Court of King's Bench of Alberta

Citation: Great North Equipment Inc v Penney, 2024 ABKB 391

Date: 20240627
Docket: 2301 08144
Registry: Calgary

Between:

Great North Equipment Inc. and 1185641 BC Ltd.

Applicants/Plaintiffs

- and -

Bradley Penney, Neil Macdonald, Dustin Monilaws, Paloma Pressure Control LLC, Paloma PC Holdings LLC, Indeed Oilfield Supply LLC, and Indeed Alberta Corp.

Respondents/Defendants

Scott Luscombe, Nthan Underwood, and Leah Carlson

Rule 6.8 Respondents

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] The Applicants examined three individuals who are not parties to this action pursuant to Rule 6.8 to obtain evidence to support their application to extend an interlocutory injunction preventing the Respondents from soliciting their employees and clients. During the examinations, the Applicants requested that the non-party witnesses give undertakings to produce records and information. The undertakings were taken under advisement and subsequently refused.

[2] The Applicants submit that the non-party witnesses are obliged to answer reasonable undertaking requests in the same way as witnesses subject to cross-examination on an affidavit pursuant to Rule 6.7. The Respondents reject this position. They say that a non-party witness is to be treated the same as a witness at trial and that there is no obligation to answer undertakings. Counsel for the parties were unable to identify any case where the question of the obligation to answer undertakings was decided under Rule 6.8 or its predecessor, Rule 266.

[3] For the sake of clarity, I will refer to the Respondents/Defendants as the Respondents and the Rule 6.8 Respondents as the non-party witnesses.

II. Rule 6.8 – Examination of a Non-Party for a Pending Application

[4] The right of a party to examine a non-party to obtain evidence for a pending application goes back to the mid-19th century practice of the High Court of Chancery: ***Dechant v Law Society of Alberta***, 2000 ABCA 265 at paras 12-13. The original Chancery rule was substantially replicated in former Rule 266 which read as follows:

> A party to an action or proceeding may by service of an appointment issued by an officer having jurisdiction in the judicial district where the witness resides to issue appointments for the examination of parties for discovery, require the attendance of a witness to be examined before that officer for the purpose of using his evidence upon any motion, petition or other proceeding before the court or any judge or judicial officer in chambers; and his attendance may be procured and his examination conducted in the same manner as those of a witness at the trial [emphasis added].

[5] Pursuant to Rule 266 the examination of a non-party witness proceeded as an examination-in-chief. Only if the witness proved to be hostile could an application be made to the Court for permission to conduct a cross-examination. Regardless of the mode of examination, the transcript was part of the examining party's evidence on the application.

[6] Rule 266 was studied by the Alberta Law Reform Institute ("ALRI") as part of the Rules of Court Project in the early 2000s: Consultation Memorandum No. 12.10: Motions and Orders (July 2004) at 35-38. The General Rewrite Committee recommended that Rule 266 be modified to permit cross-examination of adverse parties without first requiring a Court application to have the witness declared hostile.

[7] Rule 266 became Rule 6.8 in the *Alberta Rules of Court*, Alta. Reg. 124/2010:

> 6.8 Questioning witness before hearing – A person may be questioned under oath as a witness for the purpose of obtaining a transcript of that person's evidence for use at the hearing of the application, and
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> (a) rules 6.16 to 6.20 apply for the purposes of this rule, and
>
> (b) the transcript of the questioning must be filed by the questioning party.

[8] Rule 6.16, which is incorporated into Rule 6.8, provides that a notice of appointment may specify records that a witness must bring to questioning. Rule 6.20(2), consistent with the ALRI recommendation, provides that a cross-examination may be conducted where the witness is adverse in interest.

III. Evidence for Applications

[9] The types of evidence that may be put before the Court on an application is set out in Rule 6.11. Two kinds of oral evidence are permitted. Evidence obtained prior to a hearing and recorded in a transcript and oral evidence given in Court. Oral evidence in Court is only permitted on an application with leave of the Court. Oral evidence in Court at an application "must be given in the same manner as at trial": Rule 6.11(2).

[10] The starting point is that affidavits and transcripts of oral evidence put before the Court on an application stand in place of *viva voce* evidence being given in Court. Accordingly, the mode of adducing evidence on an application is analogous to the approach used at trial and fundamentally different than Part 5 questioning (*i.e.* what used to be called oral discovery). A witness may be required to attend at trial and bring relevant records: Rules 8.8 & 8.9. A witness at trial, however, is not required to give and answer undertakings.

[11] The purposes of Part 5 questioning are set out in Rule 5.1. Rule 5.1(1) explains that a purpose of record production and oral questioning is to "obtain evidence that will be relied on in the action." Undertakings are an essential feature of the Part 5 questioning process because they assist the parties to obtain evidence that will be relied on in the action. Rule 5.30 provides as follows:

> 5.30 Undertakings – (1) If, during questioning, a person answering questions
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> (a) does not know the answer to a question but would have known the answer if the person had reasonably prepared for the questioning, or if as a corporate representative the person had reasonably informed himself or herself, or
>
> (b) has under the person's control a relevant and material record that is not privileged,
>
> the person must undertake to inform himself or herself and provide an answer, or produce the record, within a reasonable time.
>
> (2) After the undertaking has been discharged, the person who gave the undertaking may be questioned on the answer given or record provided.

[12] There is no rule comparable to Rule 5.30 in Part 6, Division 1 of the *Rules of Court* which concerns applications. This is, of course, because evidence for an application is generally adduced according to the same principles as at trial and witnesses do not give undertakings when testifying at trial. Perrel J in ***Ontario v Rothmans Inc***, 2011 ONSC 2504 explained at para 114, "[i]f a witness does not know the answer to a question in cross-examination at trial, the witness will not be required to undertake to obtain the answer."

[13] Alberta has not taken a strict approach to enforcing the principle that cross-examination on an affidavit is treated in the same fashion as evidence given at trial. Master Prowse, as he was then known, reviewed 80 years of case law in ***Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd***, 2008 ABQB 671. He concluded at para 5 that a Court "should be reluctant to direct that undertakings be provided" and that "it should be more difficult to have undertakings directed on a cross-examination than at examinations for discovery." He then explained that undertakings should be required to be given and answered in circumstances where:

(a) the deponent has referred to information or documents in the affidavit, or could only have made the assertions contained in the affidavit after having reviewed the information or documents being sought, or

(b) the undertakings relate to an important issue in the application, and the provision of such information:

(i) would not be overly onerous, and

(ii) would likely significantly help the court in the determination of the application.

[14] Alberta's departure from a strict rule against undertakings in cross-examinations is prudent and consistent with the foundational rules of the *Rules of Court* which prioritize proportionality and efficiency so that matters may be "fairly and justly resolved in ... a timely and cost-effective way": Rule 1.2. Justice Graesser in ***Rozak (Eatate)***, 2011 ABQB 239 at para 40 explained that requiring a deponent to answer undertakings as contemplated by Master Prowse levelled the playing field because a deponent is often able to supplement their evidence with a further affidavit prior to the application being heard. The Alberta approach to undertakings arising from cross-examinations on affidavits is pragmatic, not permissive.

IV. Rule 6.8 and Undertakings

[15] The Applicants submit that the pragmatic approach to Rule 6.7 should be adopted for Rule 6.8. They submit that the purpose of Rules 6.7 and 6.8 is the same, to obtain evidence to assist the Court in deciding applications. They cite the fact that witnesses being examined pursuant to Rule 6.8 may be required to bring records to the questioning: Rule 6.16. The Applicants contend that requiring witnesses examined pursuant to Rule 6.8 to answer undertakings would "incentivize" them "to meet their preparation obligations at first instance." They further raise the spectre of inefficiency of what they say the logical alternative is, serving a new notice to attend that requires the witnesses to re-attend for examination with the missing records.

[16] There is a fundamental difference between witnesses examined pursuant to Rule 6.7 and Rule 6.8. Witnesses who have sworn an affidavit have consented to taking an active role in the litigation; they are either parties or have agreed to assist a party. It is reasonable to ask such witnesses to answer undertakings in the circumstances stated by Master Prowse in ***Dow Chemical***. Indeed, their choice to provide an affidavit implies their consent to provide information and records referred to in their affidavit and to provide other information that would significantly assist the Court so long as it is not overly onerous to do so.

[17] Witnesses who are examined pursuant to Rule 6.8 are strangers to the litigation in the sense that they are not parties. Witnesses examined pursuant to Rule 6.8, as in the present case, have a connection to the events in dispute but, for whatever reason, have not been joined to the litigation as parties. Such witnesses have not consented to taking an active role in the litigation and it is reasonable that they be treated differently than witness who have provided an affidavit. A Rule 6.8 examination should be no more intrusive than necessary – this is a theme that runs through the principles governing Rule 6.8 examinations identified by Feth J, as he then was, in ***Gow Estate (Re)***, 2021 ABQB 305 at para 15.

[18] The Ontario analogue to Rule 6.8 is Rule 39.03 of the *Rules of Civil Procedure*, RRO 1990, Reg 194. Though Ontario discovery and applications evidence practice is different and generally more restrictive than in Alberta, it is still worth noting that undertakings are not given on examinations pursuant to Rule 39.03. Associate Justice Todd Robinson observed in ***Xie v. Gross***, 2022 ONSC 5359 at para 35:

> Generally, the scope of a witness' examination under rule 39.03 is limited to information that is within their personal knowledge. Witnesses examined under rule 39.03 are not required to take steps to inform themselves of matters beyond their personal knowledge or make inquiries of others, and they are not obliged to give undertakings: *Magnotta Winery Corporation v. Ontario (The Alcohol and Gaming Commission)*, 2020 ONSC 561 at paras. 52 and 57; *Arnold v. Arnold*, 2021 ONSC 7983 at para. 6.

[19] Maintaining a rule against undertakings in the context of Rule 6.8 balances the interests of litigants in obtaining evidence for their application and the interests of strangers to litigation to minimize their involvement. The rule is also consistent with the principle that the presentation of oral evidence obtained in advance of an application to the Court follows the model for presentation of *viva voce* evidence in Court on an application or trial.

[20] The risk inherent in a rule against requiring undertakings in Rule 6.8 examinations is that witnesses will be deliberately ill-informed and uncooperative. This risk can be addressed through other means. For example, the Court has the power to compel a witness to re-attend for questioning pursuant to Rule 6.38. And, in extreme cases, the contempt power may be used to compel compliance.

V. The Undertakings Requested

[21] An underlying issue with the records request and the undertakings for which answers are being sought in this application is that they more closely resemble the type of questions advanced in Part 5 questioning than the type of questions asked in questioning in advance of an application. The request to bring records in the Notices of Application issued to the non-party witnesses in the present case was broad and the disputed undertaking requests are more intrusive and onerous than typically seen on a cross-examination on affidavit.

[22] The Applicants' approach is understandable. The application for which the questioning is being done is an interlocutory injunction and the first part of the tripartite injunction test requires the court to assess, on a preliminary basis, the strength of the plaintiff's case. The scope of questioning is, therefore, co-extensive with Part 5 questioning – it goes to all aspects of the action. The Applicants are being thorough and diligent in seeking as much information as possible to support their position.

[23] Just because the Applicants' approach is rational in the circumstances does not mean that the Court should permit Part 5 questioning. An interlocutory injunction is an interim remedy pending trial. If full Part 5 questioning is conducted before every interlocutory injunction application, then we might as well just skip straight to the trial. The Court's consideration of the strength of a plaintiff's case in an interlocutory injunction application is done on a preliminary basis because it is understood that a more robust evidential record will be available at trial. Parties must often make their best case to the Court on an imperfect evidential record. Again, it

is important to keep in mind the foundational rules and their emphasis on fairly and justly resolving matters before the Court in a timely and cost-effective way: Rule 1.2

[24] The Notices to Attend requested that the non-party witnesses bring "all records in respect of relevant and material matters...." The Notice to Attend went on to describe the nature of the issues in the action to which the records must be relevant and material. Through the undertakings the Applicants seek to have the non-party witnesses produce bank records, cell phone records, "copies of all emails, text messages, or other communications" with the Respondents and others, social media messages, and calendar invitations. These are onerous and intrusive requests to make of any witness on a questioning in advance of an application, let alone a non-party witness. These requests fundamentally seek Part 5 record disclosure from these non-parties in the context of an interlocutory injunction application.

[25] Even if I had found that undertakings may be required in an examination pursuant to Rule 6.8 in a fashion analogous to Rule 6.7, I would have found that the requests in the present case are too intrusive and onerous. Producing the requested records will put the non-party witnesses to significant inconvenience. Further, I am not convinced of the necessity of many of the requests. Many of the records sought may be available from existing parties to the action. Most of the communications records sought involve the Respondents and should be available from the Respondents.

VI. Conclusion

[26] The application is dismissed. The judge hearing the interlocutory injunction application presently scheduled for July 16, 2024 may determine the question of costs.

Heard on the 26th day of June, 2024.
Dated at the City of Calgary, Alberta this 27th day of June, 2024.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Kris R. Noonan, Matti Lemmens, David M. Price, & Cameron Penn, Stikeman Elliott LLP
for the Applicants

Keely Cameron and Navdeep Kaur, Bennett Jones LLP
for the Rule 6.8 Respondents, Paloma Pressure Control LLC and Paloma PC Holdings LLC.