WeirFoulds LLP

Handle with Care: Joint Document Books in Civil Trials

February 26, 2021

By Gregory Richards

Two cases that the Ontario Court of Appeal decided in the last year illustrate how much thought and care must go into preparing a Joint Document Book (**JDB**) for a civil trial. Errors made regarding JDBs were key to the Court allowing both appeals and ordering new trials. Such books are regularly filed in commercial cases and other civil actions, so it is important to understand the rulings.

The Two Court of Appeal Decisions

In the first case, *Girao v Cunningham*, 2020 ONCA 260, the plaintiff sued over injuries that she suffered in a car accident. The Court of Appeal found that the trial had been unfair to the plaintiff, a self-represented litigant. This unfairness included the defence dropping "a massive and selectively redacted 16 volume 'Joint Trial Brief' on the appellant, who has substantial difficulty with the English language, something of which the defence was well aware" (*Girao*, para. 21).

The second case, *Bruno v Dacosta*, 2020 ONCA 602, involved an action for damages arising from an assault that took place in a detention centre. The Court of Appeal held that the trial judge's reasons for decision were insufficient to permit meaningful appellate review. The Court found that errors made in the admission and use of documents in the JDB contributed to the deficiency of the reasons (*Bruno*, para. 53).

Questions to Address Concerning Every JDB

The Court of Appeal in *Girao* held that there are specific questions that both counsel and a trial court must address "in considering how the documents in the joint book of documents are to be treated for trial purposes" (para. 33). The Court quoted this same list of questions in deciding *Bruno* (para. 53):

1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?
2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?
3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?
4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?
5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?
6. Does any party object to a document in the document book, if it has not been prepared jointly?

The Court of Appeal noted that these questions regarding documents in a JDB "arise in every case" (*Girao*, para. 33).

Filing an Agreement with the JDB

The Court of Appeal held that it is preferable if a "written agreement between counsel" addressing these questions is attached to the JDB and that "it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings" (*Girao*, para. 34).

The Court observed that answers to its list of questions "are not implicit in the filing" of a JDB. It is for this reason that the questions must be "expressly addressed on the record or by written agreement". Noting that problems frequently arise with JDBs because "the parties have not turned their minds to the issues in sufficient detail before the document book is tendered as an exhibit", the Court cautioned that this "must change as a matter of ordinary civil trial practice" (*Girao*, para. 35).

To address the Court of Appeal's list of questions, litigants will need to give themselves plenty of time before trial to discuss the contents of any proposed JDB. Too often, the preparation of a JDB becomes a rushed exercise of mere document assembly rather than a careful assessment of the purpose for which the documents may be used at trial.

The Role of the Trial Judge

Although counsel may agree on all aspects of a JDB, the trial judge controls the trial process. The Court of Appeal noted that "any agreement between counsel as to the admissibility of documents is not automatically binding on the trial judge". The trial judge remains the "gatekeeper of the evidence" (*Bruno*, para. 55).

It is the trial judge's responsibility to get the requisite clarity about the use that can be made of documents marked as exhibits, especially concerning a document's hearsay content. This "discipline of judicial oversight" is particularly needed where one party is self-represented (*Girao*, paras. 26-27). If no agreement is filed by the parties addressing the questions outlined by the Court of Appeal regarding documents in a JDB, the trial judge should take the parties through the Court of Appeal's list of questions before a JDB is filed (*Girao*, para. 35).

Problems Concerning Hearsay

Although a variety of issues concerning a JDB can arise in a trial setting, often they relate to whether a document containing hearsay is admitted for the truth of its contents. *Bruno* provides a good illustration of this common problem.

Plaintiffs' counsel in *Bruno* began the trial by reading into the record the parties' agreement with respect to the JDB, but the Court of Appeal noted that "the agreement was not helpful to the trial judge because of its ambiguity". In its view, the trial judge "should have probed immediately and carefully with some obvious questions, among them: If a document is not challenged, is its hearsay content deemed to be admitted? If not 'all' documents, then which?" (*Bruno*, paras. 56-57).

After seven days of trial in *Bruno*, hearsay issues were mounting. Counsel read into the record a "further stipulation" by which the parties were said to agree that government records in the JDB were business records pursuant to s. 35 of Ontario's *Evidence Act*, RSO 1990, c E.23, but that there was no agreement that statements recorded in these records were admissible for the truth of their contents (*Bruno*, paras. 58-59).

As the Court of Appeal noted, by this stage in the trial the plaintiffs had already referenced and relied on numerous documents involving various degrees of hearsay (*Bruno*, para. 60). The parties' new agreement was purporting to stipulate that double hearsay would not be admissible for the truth of its content under s. 35, an issue that required "argument and an evidentiary ruling". Unfortunately, it was now "too late" (*Bruno*, para. 61).

The trial judge was left in a dilemma over the use that could be made of the business records. Despite the parties' proviso about hearsay, the Court of Appeal found that the trial judge had "effectively accepted" the hearsay content of one of the documents in deciding the issue of who committed the assault (*Bruno*, para. 64). The parties could have avoided this problem by filing an unambiguous agreement about documents at the opening of trial.

Conclusion

The Ontario Court of Appeal's decisions in *Girao* and *Bruno* show that JDBs in civil trials must be handled carefully. Missteps resulted in the unfortunate outcome of new trials being ordered in both cases. But the Court of Appeal has also provided strong guidance. Counsel in any civil action will want to have regard to this guidance before preparing a JDB and using it at trial.

For more information or inquiries:

Gregory Richards

Toronto
416.947.5031

Email:
grichards@weirfoulds.com

Greg Richards is a skilled and experienced courtroom lawyer.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035