Court of King's Bench of Alberta

Citation: Hou v Canadian North Inc, 2024 ABKB 549

Date: 20240917
Docket: 2103 18499
Registry: Edmonton

Between:

Chee Hou

Plaintiff

- and -

Canadian North Inc and Kelco Aerospace Inc

Defendants

Docket: 2203 03248
Registry: Edmonton

And Between:

Peter Perdue

Plaintiff

- and -

Canadian North Inc and Kelco Aerospace Inc

Defendants

Reasons for Decision
of the
Honourable Justice W.N. Renke

[1] The Plaintiffs applied for orders permitting the hearing of their actions to proceed by streamlined trial. A case management meeting was held, as provided by rr 8.25(2) and 8.26(1)(c) and *Notice to the Profession and Public – Streamlined Trial Process – Civil (Non-Family) Actions*, December 22, 2023 (NPP#2023-02) p 2.

[2] I received the pleadings and written and oral submissions contemplated by r 8.27(1).

[3] The Defendants opposed the applications.

[4] Both the 2103-18499 action (the Hou action) and the 2203-03248 action (the Perdue action) concern similar issues and are in the nature of wrongful dismissal actions. I'll discuss the features of the actions below. Mr. Hou and Mr. Perdue are represented by the same counsel. The Defendants in the two actions are the same.

[5] For the reasons that follow, the Plaintiffs' applications are denied.

[6] I'll review the test for ordering an action to proceed by streamlined trial, then address the application of the test to the Plaintiffs' actions. For background to the streamlined trial rules, see Justice Armstrong's account in ***Arsenault v Big Rock Brewery Limited Partnership by its general partner Big Rock Brewery Operations Corp and Big Rock Brewery Operations Corp***, 2024 ABKB 387 at paras 5-15.

[7] I shall refer to the following documents:

- Hou action written submissions (HS)
- Perdue action written submissions (PS)
- Draft Orders attached to HS and PS (Draft Orders)
- Canadian North written submissions respecting HS (CN-H)
- Canadian North written submissions respecting PS (CN-P)
- Kelco written submissions respecting HS (K-H)
- Kelco written submissions respecting PS (K-P).

Table of Contents

I. Test for Streamlined Trial

A. Rule 8.25 and NPP#2023-02

[8] Rule 8.25 sets out the test for directing that an action be heard through the streamlined trial process:

> 8.25(1) The Court, on application by a party or on the Court’s own motion, may order or direct that a court action be resolved by a streamlined trial if the Court is satisfied that
>
> (a) it is necessary for the purpose of the action to be fairly and justly resolved, and
>
> (b) it is proportionate to the importance and complexity of the issues, the amounts involved and the resources that can reasonably be allocated to resolving the dispute ...

(3) A streamlined trial shall not be considered as a disproportionate process solely because

(a) issues of credibility may arise,

(b) some oral evidence may be required at the trial,

(c) cross-examination of some witnesses may be required, or

(d) expert evidence may be introduced.

[9] NPP#2023-02 states that (pp 1-2)

The following types of cases will often be suitable for the Streamlined Trial process:

- actions for the recovery of a liquidated sum;
- actions for the recovery of real or personal property;
- actions that depend primarily on the interpretation of documents;
- actions for damages for personal injury where the damage award would likely be under $100,000; and
- wrongful dismissal actions.

[10] I'll provide some comments on the elements of the test.

B. Comments on Test Elements

[11] Overall, the r 8.25 test reflects the approach endorsed by Justice Karakatsanis in ***Hryniak v Mauldin***, 2014 SCC 7 at para 4, with "summary judgment motion" replaced by "streamlined trial:"

> [4] .... In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[12] I recognize that there is some overlap between r 8.25(1)(a) and (b), the "necessary ... to be fairly and justly resolved" and "proportionality" elements of the test. Fairness and justice include proportionality: ***Moore v Turner***, 2024 ABKB 435, Eamon J at para 18.

[13] Practically, a result is that factors or circumstances relevant to one element of the test may be relevant to the other.

[14] It could be argued that another result of the overlap is that the proportionality element of the test is redundant. It is difficult to imagine circumstances in which a streamlined trial would be necessary but not proportionate.

[15] The two elements of the test, though, are justified in two ways.

[16] First, the proportionality test focuses attention on the scope and complexity of procedure set against the issues and economics of an action and the resources needed to resolve an action, on the identification of the right tool for the particular judicial task.

[17] Second, the "necessary for the purposes of the action" inquiry takes account of factors falling outside a proportionality assessment. It is conceivable that a process may be proportionate without being necessary for the purposes of the action to resolve the action fairly and justly.

1. "Necessary"

[18] A streamlined trial must be found to be necessary for the purpose of the action to be fairly and justly resolved. At this point, I'll focus on the term "necessary" in r 8.25(1)(a).

[19] "Necessity" is not established by the moving party beyond a reasonable doubt or to a certainty but only on a balance of probabilities. "Necessity" would be assessed on the limited and predictive materials contemplated by r 8.27(1). The use of the term means that the judge must find that streamlined trial is required for the fair and just resolution, that streamlined trial is the only means to achieve the fair and just resolution, that if the streamlined trial process were not used, a fair and just resolution would not be achieved: ***Arsenault v Big Rock Brewery*** at paras 18, 20.

[20] The necessity standard leaves the ordinary trial process as the default action resolution process.

[21] The necessity standard requires the moving party to show more than that it would be possible for a streamlined trial to achieve a fair and just result or that a streamlined trial would have the potential to achieve the fair and just result. It is true, as NPP#2023-02 states, that streamlined trial "is used when an Action *can* be fairly and justly resolved" by that process (emphasis added), in the sense that if an action could not be fairly and justly resolved by that process the streamlined trial application could not succeed. But the application should not succeed if the moving party shows only that a streamlined trial is *one way* of achieving a fair and just result. The term "necessity" imports exclusivity, the identification of the single means of achieving the fair and just result.

[22] Necessity, I observe, could be established by showing that an action can be fairly and justly resolved by streamlined trial but *not* by the ordinary trial process. Exclusivity can be established by eliminating alternatives.

2. "For the Purpose of the Action"

[23] A streamlined trial must be found to be necessary "for the purpose of the action" to fairly and justly resolve the action. In my view, this language emphasizes that necessity must be assessed in relation to the particular action. The nature of the particular action and not the "cause of action" alone must be considered.

[24] Factors relevant to the "necessary for the purpose of the action" standard include

- the assessment of whether, on the basis of the r 8.27 materials, the anticipated record would be sufficient to permit a fair and just resolution of the action – including an assessment of whether any material conflict in the evidence requires in-court testimony and cross-examination
- factors relevant to establishing of the facts, including the number of potential witnesses and the likely duration of in-court evidence
- legal doctrines that might narrow or constrain argument (e.g. presumptions or corroboration requirements)

- factors relevant to the course of the litigation, such as delay predating the streamlined trial application or delay that would be occasioned by a full trial
- any urgency in obtaining a resolution.

See ***Moore v Turner*** at paras 48, 18; ***Arsenault v Big Rock Brewery*** at para 25.

[25] Justice Armstrong provided a non-exhaustive list of circumstances showing that a streamlined trial is necessary at para 22 of ***Arsenault v Big Rock Brewery***:

> [22] Some of the circumstances in which a streamlined trial may be found necessary include:
>
> 1. Where the streamlined trial will create a more efficient process by eliminating unnecessary steps and reducing overall delay in the resolution of the dispute.
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> 2. Where the streamlined trial will result in a more cost-effective process for the parties.
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> 3. Where the streamlined trial will enhance the administration of justice by making more efficient use of court resources and provide litigants with a more accessible and timely dispute resolution process.
>
> 4. Where the streamlined trial will result in a more sharply focussed process and the elimination of complexities in the form of interim applications that do not bear on the ultimate resolution of the real issues in dispute.
>
> 5. Where it would be unjust to require the parties to proceed to a full trial, considering the value and complexity of the dispute.
>
> 6. Where the streamlined trial process will simplify the proceeding to make it easier for the parties to assess the strengths and weaknesses of their positions and thereby potentially reach a resolution without the need for a trial.

3. Proportionality

[26] Under r 8.25(1)(b), the second element of the test for ordering that an action proceed by streamlined trial is that the streamlined trial process "is proportionate to the importance and complexity of the issues, the amounts involved and the resources that can reasonably be allocated to resolving the dispute ...."

[27] The proportionality element of the test is an instance of the proportionality aimed at by the rules, confirmed in foundational rule 1.2: see ***Arsenault v Big Rock Brewery*** at paras 37-38.

(a) Proportionality and Issues and Amounts

[28] Proportionality as regards the importance and complexity of the issues or amounts at issue is straightforward.

[29] Proportionality may be missed by excess or defect. A streamlined trial may be disproportionate because it does not provide for sufficient procedural mechanisms to address (e.g.) the complexity of the issues in the action. A full trial may be disproportionate by imposing excessive procedural burdens given narrow and legally simple issues or by imposing expense burdens that approach or are greater than the amount at issue.

(b) Proportionality and Resources

[30] Rule 8.25(1)(b) also requires consideration of proportionality as regards "the resources that can reasonably be allocated to resolving the dispute."

[31] "Resources" would include the time and money of litigants.

[32] "Resources," though also includes "publicly funded Court resources:" see r 1.2(3)(d).

[33] A typical trial may be disproportionate if it imposes excessive burdens on court resources, given (e.g.) the issues and amounts at stake.

[34] A streamlined trial too may be disproportionate if it imposes excessive burdens on court resources. This might appear to be a curious proposition, since streamlined trials are to reduce procedural burdens, not increase them.

[35] A streamlined trial is to be decided in large part on the written record. If the nature of that written record is such that judicial review of the record unaided by typical trial processes would result in a greater expenditure of judicial resources than would a trial, a streamlined trial may impose disproportionately excessive demands on judicial resources.

[36] Thus, the parties must provide an estimate of judicial preparation time for a streamlined trial. We read in r 8.29(3) that

> (3) When estimating the trial time needed for a streamlined trial, the parties shall include sufficient preparation time prior to the commencement of the trial for the trial judge to review the streamlined trial record.

[37] Justice Armstrong discussed the court resources problem in ***Arsenault v Big Rock Brewery*** at paras 29-34 (this discussion occurred in the assessment of the "necessity" element of the test; as indicated, material circumstances may be relevant to both elements of the test):

> [29] In addition to looking at the steps required to get a matter ready for trial (streamlined or standard), I must also consider the conduct of the trial itself. The resources required for a trial to be fairly and justly decided include both the trial time itself and the time required for a judge to properly prepare for the trial ....
>
> [30] Preparing for a streamlined trial when there are multiple affidavits and transcripts of questioning on those affidavits is a very intensive process that requires significant judicial time. In addition to the steps required to prepare for a standard trial, the judge must review all the affidavits and questioning transcripts. In more complex matters, such as the present one, this can amount to many hundreds, if not thousands, of pages of material ....
>
> [32] While there may be a savings of two or three days of trial time with a streamlined trial, that savings will be more than offset by the additional pre-trial steps that will be required for a streamlined trial in this case and by the considerable time the judge must spend reviewing all the evidence in advance of a streamlined trial.

4. Additional Division 5 Provisions

[38] Additional provisions of Division 5 of Part 8 of the rules illuminate features of actions appropriate and, by implication, inappropriate for the streamlined trial process, as promoting or not promoting fair and just resolutions and proportionate processes.

(a) The Record and Agreements

[39] Rule 8.28 provides as follows:

> 8.28 The parties have a joint responsibility to prepare the record for a streamlined trial to ensure an efficient adjudication, including by
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> (a) identifying the real issues in dispute,
>
> (b) agreeing on relevant and material facts and records that are not in dispute,
>
> (c) ensuring that only the relevant and material evidence necessary to resolve the dispute is contained in the trial record, and
>
> (d) organizing the record and the evidence to expedite the streamlined trial and assist the trial judge.

NPP#2023-02 comments that "[v]irtually all Streamlined Trials should proceed with an Agreed Statement of Facts," concerning (at least) "undisputed background facts relating to the identity of the parties, the background to the cause of action, and the identity of the records that are not in dispute." The greater the disagreements respecting facts and records, the less appropriate for a streamlined trial.

(b) Amenability to Resolution on the Documentary Record

[40] Rule 8.30(2) provides that

> (2) Subject to rule 13.18(3), the rules of evidence and any contrary direction, evidence at a streamlined trial shall be entered by affidavit.

[41] This rule confirms that streamlined trials are to be decided on, for the most part, the documentary record as opposed to testimony. NPP#2023-02 comments that "[a]s noted, the Streamlined Trial process assumes that most of the evidence will be introduced by Affidavit. Oral evidence is limited." This rule has implications for the suitability of streamlined trial gauged by the scope of factual disagreement, the amenability of the evidence to presentation through affidavit, and the need for more than very limited oral evidence.

[42] In my opinion, the comments of Justice Marion in ***Serinus Energy PLC v SysGen Solutions Group Ltd***, 2023 ABKB 625 at para 63 respecting the first element of the test for the former summary trial procedure ("can the court decide disputed questions of fact on affidavits or by other proceedings authorized by the *Rules* for a summary trial?") are useful in the present context, keeping in mind the language of r 8.25:

> [63] Whether the first part of the twofold test will be met will depend on the nature and quality of the material before the court: *Compton Petroleum Corp v Alberta Power Ltd*, 1999 ABQB 42 at para 20. Perfect evidence is not required. The evidence need only be sufficient to permit the judge to find the facts necessary to adjudicate the issues of fact or law and reach a just result: *956126 Alberta Ltd v JMS Alberta Co Ltd*, 2020 ABQB 718 at para 225, citing *Beaver*

> *First Nation Band v Bulldog*, 2004 ABCA 79 at para 5; *Goulbourne v Buoy*, 2003 ABQB 409 at para 26. Further, conflicting evidence is not alone a bar to summary trial if the conflict can be resolved by reference to other evidence, or if the disputed evidence is immaterial: *571582 Alberta Ltd v NV Reykdal & Associates Ltd*, 2000 ABCA 330 at paras 2–4; *Jagodnik v Oudshoorn*, 2015 ABQB 456 at para 5; *WestJet v ELS Marketing Inc*, 2013 ABQB 666 at para 63, rev'd in part 2014 ABCA 299; *Benke* at paras 13–19; *Compton* at para 20.

(i) Scope of Disagreement

[43] Findings of fact may be made by the trial judge in a streamlined trial. The process does not require agreement on all material facts. But again, the greater the disagreements on the facts, the slimmer the scope of factual agreement, the less suitable the action for streamlined trial.

(ii) Amenability to Evidence Presentation through Affidavit

[44] NPP#2023-02 comments (p 3) that "[e]ach party's case should primarily be presented by a lead Affidavit. Note that since a Streamlined Trial will dispose of all or part of a claim, Affidavits should generally be based on personal knowledge, not hearsay .... Oral evidence should primarily be produced only when cross-examination is required. Cross-examination should primarily take place by questioning on the Affidavits before the trial, with the transcript included in the trial record."

[45] Further, "[t]he parties should endeavor to agree on the area of expertise of the experts, and expert evidence should generally be introduced by Affidavits attaching the experts' reports and resumés: R. 5.36. Oral testimony of experts should be the exception: R. 5.39. Where justified, the experts can be examined prior to trial: R. 5.37." At p 4 we read that

> In many cases it will be unnecessary to call the affiants to testify in chief. The parties have a presumptive right to cross-examine the affiants, and where necessary they can be called to give oral evidence for that purpose. However, cross-examination should primarily take place by questioning on the Affidavits before the trial.

NPP#2023-2 states that "[t]he parties must carefully consider the need for and duration of any oral evidence and provide for it in the Streamlined Trial Order" and "[a]s a general rule, examination in chief of any witness should not exceed 10 minutes, and cross-examination of any witness should not exceed 30 minutes."

[46] To the extent that a fair and just resolution cannot be achieved by primary reliance on affidavit evidence, on the written record as opposed to in-court testimony and cross-examination and with only brief and limited supplemental in-court examination in chief and cross-examination, the action would not be suitable for the streamlined trial procedure.

(iii) Affidavits and Personal Knowledge

[47] I suggest that an affidavit not based on personal knowledge but satisfying an exception to the rule excluding hearsay would be acceptable for streamlined trial purposes. See, e.g., ***Murphy v Cahill***, 2012 ABQB 793, Veit J at para 29; ***R v Monkhouse***, 1987 ABCA 227, Laycraft CJA at paras 18-30; ***Attila Dogan Construction v AMEC Americas Limited***, 2015 ABQB 120, affd 2015 ABCA 406, Wittmann CJ at paras 64-75(QB).

5. NPP#2023-02 and Opening and Closing Argument

[48] The necessity and proportionality elements of r 8.25 are addressed by NPP#2023-02 in its comments on opening and closing argument (p 4):

> In advance of the Streamlined Trial, each party must prepare for the trial judge a very brief written opening statement (maximum 5 pages) to a) outline what that party believes the evidence will demonstrate, and b) give an overview of that party's position on the outcome ....
>
> Each party shall file a closing brief usually limited to 15 pages, outlining the facts relied on, reasons for the relief requested, and any legal or other arguments. Each party will generally be limited to 15 minutes for closing argument. The party that gives the first closing argument will be allowed a short response to the closing argument of the other party.

[49] To the extent that the issues do not permit the compaction the Notice suggests, the action is not suitable for streamlined trial.

II. Assessment

[50] I turn to the assessment of the Plaintiffs' applications for streamlined trials.

A. Necessary for the Purpose of the Action to be Fairly and Justly Resolved

[51] The Plaintiffs contended that there are "few witnesses of import" and "[a]ny of the few potential witnesses ... can provide evidence by Affidavit or be allowed to supplement such evidence on discrete points through oral evidence" (HS, PS para 3). Credibility "can be resolved through consideration of the documentary and affidavit evidence, or ... by way of direct oral testimony and cross-examination ... without the need for all evidence to be adduced orally" (HS, PS, para 4).

[52] Canadian North responded that the Plaintiffs' proposals rely on "an inaccurate assumption of the simplicity of this matter. This is an incredibly fact-heavy case and those facts will go to the heart of the issues to be determined by the Court" (CN-H, CN-P paras 3, 21).

1. The Issues

[53] The actions are wrongful dismissal actions, and so at least fall within the NPP#2023-02 list of actions that may be suitable for streamlined trial.

[54] Each Plaintiff's streamlined trial application identifies six issues requiring determination (HS, PS paras 7-12):

- whether the Plaintiff worked for Canadian North as an employee, dependent contractor, or independent contractor
- whether the Defendants were common employers of the Plaintiff at the end of the Plaintiff's employment
- whether the Plaintiff was terminated by the Defendants

- whether the Plaintiff was entitled to overtime at the rate of 1.5x his hourly rate in excess of 8 hours per day or 40 hours per week, whichever is greater, for the entire period of employment with the Defendants
- whether the Plaintiff was entitled to payment for public holidays off work, vacation pay of 4% for all earned wages, employer-paid EI premiums and employer-paid CPP premiums
- whether the Plaintiff was entitled to reasonable notice of termination and, if so, the length and calculation of reasonable notice.

The Defendants identified four additional issues requiring determination (CN-H, CN-P paras 20, 21, K-H, K-P paras 5-7, 9):

- if a Plaintiff is found to be an employee or dependent contractor, whether the Court has jurisdiction over the Plaintiff's claims, or whether jurisdiction rests with a labour arbitrator in light of the collective agreement between Canadian North and the incumbent trade union, Group of First Air Employees
- whether each Plaintiff failed to mitigate damages
- whether each Plaintiff's claim is barred by the *Limitations Act*
- if the Defendants are found to be common employers, how damages are to be apportioned between them.

[55] The Defendants' contractual arrangements with third parties are contended to be relevant, as is a specification of the regulatory environment that sets the legal context for various contractual relations, and the Defendants' business model for the delivery of aircraft maintenance services. The role of the incumbent trade union is also relevant (CN-H, CN-P para 14).

[56] In addition, the alleged misclassification of the Plaintiffs allegedly occurred over a period of 5 years (HS, PS para 4).

[57] The number and complexity of the issues suggests that streamlined trial would lack proportionality and would risk an inadequate record.

2. Agreed Statement of Facts

[58] Given the factual issues in dispute, Canadian North stated that "[t]he parties are unlikely to be able to agree to an agreed statement of facts" (CN-H, CN-P para 3).

[59] I would expect that some facts would not be in dispute (e.g. the Defendants' places of business, and the period that the Plaintiffs worked for the Defendants (in whatever capacity)), but I gather that only a slim and limited Agreed Statement of Facts would be possible and that numerous and significant factual issues would be left in dispute.

[60] This consideration would run up against the NPP#2023-02 guideline that "[v]irtually all Streamlined Trials should proceed with an Agreed Statement of Facts."

3. Lead Affidavits

[61] Given the issues referred to above, Canadian North did not consider it possible to present its case through a "lead affiant" (CN-H, CN-P para 14).

[62] This consideration would run contrary to the NPP#2023-02 expectation that "[e]ach party's case should primarily be presented by a lead Affidavit" (p 3).

4. Witnesses

[63] A streamlined trial is not a disproportionate process solely because issues of credibility may arise, some oral evidence may be required, or some expert evidence may be introduced: r 8.25(3). But a streamlined trial is not always a proportionate process if issues of credibility may arise, oral evidence may be required, or some expert evidence may be introduced. Proportionality (and the securing of a just and fair resolution) will depend on the nature of the credibility issues and the degree to which oral (vs written) evidence is necessary.

(a) Number of Witnesses

[64] The Draft Orders contemplate 6 witnesses total - in each action, the Plaintiff and an additional witnesses, a representative for each of the two Defendants, and one additional witness for each of the two Defendants (Draft Order para 13).

[65] Kelco anticipates calling two witnesses, its corporate representative and one other witness (K-H, K-P para 9).

[66] Canadian North, however, stated that given the nature and number of issues, the facts in dispute, and the 5-year time period, two witnesses will be insufficient. Canadian North anticipates calling 10 witnesses and an expert witness (respecting the aircraft maintenance labour market) (CN-H, CN-P paras 6, 12, 14, 15).

(b) Time for Testimony

(i) Draft Orders

[67] The Draft Orders contemplate that each Plaintiff would have one hour for testimony in chief and would be subject to cross-examination for 30 minutes.

[68] A Plaintiff's additional witness would have 20 minutes for testimony in chief and would be subject to cross-examination for 30 minutes.

[69] Each Defendant's representative would have one hour for testimony in chief and would be subject to cross-examination for 30 minutes.

[70] A Defendant's additional witness would have 20 minutes for testimony in chief and would be subject to cross-examination for 30 minutes (Draft Orders paras 13, 14).

(ii) Exceeding NPP#2023-02 Guidelines

[71] The Defendants observed that the proposed time for testimony in chief for each witness significantly exceeds the NPP#2023-02 guideline of 10 minutes.

[72] Kelco pointed out that while the Draft Orders assign 30 minutes for cross-examination as suggested by NPP#2023-02, generally time allotted for cross-examination should be equal to or greater than the time allotted for testimony in chief. If witnesses should have an hour for testimony in chief, the practical implication is that an hour or more should be permitted for cross-examination (K-H, K-P para 3(b)).

[73] The Defendants also contended that the Plaintiffs' time frames "significantly [underestimate] the amount of time necessary for both examination-in-chief and cross-examination, given the number and complexity of the issues ...." (CN-H, CN-P para 11).

[74] The time required for oral evidence suggests unsuitability for streamlined trial.

(c) Credibility

[75] The Defendants anticipate that there will be significant issues of credibility relating to the manner in which each Plaintiff provided services (CN-H, CN-P para 16).

5. Closing Argument

[76] The Draft Orders propose that each party

- shall file a brief limited to 15 pages before trial
- shall be limited to 45 minutes for closing argument (Draft Orders paras 17, 18).

[77] NPP#2023-02 referred to a closing brief "usually limited to 15 pages" and "15 minutes for closing argument."

[78] The Draft Orders exceed the Notice guidelines concerning closing argument.

[79] Canadian North anticipates making closing submissions going "well beyond the ... 15 page limit suggested in [NPP#2023-02]" due to the number and complexity of the issues (CN-H, CN-P para 17). I infer that the Defendants would require more than 15 minutes for closing argument.

[80] The requirements for briefs and arguments suggest the unsuitability for streamlined trial.

B. Proportionality

1. Amounts Involved

[81] The amounts involved are not large, relatively speaking. The total claimed in the Hou action is $298,789.25. The total claimed in the Perdue action is $340,970.16. Both claims fit under column 3 of Schedule C.

2. Complexity of the Issues

[82] As indicated, 10 main issues must be addressed in the litigation. It appears that evidence respecting business context, regulatory context, and the relevant labour market will be required. On the information provided to me, this case is more complicated than the typical wrongful dismissal case.

3. Length of Documentary Record

[83] Canadian North pointed out that in the Perdue action, a 558-page affidavit of records was served by the Plaintiff. Canadian North served a 573-page affidavit of records. In the Hou action, a 325-page affidavit of records was served, with Canadian North responding with a 484-page affidavit of records (CN-P, CN-H, para 4).

[84] Canadian North "anticipates relying on a significant number of records contained [in] both affidavits of records requiring witnesses to introduce same."

[85] Canadian North stated that even if a joint book of documents is possible, it "anticipates needing a secondary book of documents" (CN-H, CN-P para 3).

4. Reasonable Resources

[86] The Draft Orders proposed a 3-day trial. That estimate is overly optimistic given the factual and legal complexities supported by the information I have received.

[87] There was no estimate of judicial preparation time, particularly given the extensive documentary record that may be reasonably predicted on the basis of the affidavits of records. That record would also include transcripts on questioning on affidavits.

C. Cases

[88] The Plaintiffs relied on numerous cases. Because streamlined trials have only recently been established in the rules, understandably none concerned streamlined trials. The specifically relevant cases concerned summary trials. While I accept that the summary trial jurisprudence will be useful in charting an approach to streamlined trials, the test for ordering a summary trial differs from the test for ordering a streamlined trial. Further, whether or not a particular action will properly attract the streamlined trial process is a matter of case-by-case assessment, not a matter of precedent. My comments on the proffered authorities are as follows:

> ***Serinus Energy v SysGen Solutions*** – This case concerned "at its core," a "simple question" (para 1). The issues in the present case are not simple, on the facts and law. The amounts at issue were small (para 73), as in the present case. "The parties have expended significant resources preparing affidavits; and conducting numerous questionings on affidavits, to put a robust record before the court. It is doubtful that much more additional evidence would be garnered through an expensive and delayed trial process" (para 73). The complexities of the present case militate against resolution on the basis of affidavit evidence.
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> ***Benke v Loblaw Companies Limited***, 2022 ABQB 461, Feasby J – The key factual dispute concerned what the Plaintiff said to the Defendant's occupational health nurse. The Court could decide this factual question on the documentary record (including Questioning transcripts) (paras 21-22). The amount at issue was a little lower than in the present case, and the cost of aggregate legal fees for trial was disproportionate to the amount at stake (para 23). Again, the complexity of the present case militates against resolution primarily on a documentary record.
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> ***McDonald v Sproule Management GP Limited***, 2023 ABKB 587, Marion J – A wrongful dismissal/summary judgment case. Justice Marion wrote as follows at paras 125-128:
>
> > [125] There will be little utility, and significant delay and expense, requiring this matter to proceed to trial. The amount at issue is undoubtedly significant for the parties, but the claim is already 7 years old. The parties have expended significant resources on this action (already going to the Court of Appeal on a procedural issue) and on this Application. Trial litigation costs will be significant. Sproule is properly concerned about failing memories, loss of evidence and availability of witnesses that are no longer in its control.
> >
> > [126] Further, Helwerda's death means that there is unlikely to be a better record at trial in respect of any of his one-on-one

> conversations with McDonald, including in respect of the Performance Review and the critical January 20 Meeting in which Helwerda gave the January Advice.
>
> [127] I am satisfied that Sproule has had a fair process and opportunity both to know the case against it, to comprehensively test McDonald's case in a 500+ page Transcript, and to put its best foot forward to adduce response evidence to attempt to establish a genuine issue requiring a trial.
>
> [128] Accordingly, it is possible and appropriate to exercise my discretion to resolve McDonald's claim summarily ….

The present action does not have a litigation history similar to the ***McDonald*** case. Neither have any risks to available evidence been identified in the present case. The Defendants have argued that trial will permit a significantly better record than might be accomplished through the affidavit-based process contemplated for streamlined trials.

Rice v Shell Global Solutions Canada Inc, 2019 ABQB 977, Eamon J – A wrongful dismissal case. There was one main liability issue, whether or not the plaintiff's employment was fixed term. This issue turned on interpretation of the plaintiff's employment contract (paras 1, 7). There was some agreement on damages issues. One issue was whether mitigation must be considered, as a matter of law (not fact). This action, again, was considerably less factually complex than the present case.

Shamac Country Inns Ltd v Sandy's Oilfield Hauling Ltd, 2015 ABQB 518, Wacowich M – A summary judgment case, proceeding on agreed facts. The common employer doctrine was at issue, as was negligence. The present case will not proceed on agreed facts. The present case involves the common employer issue, and also turns on the nature of the plaintiffs' contractual relations with the employer or employers. These issues will take significant evidence and argument to work out.

Rudichuk v Genesis Land Development Corp, 2020 ABCA 42 – A summary judgment appeal. The relevant passage is at para 32: "The plaintiffs have not demonstrated that the chambers judge made a reviewable error in concluding that there was a credibility contest that needed to be determined at trial and that she was unable to make a just determination on the record." The Defendants provided grounds for the contention that the present case will require trial-based credibility assessments to achieve a fair and just result.

Stonham v Recycling Worx Inc, 2023 ABKB 629, Marion J – A wrongful dismissal case. Justice Marion wrote as follows at paras 54-55:

> [54] …. the record was strong enough for me to make factual findings and the first part of the test for summary trial suitability is met.
>
> [55] The second part of the test for suitability is also met in this case. The maximum amount now involved is $54,000 plus interest

> and costs, the matter is not complex, the cost of proceeding to trial would be prohibitive, and there is a low likelihood that additional material or helpful evidence would be available at trial. The two witnesses were cross-examined in court and so there was a sufficient basis for me to assess credibility.

There was only one witness for the plaintiff and one witness for the defendant. Both witnesses had been questioned on affidavit. Excerpts from the plaintiff's questioning for discovery were also relied on. In comparison, in the present case the amounts at stake are much larger, the issues far more complex, and the number of witnesses greater.

Bank of Montreal v Lysyk, 2003 ABQB 186, Veit J – I note Justice Veit's comment at para 7:

> [7] The expression "summary trial" is unfortunate, having as it does, the connotation of shortcut process designed for unimportant matters. The court's model for summary trials should be the process of the English Commercial Court, which typically decides commercial matters involving millions of pounds within a relatively short time of the cause of action having arisen using witness statements and affidavits, thereby establishing itself as one of the premier commercial arbitration tribunals in the world.

And at para 47:

> [47] Other judges have, at various times, attempted to provide other guidelines. The result, however, is that such additional guidelines may lead to mischief. Courts must return to the very general limits established by the British Columbia Court of Appeal in *Inspiration Management* [1989 CanLII 229, 36 BCLR (2d) 202]: a cause of action can be tried summarily if the court can decide the issues by a process which relies heavily or totally on affidavits and cross-examination on affidavits and on the other methods of proof allowed in the Rules, so long as that process is not unjust.

I accept Justice Veit's observations. The very question regarding the present case, though, is whether a fair and just resolution of the issues may be decided primarily on affidavits and cross-examination on affidavits. The Defendants have provided reasons why a fair and just result cannot be achieved on the foundation of a documentary record with modest oral evidence supplementation. The Plaintiffs have not provided countervailing grounds.

[89] I do not consider the cases offered by the Plaintiffs to advance their applications for streamlined trials.

D. Conclusions

[90] The Plaintiffs advance wrongful dismissal actions. The amounts at issue are not large.

[91] However, the issues raised in the litigation are not confined to typical issues in typical wrongful dismissal cases. Both facts and law will be at issue, as regards the legal relationship between the Plaintiffs and one or more of the Defendants and between the Defendants on the common employer and contributions issues. Significant evidence will be required to establish the background for understanding the contractual relations between the Plaintiffs and one or both Defendants. Depending on the legal characterization of the Plaintiffs' contractual relations, further issues may arise respecting the intersection of their work with the work of employees bound by a collective agreement, and consequently respecting the Court's jurisdiction respecting this litigation.

[92] The "lead Affidavit" approach of streamlined trials appears not to be feasible in the current circumstances. Because of differences on the facts between the parties, a useful Agreed Statement of Facts appears to be out of reach. More time for testimony and cross-examination is required than as contemplated by the Draft Orders or NPP#2023-02. More time for argument is likely required than as contemplated by the Draft Orders or NPP#2023-02.

[93] Imposing restrictions on standard trial process through ordering a streamlined trial would not, in my opinion, permit a fair and just resolution of the issues raised in the litigation.

[94] A streamlined approach would be disproportionately deficient given the issues in the actions and the evidential requirements of the actions.

[95] The litigation is likely to involve an extensive documentary record. There was no consideration of the judicial time required to address the documents outside the trial itself. Moreover, the judge would be deprived of the context for understanding and appreciating exhibited documents gained through the usual trial process.

[96] The litigation has not been unduly delayed. There is no urgency compelling a trimmed-down and faster-tracked trial process. No evidence is at risk.

[97] For these reasons, the applications for orders for streamlined trials are dismissed.

Heard on May 31, 2024; additional written materials provided on June 3 and June 7, 2024.
Dated at the City of Edmonton, Alberta this 15th day of September, 2024.

W.N. Renke
J.C.K.B.A.

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