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O'BRIEN'S DIVISION VIII ONTARIO — COURT FORMS by W. Bruce Drake and Christopher Wirth Release No. 2, August 2024

What's New in this Update:

This release features updates to the forms and commentary in Chapter 27 (Applications) and Appendix 1 (Words and Phrases).

Highlights include updates to:

Words and Phrases — No Valid Defence — Ontario — “No valid defence” at such a preliminary stage of the litigation cannot mean that the court should determine definitively that there are no defences. It does however mean that simply showing that the action has substantial merit is not enough. The plaintiff will not meet the test unless he or she can also show it is reasonably possible that none of the available defences will succeed. Conversely, if it appears that one of more of the defences will probably succeed, the motion must be granted, and the action halted. [*Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 OR (3d) 211 at para. 33]. This assessment requires an evidentiary basis, but it does not require certainty: *Li et al. v. Barber et al.*, 2024 ONSC 775, 2024 CarswellOnt 1280 (Ont. S.C.J.).

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Words and Phrases — Stare Decisis — Ontario — [T]he doctrine of stare decisis provides, in the vertical hierarchy of the judiciary, that lower courts are to follow the decisions of higher courts. There are exceptions where a lower court can depart from the precedent of a higher court, and I am urged by the Tenant that this is such a case.

.....
The doctrine of stare decisis is a fundamental organizing principle of the common law. It promotes consistency and predictability in the law. With predictability and consistency, people can organize their affairs knowing how their actions would be interpreted by the courts based on prior precedents.

.....
There are two forms of stare decisis, vertical stare decisis and horizontal stare decisis. The former applies where a lower court is asked to depart from a higher court’s ruling. . . Horizontal stare decisis applies as a matter of comity between judges of the same court. In those circumstances a judge from one court ought not to deviate from a principle applied by a judge of the same court, assuming the case is not distinguishable. . . : *The Canada Life Assurance Company et al. v. Aphria Inc.*, 2023 CarswellOnt 19921, 2023 ONSC 6912, 169 O.R. (3d) 272 (S.C.J.) Callaghan J. at paras. 20, 65, 66.

Words and Phrases — Vexatious — Ontario — The word, “vexatious” “means causing or tending to cause annoyance, frustration, or worry”. [footnote reference to Oxford Dictionary (online) omitted] A proceeding is said to be vexatious “when the party bringing it is not acting bona fide, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result”. [footnote reference to Black’s Law dictionary, in The Law Dictionary (online) omitted].

Principles frequently cited are those set out by Henry J. in *Re Lang Michener et al. and Fabian et al.* [(1987), 59 O.R. (2d) 353 (H.C.)]. For a litigant to be vexatious, their conduct is not required to fall within the scope of each of the Lang Michener categories. In addition, the court is entitled to take into consideration a litigant’s conduct “outside the courtroom”.]: *Blaskavitch v. Smith*, 2023 ONSC 2133, 2023 CarswellOnt 10679 (Ont. S.C.J.).

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