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Motions and Applications

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Our litigation bulletin series is designed to demystify the litigation process. This latest bulletin in the series is about applications and motions. Although applications and motions are fundamentally different from one another, we will discuss both of these concepts in this bulletin because applications and motions share a number of procedural similarities.

An application is a form of legal proceeding. A motion, however, is not a separate proceeding. Rather, a motion is a procedure by which particular relief is sought within the framework of an existing (or impending) action.

Applications

Background

An application is one of two ways to start a legal proceeding in Ontario. The other, which we discussed in our February 2008 bulletin, is an action. Where a statute or the Rules of Civil Procedure allow it, it is possible to start a proceeding by issuing a *notice of application* (rather than a *statement of claim*, which is issued in an action). The procedure for an application is different from the procedure for an action and is generally used in cases where it is unlikely that there will be any material facts in dispute or where relief is sought under a specific statutory provision.

How an Application Differs From an Action

An application differs fundamentally from an action. Actions are generally lengthy proceedings involving pleadings, documentary and oral discovery, various pre-trial procedures and a trial (many of these procedures are described further in other bulletins in our litigation bulletin series). An application, on the other hand, is a quicker and more streamlined way to bring a dispute before the court for adjudication. Identifying an opportunity to proceed with a case by way of application as opposed to an action can save months, or sometimes years, of time and effort. For this reason, an application can also significantly reduce the costs associated with legal proceedings.

Differences in Procedure

The procedure on applications and actions differs significantly. As set out above, an application is commenced by way of a notice of application. In applications, there is no documentary discovery, nor are there examinations for discovery, although there may be cross-examinations of witnesses.

While applications and actions have very different procedure, the procedure on applications and motions is quite similar. Typically, a notice of application is served on other parties and filed with the court together with written evidence. A *notice of application* is similar in form to a

notice of motion, the document which gives notice of a party's intention to seek relief (by way of a motion) during the course of an existing action.

Applications generally require supporting evidence. The usual method of tendering evidence for use on both applications and motions is by way of written evidence. The written evidence filed on an application is presented in the form of an *affidavit*. Affidavits are written documents containing statements that are verified by the person making the statements by an oath or solemn affirmation. Documents to be used on applications and motions that relate to the matters at issue are usually marked as *exhibits* to affidavits. Witnesses may be cross-examined on their affidavits (and the exhibits attached thereto) in the context of an application.

Types of Applications

Only certain matters may be determined by way of application. Examples of the types of matters that may proceed as an application include:

- the determination of rights that depend on the interpretation of a document such as a will or a contract;
- the determination of rights that depend on the interpretation of a statute, regulation or municipal by-law;
- a declaration of an interest in land;
- the oppression remedy contained in the Ontario *Business Corporations Act*;
- an order under a statute such as the *Bulk Sales Act*;
- a request to enforce an order of a court of a jurisdiction other than Ontario;
- any matter where it is unlikely that there will be any material facts in dispute.

Hearing of Applications

The hearing of an application is significantly different from a trial. Applications are heard by a judge (and never by a jury), and witnesses do not generally give oral evidence in open court. The evidence on which the argument of the application proceeds consists of the affidavits and transcripts of any cross-examinations of witnesses who swore affidavits. Cross-examinations are conducted out of court and not in the presence of a judge (our April 2008 litigation bulletin described out of court examinations, including cross-examinations, in more detail). After all affidavits have been served and filed, and after all cross-examinations have occurred, counsel must file written submissions for the judge in a document called a *factum*. A factum is a written argument containing facts and law relied on by the person bringing the application. The case law cited in a factum is usually contained in a case book called a *brief of authorities* that is also filed for the judge's use.

Even where an application has been properly brought before a judge, at the hearing of the application the judge may consider that there are material facts in dispute. In such a case, a judge may direct a trial of the issue in dispute, and the proceeding may continue as an action in whole or in part. A judge may also order that further procedural steps occur before the matter proceeds to trial. Such steps could include the exchange of affidavits of documents or the conduct of examinations for discovery, which are steps that must occur in an action. A judge might make an order that an application proceed to trial where there are disputed facts, and the resolution of the dispute requires an assessment of the credibility of witnesses. A judge generally cannot assess the credibility of witnesses when witnesses do not appear in person in court.

After hearing an application, a judge can order the relief sought, or dismiss the application. The proceeding is then finally concluded (other than any appeal rights that a party may have and choose to exercise).

Motions

Background

As set out above, a motion is not a separate proceeding. A motion is a procedure by which particular relief is sought within the framework of an existing (or impending) action. There is a broad range of relief that a party may seek on a motion, ranging from relatively minor procedural issues to the determination of an entire proceeding. Since a motion is a step taken within the context of a proceeding, it is almost always brought after a proceeding has been commenced. However, in urgent or exceptional circumstances, a motion may be brought before a proceeding is started. In such circumstances, the moving party (the party bringing the motion) usually must undertake, or promise, to start a proceeding immediately.

Who Hears Motions?

Depending on their type and complexity, motions are brought before a judge, a master or a registrar. A wide variety of consent matters can and should be dealt with in writing and are usually dealt with by a registrar. Other motions are heard in court before a judge or master, similar to the way in which an application proceeds. A judge has jurisdiction to hear any motion in a proceeding, but it is often neither necessary nor appropriate to bring a motion before a judge. For example, motions to amend pleadings or motions to compel answers to questions refused during oral examinations are within the jurisdiction of a master and are typically brought before a master. No attendance before a judge or a master is required for matters that are heard by a registrar because they are on consent of all parties.

Procedure

There are rules that govern the circumstances in which a motion may be brought, what relief may be sought on a motion, and how a motion will be determined. A motion is usually started by serving and filing a *notice of motion*. The notice of motion must contain details about:

- the relief sought on the motion (what the moving party would like the court to do for them);
- the grounds on which the moving party asserts they are entitled to the relief they are seeking (the reasons the moving party says the relief should be granted by the court); and
- the evidence to be used at the hearing of the motion.

Most motions require supporting evidence. As with applications, the usual method of tendering evidence for use on a motion is by way of affidavit. Affidavits are generally served with the notice of motion in a bound brief called a *motion record*. Witnesses may be cross-examined on the affidavits delivered in support of a motion. Transcripts of the cross-examinations are filed with the court if a party intends to refer to them during the hearing of the motion.

Just as they do on applications, counsel usually serve and file written submissions, or factums, to explain their clients' position on a motion. Routine motions may proceed without factums, but a factum usually is appropriate and is often mandatory. Even where a factum is not mandatory, many counsel consider it a practical necessity to file one, and judges and masters often expect one.

Types of Motions

Examples of motions that a party to a proceeding may be able to bring include:

- a motion to amend pleadings (statement of claim, statement of defence, reply, crossclaim, counterclaim);
- a motion for default judgment, where a defendant has failed to defend an action and the plaintiff wants to obtain judgment in the defendant's absence;

- a motion to compel answers to questions refused at examinations for discovery or cross-examinations;
- a motion for determination of an issue (i.e. a point of law) that is relevant to the proceeding before the action proceeds to trial;
- where a plaintiff believes that there is no genuine issue for trial, the regular procedure may in certain circumstances be circumvented by a motion for summary judgment (judgment without a trial);
- a motion requiring a plaintiff to post security for legal costs with the court prior to proceeding with their action or application;
- motions to preserve rights in pending litigation, for example:
    - motions for interlocutory (provisional, interim or temporary) relief such as an order restraining labour union picketing, an order requiring a former employee not to compete with an employer, or other orders protecting the rights of a plaintiff;
    - a motion to obtain a certificate of pending litigation over real property (land or buildings on land);
    - a motion to recover possession of, or restrain disposition of, personal property.

The circumstances in which any of the relief listed above may be granted by a court will vary depending on the facts of each case and the circumstances of each party. Counsel can provide advice about whether a particular motion is likely to succeed or fail in a particular case. A carefully considered and timely motion can result in a significant strategic advantage in the proceeding, and in certain circumstances, can bring an end to the entire proceeding.

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