

# HEARSAY

## HEARSAY - June 2022: *In This Edition*

### Big Win...

#### Articles

- Strategic Litigation Against Public Participation (SLAPP) legislations, expression of public interest, and the prevention of the effects of SLAPP suits.
- Brief Anatomy of Representations and Warranties Insurance

#### Case Comments

- Privacy breaches and speculative disclosure: Sufficient to certify a class action?

- British Columbia Court of Appeal comments on the test for want for prosecution applications
- Summary of Severance et al. v. O’Hanley et al. 2022, ONSC 1433

#### CDL News

- 2022-2023 Board of Directors
- CDL Diversity & Inclusion Committee Status Report

# SUMMARY OF *SEVERANCE ET AL. V. O'HANLEY ET AL.*, 2022 ONSC 1433

By Rory Love  
Alexander Holburn Beaudin + Lang LLP

In *Severance et al. v. O'Hanley et al.*, 2022 ONSC 1433, the Court provided confirmation as to the proper use of a Counterclaim.

The action related to a pedestrian accident that occurred on February 20, 2015. There were two separate lawsuits and multiple parties relating to the accident. HMQ attempted to claim contribution and indemnity against the Severances through a counterclaim from relief sought in the companion action.

The Court found that “HMQ’s claims for contribution, indemnity, and relief over as against the Severances should not have been asserted by counterclaim. They are properly made by third party claims in the Barrie Action.”

The Court specifically noted that “It is unfortunate that counsel for HMQ did not correct their procedural error when it was brought to their attention in 2017. I do not accept that the fact the two actions are now being tried together as sufficient to resolve the fact that there is no cause of action by way of counterclaim against the Severances for relief over for alleged contribution and indemnity and a set off in a different action. HMQ was invited to correct that error and failed to do so when they knew or ought to have known that the counterclaim was procedurally improper.”

Further, the Court was “not prepared to order that the counterclaim in the Subject Action proceed as a third party claim in the Barrie Action nor am I prepared to grant leave for HMQ to amend their pleadings in the Barrie Action to add the Severances as third party’s for the following reasons:

- (a) The only parties who participated in this motion were counsel for the Severances in the counterclaim (not the main action) and for HMQ. It would be inappropriate to make the orders requested by HMQ without providing counsel in the Barrie Action and counsel for the Severance plaintiffs in the Subject Action to make submissions on a motion seeking leave to amend the pleadings in the Barrie Action;
- (b) HMQ knew or ought to have known in 2017 that their counterclaim was incapable of success in the Subject Action and took no steps to rectify their error; and
- (c) Notwithstanding the two actions are being tried together, they still remain two different actions.

The counterclaim was dismissed with costs.

The *Rules of Civil Procedure* (the Rules) set out when parties may advance a counterclaim (Rule 27.01) and when they should advance a third party claim in an action (Rule 29.01). There is nothing in Rule 27.01 (1) that provides that a defendant may assert a counterclaim in one action for damages alleged in another action against a non-party to that other action. It is important to remember, that the Rules do provide a process to make claims for contribution and indemnity by adding a party to an action via a third party claim (Rule 29.01). In the case of *Huachangda Canada Holdings Inc. v. Solcz Group Inc.*, 2018 ONSC 7373 at para. 19 noted that: “Thus, on a plain reading of Rules 27.01 and 29.01, only a perpetrator of the wrongdoing alleged in a counterclaim can be joined as a necessary or proper party to that counterclaim; anyone not falling in that category must be considered under the third party rule.”

The decision in *Severance* highlights that when parties seek contribution, indemnity and relief against another party in an action, it is always important to use the proper mechanism in order to advance that claim.