

The Court Provides Clarity on the CPN7 Apparent Vexatious Application or Proceeding (AVAP) Procedure

In *De'Medici v Wawanesa Mutual Insurance Company*, 2023 ABKB 210, the court took the opportunity to provide clarity on the Civil Practice Note 7 (“CPN7”) procedure for dealing with apparently vexatious applications or proceedings given the increased use of the procedure often with lengthy materials being submitted. The court has made it clear that litigants must exercise caution when referring matters under CPN7 and discouraged its use except in the clearest of cases.

This procedure was introduced in 2018 to effectively deal with potentially abusive and frivolous claims in a cost-effective and timely manner. The aim was to set out a summary procedure for the Court to use Rule 3.68 of the Alberta *Rules of Court* to deal with a claim, defence, action, application or proceeding that appears on its face to be frivolous, vexatious, or otherwise an abuse of process. Under CPN7, the Court can make an Order to stay or dismiss an Apparent Vexatious Application or Proceeding. Essentially, it was used to weed out pleadings or proceedings which were clearly unmeritorious.

Counsel are able to refer a matter to the Court to be considered under CPN7 through a written request, however until now the procedure for making the written request was unclear. The court has now clarified that the written request should be following these guidelines:

- 1) A letter requesting CPN7 should be no more than a line or two, since the defect in the pleading should be evident on its face. If further explanation is required, the parties may want to consider other procedures available under the Rules
- 2) The letter should enclose a copy of the impugned pleading or commencement document
- 3) If the party is alleging the pleading is a collateral attack or *res judicata*, then they should also include a copy of any previous written decisions, pleadings or orders that support this. However, if the party is attaching multiple decisions, the defect might not be evident on its face and CPN7 may not be the appropriate procedure.

The court still considers the application with regard to the substantive legal tests that come from Rule 3.68 with minor modifications to account for the summary procedure set out in the Practice Note. The CPN7 procedure should be used “where a pleading is so bad that no argument is necessary to show how bad it is or where a pleading is oppressive or vexatious and violates the principles of justice or is unfair to the point of being contrary to the interests of justice.”

The court reserves the CPN7 procedure for the clearest of cases and explicitly states that it should not be used unless there is a reason to prefer it to the other procedure available under the Alberta Rules of Court, such as where the litigant might use the other procedures to perpetuate an abuse of the Court’s process or where the pleading is so clearly hopeless that an application under the Rules would be an utter waste of time, money and resources.

The procedure in CPN7 cannot be used to declare someone a vexatious litigant and/or seek an order to limit a person’s access to the Courts. An application under the *Judicature Act* must be made for this.

In this case, the Defendants had asked the Court to dismiss the proceeding under CPN7 because the Plaintiff had a pattern of vexatious behavior displayed in the course of his litigation history. Counsel submitted a 10 page letter detailing this history, but did not submit the other pleadings it had referred to, or in fact the impugned Statement of Claim. The court declined to consider the legal submissions since the commencement document must be problematic on its face to be captured by CPN7. Since the request also did not provide the Statement of Claim, the Court could not conclude whether it was frivolous, vexatious or otherwise an abuse of process.

Further, the fact that a litigant may have previously filed vexatious pleadings does not automatically mean that the present pleading would also be vexatious. Pleadings must be assessed on their own right to determine whether they are vexatious.

While the Court has now offered further guidance and clarification on when the CPN7 procedure can be used and how to use it, it is still a useful tool to effectively deal with clearly problematic pleadings. Brownlee LLP has been successful in using this procedure in such cases such as *Pan v Standard (Village)*, 2022 ABKB 796, and would be pleased to assist clients in navigating when to refer pleadings under the CPN7 procedure or whether to proceed with an application under the Rules.