Compliance with undertakings

Judge offers guidance on a 'troublesome area of practice'

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A Superior Court judge is urging lawyers not to rush to court with motions to compel compliance with an undertaking before attempting to work it out with opposing counsel.

In *Cuff v. Gales*, Justice David Price noted undertakings are a "troublesome area of practice" but emphasized that co-operation among lawyers will help. Before bringing a motion to compel compliance with unmet undertakings, lawyers should have a "thoughtful conversation," he wrote in his Aug. 15 reasons.

The judge was dealing with the cost order in such a motion, one he found to be premature after one lawyer brought it against the opposite party just a month after an initial communication about meeting a number of undertakings in a personal injury matter. "Most motions to dismiss actions for non-compliance with undertakings can be avoided by proper management of files in lawyers' offices and thoughtful communication between lawyers," wrote Price.

In *Cuff*, when a student at lawyer Darrell March's office e-mailed opposing counsel Louis Coté to say they'd be bringing a motion to compel to compliance with several undertakings, Coté was "predictably defensive," noted Price, who said the lawyers could have first talked about what was causing the delay.

After finding the motion in the case was premature, Price ordered both parties to cover their own costs and the plaintiffs to respond to the unmet undertakings.

The court also gave a rough timeline of when a party should take action in cases of non-compliance with an undertaking. Price noted a party asked to obtain documents from a non-party would send a letter to the non-party only after receiving the transcripts of the examination, a process that takes about a month. Preparing and sending out letters could take two more weeks, he added.

Lenczner Slaght Royce Smith Griffin LLP partner Nina Bombier says the judge's guidance is helpful.

"I think the overarching point of the [judge's] decision is that counsel have to co-operate and communicate around the compliance of undertakings," she says.

Oftentimes, counsel manage quite well without the court's intervention, but this is a case where someone "pulled the trigger" too soon, she adds.

The decision is a reminder 'that counsel have to co-operate and communicate around the compliance of undertakings,' says Nina Bombier.

Toronto lawyer Ben Hanuka says the timeline the judge offered in this case was generous. Lawyers could speed up the process by taking their own notes of the undertakings and sending request letters right after the examinations, he says.

The roughly six-week timeline is "too lenient," he adds, admitting "it's not unrealistic if both parties are passive."

Bombier says parties sometimes agree to too many undertakings they're unable to meet.

"I think it's incumbent on counsel to be careful about the scope of undertakings given," she says. "In getting any undertaking, ensure that you can comply with it and that you're not sort of taking on a fishing expedition."

The court also acknowledged producing every required document could be overwhelming to the party that has given many undertakings.

"The demands of an examination on the party being examined, that party's lawyer, and the examining lawyer, should not be underestimated, and it is increasingly recognized that a human being has a finite 'bandwidth' of attention and, accordingly, a limited ability to focus effectively on multiple tasks simultaneously without intolerable stress and intolerable error," wrote Price.

"This leads to a recognition by litigants, lawyers, and the court, that it is sometimes unrealistic to expect that a party who has been examined, or his or her lawyer, will be capable of reviewing questions refused, and following up on undertakings given, before receiving the transcript of the examination, in which the court reporter generally identifies the undertakings and refusals in a section dedicated to that purpose."

Still, the party that has given undertakings should keep opposite counsel in the loop about the actions it's taking to meet them, Price noted.

In *Cuff*, the premature motion to compel compliance created distrust between counsel, according to the court. Coté felt the e-mail indicating there would be a motion to compel compliance was a form of harassment, according to the ruling.

"Mr. Coté's characterization of Mr. March's student's correspondence as harassment may be overstated, but Mr. March's precipitous threat of a motion elicited a predictably defensive response and an attribution of sinister motives which, whether justified or not, led to a break-down in communication which contributed to a motion being brought that may have been avoided," wrote Price.

But Hanuka says although a motion to compel compliance may create distrust between counsel, "the presumption should be that each lawyer is being reasonable at each instance, not the other way around."

"Personal animosity or distrust between lawyers is counterproductive, is not in the interest of the parties or the administration of justice," he adds. LT