortious conduct which turns on conflicts in affidavit evidence.

C. The Complexity of the Matter

Complexity alone should not prevent the court from determining an employment related claim on Rule 18A. As McEachern C.J.B.C. stated in *Inspiration Management,*

> …experience has already shown that [Rule 18A] use is not limited to simple or straightforward cases. Many complex cases properly prepared and argued can be resolved summarily without compromising justice in any way.

This experience has generally been confirmed in the employment context. While simplicity of the claim will assist in any arguments around appropriateness, the existence of complexity is not necessarily lethal to proceeding. Cases that allege complex facts concerning fraud or conspiracy, intentional interference with contractual or economic relations, or defamation, where credibility is at issue, make an application under Rule 18A more difficult to bring successfully. However, none of these are precluded from determination under Rule 18A.

In *Baker v. British Columbia Insurance Co.* (1992) 41 C.C.E.L. 107(S.C.) the Plaintiff brought a wrongful dismissal action by way of an 18A. For the purposes of the application, the Plaintiff eliminated disputed factual issues by conceding them, making the case factually less complex. On the issue of appropriateness, the Court determined that nothing could be gained from cross examination on affidavits or discovery. On appeal, the Court agreed that, given the legal issues had been restricted and clarified, it had been appropriate to hear the matter under Rule 18A: see [1993] B.C.J. No. 487 (C.A.).

One key case which helps set the outer limits of the Court's willingness to determine matters under Rule 18A is *Iacobucci v. WIC Radio Ltd.,* [1997] B.C.J. No. 2874 (S.C.). The case dealt with issues of the notice period, benefits, and salary continuance, but most importantly a live issue of "Wallace" damages and bad faith conduct in the manner of dismissal. The parties submitted conflicted conflicting affidavits and the issue of appropriateness was joined.

Justice Harvey determined that a chambers judge must not choose between conflicting affidavits simply on the basis that he or she prefers one story to the other. However, notwithstanding sworn affidavit evidence to the contrary, it may be that other admissible evidence will make it possible to find the facts necessary for judgment to be given. The assessment turned on "both the degree of conflict in the affidavits and the question of whether the conflict goes to the heart of the issue" (para. 21): see *W.I.B. Construction v. British Columbia (School District No. 23),* [1997] B.C.J. No. 84 (S.C.).

Harvey J. concluded that the entire issue of bad faith in firing was not amenable to resolution on an 18A application where a substantial portion of the plaintiff's case rested on the subjective factor of his particular vulnerability. However, for such an issue to be resolved on 18A, "there must be present sufficient objective, provable factors to allow the chambers judge to gain an accurate picture of the circumstances of the firing, before he or she can evaluate whether those circumstances amounted to bad faith" (para. 32).

It should be noted that the issue of bad faith dismissal under the Wallace principle creates the opportunity to argue against a Rule 18A application proceeding, but will not necessarily be determinative. In *Schmidt v. AMEC Earth and Environmental Ltd.* [2004] B.C.J. No. 1571, the Court considered the *Iacobucci* case and decided that the allegations of bad faith in the manner of dismissal did not preclude an 18A. Harvey J. himself granted judgement after a summary trial of a wrongful dismissal in *Carlson v. Mercedes-Benz Canada* [1998] B.C.J. No. 2497, even though a Wallace claim of bad faith was before the court in that case.

Sinnott v. Westbridge Computer Corp., [1993] B.C.J. No. 689 (S.C.). This wrongful dismissal summary trial application was brought three months before a scheduled 7 day trial. The chambers judge made a preliminary determination that the matter was not appropriate to hear, both because the application was brought too close to trial in respect of an issue which was not completely severable from the remaining issues, and where substantial time would be required for hearing the 18A application. The risk of wasting time and effort, and of producing unnecessary complexity was too great.

The case was sufficiently simple and straightforward to warrant proceeding with the wrongful dismissal claim by 18A, over the objections of counsel for the Defendant, in *Shearer v. Healey Enterprises Ltd. (c.o.b. Husky Bulk Plant),* [1996] B.C.J. No. 3037 (S.C.). Factors included the "evidentiary scope and the potential amount in issue" but stated that complexity or credibility would be relevant "... if, for instance, a case exhibits complicated issues or serious questions involving credibility that cannot be fairly resolved, it may well be the decision of a court to refer the matter to the trial list even though the amounts involved are not large. In such case it would not be just to proceed to give judgment in a summary trial proceeding." Notably, less than $6000 damages were awarded and costs at Scale 1.

The parties can always agree to simplify otherwise complex issues to make the case more likely appropriate for Rule 18A. For example, since the parties agreed to argue the case as if just cause were not alleged, the case proceeded under Rule 18A in *Goebel v. Jardine Rolfe Ltd.*, [1992] B.C.J. No. 903 (S.C.).

D. Urgency

Urgency has been considered as a factor when it is a matter of urgency to the Plaintiff that the employment claim be heard: *Baker v. British Columbia Insurance Co., supra.* However, when there is no great urgency to resolving the matter, it is a factor that will support arguments against appropriateness: see *Iacobucci v. WIC Radio Ltd., supra*, but will not necessarily prohibit the Court from granting judgment, especially where the substantive issue is clear and unambiguous: *McDonnell v. Intrinsic Software* [2003] B.C.J. No. 1626 (S.C.).

E. When Appropriate

It can be gleaned from the above that the circumstances in which the Court will permit a wrongful dismissal or employment related case to proceed by way of 18A are numerous and turn substantially on the facts that are sought to be determined under Rule 18A. The following cases have fit the bill:

For example, in light of *Houlihan v. McEvoy* [2002] B.C.J. No. 8 (S.C.), there can be no issue that in the proper case, the issue of cause for dismissal can be determined by Rule 18A. However, in this case it should be noted that no serious issue of credibility arose, but rather, the issue of cause turned on the legal effect of the Plaintiff's failure to inform the administration of funds lost and presumed stolen when she was aware of the losses.

A contentious issue concerning mitigation will not prevent the Court from proceeding by 18A, despite arguments that the application is premature because the issue of mitigation has not been fully canvassed. In *Carlson* v. *Ideal Cement Co.* [1986] B.C.J. No. 2575 (S.C.) the Court granted judgment on an 18A for 18 months damages, and added a contingency reduction for mitigation, even though the notice period had not yet run. The Court of Appeal upheld the decision, noting that cross-examination on affidavits had occurred: [1987] B.C.J. No. 1827 (C.A.).

The *Carlson* Court's reasoning was applied in *Scott v. Lillooet School District No. 29* [1991] B.C.J. No. 769 (C.A.), where the Defendant argued on appeal that the ruling on 18A was inappropriate because the evidence concerning mitigation and an amount in lieu of overtime was uncertain at the time of the hearing. The Court dismissed this argument stating that there was sufficient evidence for the trial judge to "assess the future probability of damage being sustained despite many elements of the damage being unresolved." Nothing inherent in the 18A process restricted the Court's obligation to assess damages on the evidence it had, even if limited and speculative.

In *Reglin v. Creston (Town)* [2004] B.C.J. No. 1218 (S.C.), the Plaintiff sued for wrongful dismissal and sought reinstatement on the basis of a breach by the Town of a duty of procedural fairness he claimed as a statutory office holder. The court determined that the case was suitable for decision under Rule 18A, as ample evidence was before the judge to determine whether Reglin was afforded procedural fairness. One issue in the litigation was sent to the trial list.

A conflict on the competing affidavit evidence is a necessary, but not sufficient finding for the Court to conclude that a decision on an 81A would be inappropriate. In *Lewington v. Pemberton Insurance Corp.* [2001] B.C.J. No. 2126 (S.C.), both parties agreed that the case was appropriate for summary trial. Cullen J. held that while there was clearly a dispute on the evidence, it had more to do with the interpretation of the evidence and inferences to be drawn from it, than it did with direct conflicts that went to credibility. He stated that "the real difference lies in the parties view of the evidence and the facts each of them would have me draw from that evidence". The case was deemed appropriate for 18A.

In *Paine v. Empire Stevedoring Co. Ltd.* [1991] B.C.J. No. 3985 (S.C.), the Court granted judgment by summary trial in a wrongful dismissal claim, even though the Defendant set up a counterclaim arising from the employment relationship. The Court found the claim and counterclaim were severable, and the counterclaim could be advanced at a future date. There was no dispute as to the sum owing in the claim.

In *Johnstone v. Island Scales Ltd.*, [1999] B.C.J. No. 1892 (S.C.), the Defendant submitted that an 18A was not appropriate because credibility problems arose on the question of whether the Plaintiff resigned or was dismissed, and inducement. Justice Clancy disagreed and granted judgement.

F. When Not Appropriate

Numerous conflicts in the affidavit evidence made it impossible to determine the issue of the Plaintiff's dismissal in *Friscioni v. Forzani Group Ltd.* [2004] B.C.J. No. 1200 (S.C.). In that case, the issue was whether the employee had quit or had been constructively dismissed by an imposed demotion. The conflicts in the affidavit evidence raised issues of credibility that it was not possible to determine without viva voce evidence.

Where credibility findings must be made on a material point that is central to the case, the Court may be reluctant to proceed by summary trial on affidavits. In *Maddocks v. British Columbia Hazardous Waste Management Corp.* [1992] B.C.J. No. 2786 (S.C.), the issue was whether the plaintiff was entitled to damages for breach of her employment contract, or whether the contract was for a fixed term. Lysick J. viewed it as dangerous to make findings of credibility on conflicting affidavits. Where the affidavit evidence was "sufficiently in balance", he stated that one case or the other must be overwhelming in order to proceed by summary trial, and the case was assigned to the trial list.

In *Schwartz v. Selkirk Financial Technologies* [2004] B.C.J. No. 458 (S.C.), the court refused to hear the 18A application of the Plaintiff concerning his dismissal. The record before the court was insufficient and flawed, and the Court made directions to improve the record.

A cautionary tale lies in the case of *Gilchrist v. Western Star Trucks* [1998] B.C.J. No. 1863 (S.C.). In that case, the employee, a former Vice president of Western Star, brought an 18A application for resolution of various issues related to his dismissal. Matters related to bad faith dismissal and cause were impossible to determine on a summary trial application because they raised credibility issues. The Plaintiff's entitlement to stock options was decided on insufficient evidence, but that decision was subsequently overturned on appeal (B.C.J. No. 164 (C.A.)) and returned to the trial list with the remaining issues at trial. Forcing the case through 18A, or compelling an issue to adjudication by that route can sometimes make the litigation unnecessarily complex and permit the process to take on a life of its own.

In *Wills v. Bowell*, [1991] B.C.J. No. 3827(S.C.) counsel dealt the 18A application a fatal blow even though both Plaintiff and Defendant urged the Court to dispose of the matter in that manner. As a result of the failure to particularize the allegation of cause, the parties were compelled to exchange "serial affidavits" in which competing assertions made by one side were denied by the other. The matter was remitted to the trial list over the objection of both counsel.

IV. SELECTED PROCEDURAL ISSUES

The following points are intended for the most part as reminders of the requirements on an 18A. Certain procedural aspects of the 18A summary trial application are similar to the ordinary rules in ways that are important to remember. For example, the importance of the applicant putting its best case forward in its originating motion materials bears repeating – not only because, like a trial, the opportunity to reply by way of affidavit evidence is restricted to matters which would be permitted as rebuttal evidence at trial, but also because on a summary trial application, the trial judge may make an order finally disposing of the merits of the dispute in favour of the respondent.

A. Experts and Mitigation

Employment lawyers have frequent reason to rely on experts, commonly in cases where mitigation efforts are at issue and expert testimony on the employability of the Plaintiff and the state of the market place are at issue.

It should be noted that the rules for the use of expert testimony are not as strict as in trial in at least one key respect. Rule 18A(3)(e) permits the use of expert testimony consistent with Rule 40A(5), which requires that the qualifications of the expert, and a statement of the assumptions on which the opinion tendered rests, must be included in the expert statement. However, Rule 18A(3)(e)(ii) permits the Court to admit an experts opinion which has irregularities in the form. Also, Rule 18A does not appear to require the 60 days notice required for the use of an expert at trial.

B. Use of Discovery Evidence

The purpose of examinations for discovery is to permit the examiner an opportunity to question an opposing witness to fully explore both the strengths and the weaknesses of the case, as well as to obtain admissions from the examined witness that may advance the examining party's case. Accordingly, the rules concerning the use and admissibility of examination for discovery evidence are as follows:

> (a) evidence from an examination for discovery is only admissible against the party who was examined, and it is not admissible by the party who was examined. On consideration, this rule is reasonable because among other things, it prevents a party from using its own evidence proffered on examination in a self-serving manner, and is a protects the evidentiary rule against oath helping.
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> (b) The Court retains a discretion pursuant to Rule 40(27)(d) to review the whole of the examination for discovery and to admit portions of the examination that it deems relevant, other than those relied on and placed in evidence by the party relying on the examination. Accordingly, it is important to have available to the Court on an application under Rule 18A a copy of the whole transcript, if it is requested.

Thus, the words "any part of the evidence taken on the examination for discovery" in Rule 18A(3)(a), which stipulates the types of evidence that may be adduced on an 18A application, must be read with Rule 18A(4), and as subject to Rule 40(27)(a) and (d), (28), (29) and (31) to (33).

Failure to make proper use of discovery evidence may jeopardize the application. In *Schwartz v. Selkirk Financial Technologies* [2004] B.C.J. No. 458 (S.C.), the failure of the parties to make proper use of discovery evidence caused the Court to adjourn the application subject to directions concerning the filing of further material to improve the record.

Counsel should also recognize that Rule 18A(6) requires a party who decides to use evidence from an examination for discovery to give notice of the evidence to be used. The proper procedure is to have an affidavit sworn which attaches the examination for discovery transcript and sets out a notice of the specific answers the party intends to rely on: *Newton v. Newton* [2002] B.C.J. No. 7 (S.C.). However, other processes of notice, that allow the opposing party to know the case that has to be met, may be considered acceptable. Where there has not been compliance with the Rules, the Court can refuse to admit the transcripts of the examination for discovery: *Wilcox Livestocks Ltd. et al v. Toronto Dominion Bank* (1994) 96 B.C.L.R. (2d) 329 (B.C.S.C.); can abridge the time for giving notice regarding the answers to be relied upon: *Markovitch v. Graf* (1999) 37 C.P.C. (4th) 82 (B.C.S.C.); or can adjourn the application to permit the other party time to review and respond to the evidence in the transcript: *Wire Rope Industries Ltd. v. O'Hara,* [1993] B.C.J. No. 3041 (S.C.). The mere announcement, for example, in a Notice of Motion, that a party intends to rely on a certain examination of a certain witness on a certain date, is clearly insufficient.

C. Affidavit Evidence

The usual manner of advancing evidence on a summary trial application is by way of affidavit. Affidavits are governed by Rule 51, and applications under Rule 18A are not exempt from the requirement of that Rule. Rule 51(2) states:

> (a) affidavits must be expressed in the first person;
>
> (b) if the deponent is a party it must state that fact;
>
> (c) the affidavit must be divided into consecutive numbered paragraphs;

(d) it may be in form 60, but this is not a requirement;

Further, Rule 51(10) states that an affidavit may only be permitted to state what a witness would be permitted to state in evidence at trial, except as to evidence based on information and belief, but only as long as the source of such information is stated in the affidavit. The purpose of this Rule is to avoid the insertion into affidavits of inadmissible evidence, notably hearsay.

Generally speaking, an interlocutory application will permit testimony on information and belief. But this is not the case for a Rule 18A application - because it is not interlocutory, and because it is in the nature of a trial, the rules of evidence around hearsay are more strictly observed. Different judges have different tolerance for the quality of affidavits sworn on information and belief. In *Ulrich v. Ulrich* [2004] B.C.J. No. 286 (S.C.) Mr. Justice Bouck gave the following direction:

> Thus, Rule 51(10) allows a deponent to repeat any evidence the deponent would be permitted to give at a trial, if the deponent were called as a witness. A deponent would not be permitted to give hearsay evidence at trial because of its inherent unreliability. The Rules create an exception. They allow a deponent to swear or affirm in an affidavit the contents of an out-of-court statement made by a speaker to the deponent (the information) provided the deponent gives the speaker's name (the source). Failure of a deponent to name the source of the out-of-court statement may make the affidavit "worthless": *Re: Young Manufacturing Co. Ltd.,* [1900] 2 Ch. 753 at 754-755 (C.A.); *Scarr v. Gower* (1956), 18 W.W.R. 184 at 188 (B.C.C.A.). When the purpose of introducing the statement is for the proof of its truth, deponents must swear or affirm that they believe the facts contained in the statement are true (the belief).
>
> From this analysis, it seems that any affidavit supporting an interlocutory application should be framed along the following lines where the purpose of the affidavit is to prove the truth of the facts contained in an out-of-court statement made by another person to the deponent:
>
> > On or about the _____ day of _____ 20 __ at _____ , B.C., Mr./Ms. _____ [e.g., source of out-of court statement] stated to me that: _____ [repeat contents of statement made by other person to deponent] and I believe the facts contained in the statement are true.

D. Cross Examination on Affidavits

The summary trial application under Rule 18A is in the nature of a chambers application. Rule 52 governs the conduct of chambers and sets out a number of the discretions that a judge in chambers may exercise. Under Rule 52(8) a judge in chambers may depart from the usual rule that evidence in chambers is given by affidavit, and order the cross-examination of a deponent, a party, or a witness, either before the Court or elsewhere (before a reporter). The Court has a specific authority to order cross-examination within an 18A application.

Often the parties can agree between themselves that cross-examination on affidavits is required or suitable. However, where agreement is not forthcoming the person seeking to cross-examine will have to apply to the Court. To order cross-examination the Court must be satisfied that there is a material conflict on the affidavit evidence, and cross-examination would likely produce some evidence that would support the case of the applicant: *American Pyramid Resources Inc. v. Royal Bank* (1986) 2 B.C.L.R. (2d) 99 (S.C.); and see [1987] B.C.J. No. 196 (C.A.); [1988] B.C.J. No. 268 (C.A.).

The failure to elicit testimony from a key witness for an 18A application can result in the Court being unable to find the evidence necessary to dispose of the matter, in part, because there is no opportunity to cross examine: *Kular v. Lewis* [1997] B.C.J. No. 2310 (S.C.).

Counsel should remember that, in contrast to the transcript of an examination for discovery, the cross-examination transcript is admissible in its entirety by either party: *Placer Development Ltd v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (CA) at para. 56. Thus, when examination for discovery has not yet taken place, it is important for counsel to have clearly in mind the nature of the examination that is taking place to avoid a subsequent conflict.

In *Shinn v. TBC Teletheatre* [1999] B.C.J. No. 2973 (S.C.) aff'd, a conflict arose in the evidence on an 18A application concerning the precise terms of employment and the issue of which entity was the employer. On an application under Rule 18A, the chambers judge adjourned the application and ordered cross examination before the Court of two witnesses on their affidavits, and then went on to grant judgment to the Plaintiff.

The discretion to order cross examination is considerable and a decision to do so in connection with an 18A application will not be interfered with lightly. In *United Services Funds v. Ward* [1986] B.C.J. No. 3138 (C.A.) an appeal was raised on the basis that a chambers judge on the 18A application should not have ordered cross-examination before first deciding the issue of appropriateness for an 18A.

E. Hearsay, 18A, and Claims Going to Motive

The clear rule that hearsay is not admissible evidence on a summary trial application often creates difficult hurdles in an employer proving its case. For example, where the judgment of a supervisor who made the decision to terminate is called into question on a wrongful dismissal claim, the source of the information on which the employer relied in making the decision often turns on reports from others concerning work performance, a culminating incident, or otherwise. The evidentiary trail can sometimes threaten the admissibility of the evidence itself.

However, where allegations of bad faith, malice, or intentional wrongdoing are raised in the context of an employment claim, there is no rule of evidence which prevents statements from third parties being admitted not for the truth of their contents but the fact that they were made, where the statement was relied upon and goes to explaining the state-of-mind of the decision maker, and ultimately, the reason the decision was made.

The latitude created thereby is demonstrated by *Jadot v. Concert Industries Ltd.* [1995] B.C.J. No. 158 (S.C.); (1995), 10 C.C.E.L. (2d) 13 (S.C.); aff'd (1997), 33 C.C.E.L. (2d) 29 (B.C.C.A.). In this case the issue was whether the employer acted in good faith in deciding to terminate the employment of the probationary employee. The Court held that it did, but highlighted the evidence which supported the decision:

> Before terminating Ms. Jadot, Mr. Peter did not apprise her of the concerns, or the level of his concern, nor did he give her an opportunity to respond to the opinion that he was forming. In my view, in these circumstances, it was not bad faith not to give Ms. Jadot an opportunity to respond to general concerns about her lack of compatibility with the employer's organization. I allowed the defendant to introduce hearsay evidence of the comments made to Mr. Peter and Mr. Edwards by employees and people outside Concert Industries as part of the assessment process. The hearsay statements were not introduced for the truth of their contents. That evidence, however, supports my conclusion that the defendant took reasonable steps and reached the opinion in good faith that the plaintiff was not compatible within the organization.

The *Jadot* decision was cited with approval in a preliminary application to strike passages of the Defendants affidavit materials in a summary trial in *Alibhai v. Royal Bank of Canada* B.C.S.C. Registry No. S021663 (Boyd J. unreported) (March 1, 2004). In that case, the Plaintiff with 18 years service had made allegations of racist conduct against her supervisor which it was alleged

coloured her motives in terminating her employment. In refusing to strike out portions of the Respondent's affidavits on the 18A application, Madam Justice Boyd pointed out that where the good faith of the supervisors had been put in issue, hearsay statements could illuminate the state of mind of the employer in deciding to dismiss:

> Essentially, the point is that where hearsay statements are not introduced for the truth of their contents, but rather for the purpose of determining the good faith of the employer, those statements are admissible.

This line of reasoning should be weighed carefully when counsel draft affidavit materials to support an application under Rule 18A. Given the broad range of bad faith allegations frequently made in employment law litigation, the prospect that such claims could have the unintended consequence of expanding the scope of admissible evidence permitted for the Respondent to prove its case, might be a factor to consider at the pleading stage as well.

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