
A NEW ERA: OBLIGATION TO KNOW THY ADVOCATE AND SUPERVISE THY LITIGATION

*By Sean S. Carter**

A. INTRODUCTION

In an important case recently released by the Court of Appeal for Ontario (the “Court”), [*Southwestern Sales Corp. v. Spurr Bros Ltd.* 2016 ONCA 590](#) (“*Southwestern*”), the Court imposed a positive obligation on sophisticated corporate litigants to “supervise its counsel’s [lawyer’s] work to ensure an expeditious determination of the action on the merits”. The Court’s comments in *Southwestern* were made in the context of dismissing a construction lien action for delay after 13 years, and in the absence of an acceptable explanation.

B. THE COURT’S DECISION

While recognizing that each case is different, and many cases take years to come to a resolution or adjudication, the Court still made it clear in *Southwestern* that it would not accept the argument that a complex corporation should be allowed to continue to use court resources, and avoid a dismissal order (ending the action) simply because the corporation had legal representation. The Court did not extend this positive duty to supervise legal counsel to individuals. The Court did, however, establish this obligation to supervise legal counsel for sophisticated corporate entities. In *Southwestern*, the sophisticated corporate entity happened to be a for profit corporation; however, there is nothing to suggest that sophisticated charities and not-for-profit corporations, would be excluded from the same positive obligation to supervise. The Court did not suggest that the supervision of legal counsel needed to be anything more

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extensive than ensuring that the court action is not experiencing undue delay, but this duty of supervision could be expanded in the coming years and future jurisprudence.

That being said, it is clear that the Court in *Southwestern* is not suggesting that sophisticated corporate entities cannot, or should not, rely on their litigation counsel to provide advice as to the conduct of the action, but the Court is willing to impose a positive obligation to ensure the action is progressing in line with “an expeditious determination of the action”. In this regard, sophisticated corporate entities needs to remain involved in the conduct of the litigation and are responsible for ensuring that their counsel does not unnecessarily delay the action. Questions certainly abound following the Court’s determination in *Southwestern*, including what exactly constitutes a sophisticated and complex enough corporation to merit the imposition of this positive obligation to supervise legal counsel.

In *Southwestern*, the lawyer who was not properly “supervised” also lost his license to practice, due to the professional negligence in allowing such delay, amongst other things. In the scenario before the Court in *Southwestern*, the corporation with a lawyer who was responsible for the conduct of the action would likely have a right of action against the lawyer for professional negligence. Even if a corporation has a cause of action against their lawyer for professional negligence, that corporation would then face the prospect of having to bring a completely new action with a portion of legal costs that are almost always irrecoverable. In addition, that action could last several more years, and there is the difficulty of proving what the damages actually would have been had they been provable in the original action.

Particularly in the light of the Court’s decision in *Southwestern*, but important to any potential litigant, is the essential choice of choosing your litigation counsel wisely. Legal counsel should not only understand and have experience in the type of action that is proceeding, but should also understand the needs and responsibilities of the corporate entity and the industry itself. Chosen legal counsel will be the corporation’s advocate and voice to the court. Legal counsel need to take into consideration the needs of the client, and there needs to be a free-flowing exchange of ideas and a comfort and knowledge of what legal counsel is doing on the corporation’s behalf. Litigation, however, is not just about avoiding having a case thrown out for delay. To have the best chance at success in litigation, each corporation (in particular their board of directors) needs to ensure that they have an open, transparent relationship with their legal counsel and, among other things, be comfortable that the corporation’s advocate puts the organization’s

interests above any others. *Southwestern* is an excellent reminder of the increasing importance of a corporation's choice of, and ongoing relationship with its litigation counsel.



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