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‘Boomerang’ summary judgment motion: What you need to know

By Marco P. Falco

In its revolutionary 2014 decision, *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada issued a judicial call-to-arms to all litigators: to the extent possible, civil actions had to be resolved by way of summary judgment.

Not surprisingly, the *Hryniak* “culture shift” led to a plethora of summary judgment motions in Canada.

It has also given rise to what are known as “boomerang” summary judgment orders in which the judge, in the absence of a formal cross-motion, grants judgment in favour of the party resisting the motion.

A recent decision of the Ontario Court of Appeal, *Graham v. Toronto(City)*, 2022 ONCA 149, illustrates how a court’s decision to grant reverse summary judgment is guided by notions of procedural fairness to the parties

The boomerang’s path

Graham involved a personal injury action against the City of Toronto in which the city sought summary judgment to dismiss the action against it due to the plaintiff’s failure to give the city timely notice of her action within the prescribed limits under the *City of Toronto Act, 2006*, S.O. 2006, c.11, Sched. A. (the Act).

The motion judge dismissed the city’s motion, ruling that the failure by the plaintiff to provide notice under the Act was not fatal to her claim.

The motion judge went one step further, however, and granted the plaintiff summary judgment dismissing the city’s “notice” defence and declaring that the plaintiff’s action was not barred by the Act. The plaintiff, as the responding party on the motion, had not brought a cross-motion seeking this latter form of relief.

On appeal, the Court of Appeal upheld the motion judge’s order.

Notice of the potential for reverse judgment

The Court of Appeal's analysis relied largely on its previous decision in *Drummond v. Cadillac Fairview Corporation Ltd.*, 2019 ONCA 447.

In *Drummond*, the court established that if a responding party to a summary judgment motion has not filed a notice of cross-motion seeking summary judgment against the moving party and the motion judge intends to grant judgment against the moving party by way of a boomerang order, the court:

... must give the moving party some notice of that litigation risk so that the moving party can address it. The lack of such notice may render any resulting reverse summary judgment unfair.

The duty on the court to provide notice to the responding party can be accomplished by:

- inquiring on the motion scheduling request form whether the responding party intends to ask for reverse judgment;
- at the outset of the summary judgment motion, having the motion judge ask if the responding party intends to seek reverse judgment;
- requiring the motion judge who may wish to grant reverse judgment midway through the hearing to warn the parties that such an order could be possible; or
- by requiring the motion judge, when drafting reasons for decision, to inform the parties of the intention to grant a boomerang order and affording them the right to make further submissions.

The last circumstance above applied in *Graham*. Specifically, the motion judge e-mailed counsel during the course of writing her reasons to advise them of four cases she usually referred when drafting summary judgment decisions. The motion judge invited the parties to respond to these cases. Both parties declined to make additional submissions.

On balance, the Court of Appeal held that the inquiry by the motion judge to counsel was sufficient to address any fairness concerns arising from her decision to grant reverse judgment:

The motion judge was communicating with counsel for the parties, not a self-represented litigant. Her reference to para. 17 of [*Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 150] clearly put counsel on notice that she was considering granting a reverse summary judgment; there was no other possible reason for that reference. By doing so, the motion judge put the parties on notice of the litigation risk of a reverse summary judgment and afforded them an opportunity to make submissions, which they declined. In those circumstances, we see no unfairness in the procedure followed by the motion judge.

Fairness matters when granting reverse summary judgment

Graham provides a good illustration of the due process concerns that guide a judge's decision to grant a boomerang order.

The duty to inform the parties of the "litigation risk" of such an order lies in part on the court, particularly the motion judge.

Given the unfairness that could result in having an order granted against a responding party who never had the opportunity to make submissions on the issue, *Graham* establishes that the motion judge is required to alert the parties of that possibility and afford them an opportunity to respond.

However, the duty on the motion judge to advise the parties of the litigation risk is not onerous – a mere reference to case law that addressed reverse summary judgment principles amounted to sufficient notice in *Graham*. The onus then lies on the parties' lawyers to decide whether to address the litigation risk in further submissions.

Overall, the issuance of a boomerang order depends, like so much else in litigation, on the principle of fairness.

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