

COMMENTARY

Leveling the Playing Field: Severance and Access to Justice at the Manitoba Court of Appeal

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“The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve.”

– Chief Justice Beverley McLachlin¹

I. INTRODUCTION

Access to justice is one of the most serious challenges facing the Canadian legal system today. The reality of litigation today is that the cost of accessing justice is prohibitive for many Canadians, resulting in an unlevel playing field where only those who can afford it can have their day in court. As the words of Chief Justice McLachlin above indicate, this represents a failing of the Canadian legal system. While access to justice is a concern for the legal system as a whole, it is a

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¹ Remarks of the Right Honourable Beverley McLachlin, P.C. Presented at the Empire Club of Canada Toronto, March 8, 2007 “The Challenges We Face,” online: Supreme Court of Canada <<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>>.

significant issue in the realm of civil litigation where many plaintiffs may choose to not seek justice because it is simply unaffordable. The Civil Justice Reform Project of 2007 noted that “cost and delay continue to be cited in national and provincial reports as formidable barriers that prevent average Canadians from accessing civil justice.”² Recognizing this, a push for change is underway in a number of different venues and through different means. The common law has become one such venue. For the first time, the Manitoba Court of Appeal commented on access to justice in a decision in *O’Brien v Tyrone Enterprises*,³ a case that considered the test for severance of the issues of liability and damages in a civil proceeding. While this was a relatively uncomplicated appeal on a civil procedure issue that could have been dismissed on standard of review alone, the Manitoba Court of Appeal took the opportunity to give the case full consideration. This commentary from the court is an important statement on the need for access to justice and represents willingness from Manitoba’s top court to evolve precedent so that modern challenges of litigation may be better met by the law. This comment argues that not only does the *O’Brien* decision demonstrate that the Manitoba Court of Appeal is well-attuned to the realities of civil litigation, but the decision also brings Manitoba in line with the weight of authority from other provinces. Given that the problem of access to justice has arguably reached near-crisis levels, the court’s decision in *O’Brien* is a necessary and proper evolution of the law of civil procedure.

II. CASE BACKGROUND

O’Brien v Tyrone was an appeal from a decision of a motions judge that granted the plaintiff’s request for severance of the civil trial on liability and damages. A decision to grant such an application is a rarity in Manitoba, as the seminal decision of Justice Kroft in *Investors Syndicate*⁴ held that it is

² Ontario, Ministry of the Attorney General, *Civil Justice Reform Project, Findings & Recommendations*, (Ontario: Ministry of the Attorney General, 2007) at Appendix A, p 1 [the Osborne Report].

³ *O’Brien v Tyrone Enterprises Ltd*, 2012 MBCA 3, 341 DLR (4th) 618 [*O’Brien*].

⁴ *Investors Syndicate v Pro-Fund Distributors Ltd* (1980), 12 Man R (2d) 104 (available on WL Can) (QB); *aff’d* (1981), 12 Man R (2d) 101 (available on WL Can) (CA), [*Investors Syndicate*].

the “normal preference of the court ... to hear and determine all issues at one time and to discourage the piecemeal trial of actions.”⁵ However, Justice Kroft recognized that in “appropriate circumstances”⁶ severance may be granted, and set out considerations to be weighed by a judge in the exercise of his or her discretion. These considerations are:

- (1) A party ought not to be harassed at the instance of another by an unnecessary series of trials;
- (2) There must be some reasonable basis for concluding that the trial of the issue or issues sought to be severed will put an end to the action;
- (3) An order for severance should hold the prospect that there will be a significant saving of time and expense;
- (4) Conversely, severance should not give rise to the necessity of duplication in a substantial way in the presentation of the facts and law involved in later questions;
- (5) Nothing should be done which might confuse rather than help the final solution of the problem;
- (6) A plaintiff who forms an action to suit his convenience will seldom be granted the right to sever, if the defendant objects. The objection of a plaintiff to a defendant’s application does not bear such heavy significance.⁷

In the 2008 case of *Dmytriw v Odim*, Justice Simonsen reviewed the *Investors Syndicate* factors and the case law since the factors were established and concluded that in Manitoba, severance is only granted in an “exceptional case.”⁸

Despite the high bar for severance, Justice Clearwater, the motions judge in *O’Brien*, held that the plaintiff had made out such an exceptional case. The master at first instance in *O’Brien* dismissed the plaintiff’s request, but on the fresh appeal to Justice Clearwater, the decision of the master was overturned. In coming to this conclusion, Justice Clearwater gave significant weight to the issue of access to justice. The plaintiff in *O’Brien* was injured in April of 1997 upon falling down the stairs in the defendant’s rental property. The plaintiff attended the property for a party hosted by the defendant’s tenant. The plaintiff alleges that the fall occurred because the stair banister became detached from the wall. As a result of the fall, the plaintiff sustained significant injuries and has been

⁵ *Ibid* at para 17.

⁶ *Ibid*.

⁷ *Ibid* at para 21.

⁸ *Dmytriw (next friend of) v Odim*, 2008 MBQB 12 at para 11, 226 Man R (2d) 284 [Dmytriw].

unable to work since the time of the accident. There are two discrete legal issues matters which need to be resolved in order to dispose of the case. First, the issue of liability must be resolved. It is contested because the defendant claims that the plaintiff had consumed a large quantity of alcohol prior to her fall, and thus was contributorily negligent. Second, if liability is established, the plaintiff's damages must be quantified, and the plaintiff stated in affidavit evidence that proving damages would be a costly venture as it would necessitate retaining medical and actuarial experts. The plaintiff further stated that her lawyers are representing her on a contingency basis and are unable to front the costs for determining damages unless the plaintiff was successful on the issue of liability. Without severance, the costs of going forward with the proceedings would therefore fall to the plaintiff. Yet, the plaintiff is impecunious, having stated in her affidavit that between for the years of 2005 - 2007, she earned \$7000 - \$7400 a year from CPP disability, and has no other source of income.

Given the plaintiff's impecuniosity, Justice Clearwater held that access to justice was a proper consideration in the determination of the severance issue. Justice Clearwater referred to the principles in *Investors Syndicate* and went on to hold that:

... this is an "access to justice" issue. Litigants in the economic position of this plaintiff, absent any evidence or suggestion that their claim is frivolous or vexatious or otherwise without merit, have little or no ability to fund the cost of litigation in today's economy. I am mindful that if the plaintiff is successful on a trial of the issue of liability, the expenses for expert witnesses will be necessary. However, if the defendant is successful on the issue of liability, it will not likely need to incur the further costs it would otherwise incur on the issue of damages. However, although the plaintiff's current counsel is not (at least at this point in time) prepared to fund these disbursements on a contingency basis absent a favourable finding of liability, it is likely that the plaintiff would be able to retain him or other counsel on a further contingency basis if the defendant has been found liable.⁹

On appeal, the defendant argued that the motions judge had placed undue weight on the financial hardship of the plaintiff and had not given proper consideration to the *Investors Syndicate* factors. Chief Justice Scott summarized the reasons of the court, that

⁹ *O'Brien v Tyrone Enterprises*, 2010 MBQB 229, 259 Man R (2d) 99 at para 18 [O'Brien motions decision].

[f]or many years, it has been well understood that severance of a civil trial on liability and damages in Manitoba would only be granted in the most "exceptional" of circumstances. This appeal directly raises the issue whether a change in perspective is now desirable given the increasing concerns about access to justice, including the cost and delay associated with civil litigation, and in light of the amendments to the Queen's Bench Rules which occurred in 1989.¹⁰

Chief Justice Scott concluded that such a change of perspective is appropriate, and upheld the decision of the motions judge, with Justices Hamilton and Freedman concurring. In so concluding, Chief Justice Scott held that the motions judge did not err in giving significant weight to the consideration of access to justice in these circumstances. The appellate decision confirms that "financial hardship does not automatically lead to severance being granted,"¹¹ but it is not an error to give this consideration weight in the exercise of judicial discretion in determining the "just, most expeditious and least expensive"¹² resolution.

III. COMMENT

The Court of Appeal's decision in *O'Brien* is an important and proper decision. First, this decision brings Manitoba in line with the majority of precedent from other provinces. Each province has its own rules of civil procedure; the authority for granting severance is rooted in common law in some provinces¹³ and is provided for in the rules of court in other provinces.¹⁴ Despite the varied sources of authority for severance between the provinces, the factors to be considered therein are essentially the same across Canada. In *Dmytriw*, Justice Simonsen noted that "regardless of what test is used, the considerations the courts have taken into account are essentially the same."¹⁵ Therefore, the precedent from other jurisdictions is appropriate to consider in determining the law in Manitoba. There is

¹⁰ *O'Brien*, *supra* note 3 at para 1.

¹¹ *Ibid* at para 54.

¹² *Ibid* at para 56; *Court of Queen's Bench Rules*, Man Reg 553/88, s 1.04(1) [Rule 1.04(1)].

¹³ Such as Manitoba and Ontario, as seen in the cases surveyed within this comment. Note, however, that new Ontario Rule 6.1.01 provides for separate hearings on one or more issues in a proceeding on consent of the parties. See *Ontario Rules of Court*, RRO 1990, Reg 194 at 6.1.01, as amended by O Reg 438/08 at s 9.

¹⁴ See *Alberta Rules of Court*, AR124/2010 at 7.1(1) and *Supreme Court Civil Rules*, BC Reg 168/2009 at 12-5(67).

¹⁵ *Dmytriw*, *supra* note 8 at para 11.

authority that rejects granting severance on the basis of impecuniosity, as is noted by Chief Justice Scott,¹⁶ however this does not represent the weight of the authority. Significantly, the Ontario case of *Carreiro (Litigation guardian of) v Flynn*¹⁷ holds that a court's discretion to grant severance "should not be cabined and confined to the consideration of only a pre-set list of factors or criteria."¹⁸ Prior to the decision in *O'Brien*, the *Investor's Syndicate* criteria for severance were rigidly adhered to in Manitoba, however, there is no suggestion in *Investors Syndicate* that this list of six factors should constitute the only considerations in the exercise of judicial discretion. Rather, Justice Kroft specifically noted that "the question of when or if issues should be severed and tried separately, is one of general discretion for the court. The only limit to the discretion is that there be sufficient reason for exercising it."¹⁹ Further, in *CAE Aircraft Ltd v Canadian Commercial Corporation* Justice Hewak commented that in *Investors' Syndicate*, Justice Kroft

was not attempting to list exhaustively all but only some of the considerations, and... given a specific case with specific facts and circumstances, not necessarily would all of these considerations apply, but if they did, it might well be that certain ones would be of more importance to be given more weight than others.²⁰

Thus, there is support both from outside and within Manitoba for flexible judicial engagement with the test for severance, and for recognition that the factors set out in 1980 are not the only considerations for granting severance.

While access to justice was not previously considered as part of the *Investors Syndicate* test in Manitoba, the issue has played an important role in decisions in other jurisdictions, granting credence to the court's affirmation of the motions judge in *O'Brien*. Given that the *Investors Syndicate* test is not a closed list and taking into account the authority from other provinces where financial hardship has been approved as a factor for consideration, the Manitoba Court of Appeal rightly affirmed the

¹⁶ *O'Brien*, *supra* note 3 at para 34. See *Duffy v Gillespie et al* (1997), 36 OR (3d) 443, 155 DLR (4th) 461 (Div Ct).

¹⁷ [2004] OTC 664 (available on WL Can) (SCJ), *aff'd* (2004), 195 OAC 315 (available on WL Can) (Div Ct).

¹⁸ *Ibid* at para 12.

¹⁹ *Investors Syndicate*, *supra* note 4 at para 20.

²⁰ (1983), 21 Man R (2d) 89 at para 10 (available on WL Can).

evolution of the test for severance in Manitoba. Financial hardship was specifically considered as early as 1980 in British Columbia, in the case of *Lord v Royal Columbian Hospital*²¹ and was further relied upon in 1985 in *Royal Bank of Canada v Vista Homes Ltd*,²² and in 1990 in *Anderson v University of British Columbia*.²³ Similarly, in Ontario, the 1996 case of *Girard (Litigation Guardian of) v Salvation Army Grace Hospital* referenced access to justice because upholding the decision of the motions judge to grant severance was necessary “in order to level the playing field”.²⁴ As Chief Justice Scott noted in the *O’Brien* decision,²⁵ access to justice was specifically referred to in *Bidochka v Ford Motor Co of Canada Ltd et al*, as Justice Melnick concluded that the plaintiff would be unlikely to have her day in court without severance.²⁶ Further, the case of *Vanderlee v Doherty*,²⁷ relied upon by the court in *O’Brien*,²⁸ is significant in that the decision highlights the “court’s role in ensuring access to justice.”²⁹ The court in *O’Brien* correctly notes that this role is codified in the Manitoba *Queen’s Bench Rules* under the fundamental principal that judicial discretion should be exercised to “secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”³⁰ Taking this principal with the weight of authority from other provinces, it is clear that it is appropriate to give consideration to factors beyond the set list from *Investors Syndicate*, and that this expanded analysis can properly include the issue of access to justice. As argued above, enabling judges to give weight to access to justice where such consideration is warranted is reflective of the realities of civil litigation today and better equips the Manitoba legal system to level the civil litigation playing field, following the lead of other jurisdictions.

Notably, there is case law that seemingly supports the rejection of access to justice as a factor for consideration in determining severance.

²¹ (1980), 27 BCLR 123 at para 17 (available on WL Can).

²² (1985), 63 BCLR 366 at para 30 (available on WL Can) (SC).

²³ (1990), 51 BCLR (2d) 393 at 394 – 395 (available on WL Can) (SC).

²⁴ 1996 CarswellOnt 5106 (WL Can) (Ont CJ).

²⁵ *O’Brien*, *supra* note 3 at 37.

²⁶ 2000 BCSC 95; 48 CPC (4th) 334 at para 9.

²⁷ 2000 ABQB 66, 258 AR 194 [*Vanderlee*].

²⁸ *O’Brien*, *supra* note 3 at para 38.

²⁹ *Vanderlee*, *supra* note 27 at para 5.

³⁰ Rule 1.04(1), *supra* note 12.

Perhaps most importantly, Justice Simonsen rejected the request for severance in *Dmytriw*. As another recent Manitoba case, *Dmytriw* can be read at face value as highly persuasive precedent in this regard. Justice Simonsen emphasized that financial hardship in and of itself is not a reason to sever, but rather it must be demonstrated that the case is exceptional.³¹ Indeed, the defendant in *O'Brien* relied on the *Dmytriw* decision in support of their position.³² However, Justice Simonsen did not preclude consideration of access to justice in determining a request for severance, but rather held that it is not the sole factor for consideration. It is but one factor to be considered in addition to other important considerations, such as whether or not severance would prejudice the defendant. Further, *Dmytriw* was rightly distinguished on the facts by the court in *O'Brien*. The plaintiffs in *Dmytriw* had an annual income over two years of between 8.5 to 12 times more than the plaintiff in *O'Brien*.³³ The facts in the two cases are thus entirely different, and accordingly Justice Simonsen gave different weight to the financial hardship alleged by the plaintiffs in *Dmytriw* than did Justice Clearwater as the motions judge in *O'Brien*. The court was therefore right to distinguish *Dmytriw* as simply different on the facts, and to recognize that the *Dmytriw* case should not be read as precluding access to justice as a consideration altogether.

An argument against including access to justice in the considerations for severance is that access to justice is provided by contingency fee arrangements, and where it is not, the problem is the contingency arrangement itself.³⁴ This argument was made by the defendant in *O'Brien*, and rejected by the court. In the absence of supporting evidence, the court specifically rejected the notion that there exists a typical form of contingency agreement (the “all or nothing” arrangement) that leaves other agreements to be deemed improper.³⁵ While the court recognized that contingency agreements can promote access to justice, it did not see this as a reason to dismiss the appeal. The court held that “contingency fee agreements, appropriately structured, can be an important tool in improving access to justice. The motions court judge was entirely correct

³¹ *Dmytriw*, *supra* note 8 at para 16.

³² See *O'Brien*, *supra* note 3 at para 40.

³³ *Ibid*.

³⁴ See *ibid* at para 44.

³⁵ *Ibid* at para 46.

in taking this factor into account in his decision.”³⁶ It is not entirely clear what the court means by noting that the “motions court judge was entirely correct in taking this factor into account in his decision.” Further elaboration from the court would have been useful as important questions remain regarding the contingency agreement aspect of the *O’Brien* decision. To what extent is it proper to take the contingency arrangement into account? How detailed should a motion judge’s consideration of a specific contingency arrangement be? Cross-referencing the court’s holding with the motions judgment, it is clear that Justice Clearwater did accept that the plaintiff had a contingency arrangement with her lawyer for the claim regarding liability, with the lawyer unprepared to fund the disbursements required for a finding on damages.³⁷ Justice Clearwater surmised that a further contingency agreement was likely should the plaintiff be successful on the issue of liability.³⁸ Reading the two *O’Brien* decisions together, it can be understood that while contingency agreements are an important tool in improving access to justice, such arrangements may be structured differently from case to case and may not be sufficient to ensure a plaintiff’s day in court in all cases. Certainly in *O’Brien* itself, the plaintiff did have a contingency agreement with her counsel, but that agreement was not enough to ensure access to justice in a case with an impecunious plaintiff and a necessarily expensive determination of damages.

This still leaves the question – is there a problem with some forms of contingency agreements? In a case in which there was evidence to support an argument that a given contingency agreement substantially deviated from an established model or typical agreement, would the outcome be different? The answer, simply, is no. While civil litigators may, as the defendant in *O’Brien* suggested, have some sort of standard contingency agreement that individual lawyers or entire firms may use with little adjustment from case-to-case, it is clear that contingency agreements may legitimately take a variety of forms. The Law Society of Manitoba’s Code of Professional Conduct Rule 2.06(2) provides that “a lawyer may enter into a written agreement that provides that the lawyer’s fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer’s

³⁶ *Ibid* at para 51.

³⁷ *O’Brien* motions decision, *supra* note 9 at para 18.

³⁸ *Ibid*.

services are to be provided.” The commentary on this Rule suggests that, in determining the terms of an individual agreement, a lawyer and client may take into account a number of factors. Indeed, the Rules provide for flexibility in the establishment of a contingency agreement, whereby a given agreement can be crafted with an eye to the unique factors in a given situation. This flexibility is limited by the test provided for in the commentary that the fee, in all of the circumstances, be fair and reasonable. Where the agreement is indeed improper, such an issue is not appropriately addressed in a severance motion. Rather, the client’s rights are properly addressed under section 55(5) of *The Legal Profession Act* which provides that

“The client may, at any time within six months after the remuneration provided for in the contingency contract is paid to or retained by the member, apply to the Court of Queen’s Bench for a declaration that the contract is not fair and reasonable to the client.”³⁹

Under section 55(7), the judge hearing the application can declare the contract void, order the costs, fees, charges, and disbursements of the member in respect of the business done to be taxed as if no contingency contract had been made, and order re-imbusement to the client.⁴⁰ Beyond this, a complaint could, of course, be made to the Law Society if a lawyer’s conduct regarding a contingency agreement has been improper. When it comes to a severance motion, as per *O’Brien*, a judge in a severance case may properly take into account the existence and general nature of a contingency agreement. Where the agreement does not practically permit access to justice, such a consequence may be considered as a factor in the judge’s exercise of discretion. There is no reason to believe that anything other than affidavit evidence is necessary for a judge to take into account a plaintiff’s financial circumstances. It is not necessary for a severance motions judge to go beyond these basic considerations.

At the end of the day, contingency arrangements are but one tool by which access to justice can be achieved. Certainly, it could be argued that if lawyers sincerely wanted to address access to justice, the legal profession should ensure that there is no room for a lawyer to draft an agreement that is not enough, in and of itself, to give the plaintiff their day in court; however, this argument is flawed. Given the increasingly problematic

³⁹ *The Legal Profession Act*, SM 2002, c 44, CCSM c L107, s 55(5).

⁴⁰ *Ibid* at s 55(7).

financial reality of civil litigation today, the legal profession wants to encourage lawyers to enter into contingency arrangements. These arrangements should be realistically obtainable in as many cases as possible. Even in a case where liability is far from certain, a plaintiff still deserves to be able to access justice. Restricting contingency arrangements to only those situations where a lawyer is prepared to fully fund all aspects of a plaintiff's case up front would likely result in fewer lawyers taking on clients on a contingent basis. Instead, it should be open to a lawyer to draft a further agreement once liability is proven following a successful severance motion, rather than expecting the lawyer to fund everything up-front in an uncertain case. What the *O'Brien* case demonstrates is that contingency arrangements are one aspect of achieving access to justice, but the courts, not just lawyers, should be aware of and responsive to the realities of civil litigation. Thus, including access to justice in the considerations for determining a severance motion adds another important aspect to the legal profession's ability to ensure a plaintiff's day in court.

Finally, any so-called "flood gates" concerns over the ruling in *O'Brien* should be dismissed. The distinction made between *Dmytriw* and *O'Brien* demonstrates that only in compelling cases will access to justice be a significant consideration in granting a severance request. The court recognized that applications for severance are "very much factually driven"⁴¹ and this is made clear in the different results in the *Dmytriw* and *O'Brien* decisions. The court is clear that the criteria from *Investors Syndicate* should still be given consideration, however, in a factually appropriate case, access to justice may properly be given significant weight. This is particularly so given the fact that the defendant in *O'Brien* did not file any evidence as to prejudice it would suffer in the event of a successful application.⁴² The court leaves open the possibility that in a different case, where such prejudice against the defendant is evident or where a plaintiff's financial situation was better, leaving them more able to afford their day in court, access to justice considerations would not be enough to grant a severance request. Further, any lingering worries of opening the flood gates of severance should be dispelled in light of the recent Alberta Court

⁴¹ *O'Brien*, *supra* note 3 at para 53.

⁴² *Ibid* at para 55.

of Appeal decision in *Gallant v Farries*,⁴³ which distinguished *O'Brien* on the facts.⁴⁴ In essence, despite the decision in *O'Brien*, an applicant for severance must still demonstrate a clear and compelling case. The issue of access to justice alone will not necessarily be enough to result in a successful application, except perhaps in the most extreme of cases. The decision in *O'Brien* does not open the dam to a flood of separate trials. Rather, *O'Brien* provides an avenue of opportunity for the full context of a case to factor into judicial discretion. In the end, this is how our civil legal system can ensure that a just resolution is achieved.

⁴³ 2012 ABCA 98, 522 AR 13.

⁴⁴ *Ibid* at para 22.