CITATION: 1555638 Ontario Inc. o/a Framatome Canada Corp v. Cooper, 2024 ONSC 5445
COURT FILE NO.: CV-22-00682689-0000
RELEASED: 20241002

SUPERIOR COURT OF JUSTICE – ONTARIO

2024 ONSC 5445 (CanLII)

RE: 1555638 ONTARIO INC. O/A FRAMATOME CANADA LTD., applicant

AND:

WILLIAM COOPER, respondent

BEFORE: ASSOCIATE JUSTICE R. FRANK

COUNSEL: Ian Matthews for the applicant/moving party, 1555638 Ontario Inc. o/a Framatome Canada Ltd.

Peter Carey and Andrew Goldberg for the respondent/responding party, William Cooper

HEARD: September 23, 2024

ENDORSEMENT

[1] On this motion, the applicant/moving party, 1555638 Ontario Inc. o/a Framatome Canada Ltd. ("Framatome Canada"), seeks an order:

(a) requiring the respondent/responding party, William Cooper, to forthwith disclose and produce for inspection to Framatome Canada the approximately 900 Framatome Canada documents that Mr. Cooper has retained from his Framatome Canada laptop in his possession, power, and control after he was terminated on November 4, 2020;

(b) requiring Mr. Cooper to disclose and produce for inspection to Framatome Canada a list of all files from Framatome Canada retained in his possession, including file names and dates thereof;

(c) requiring Mr. Cooper to reattend for cross-examination on, and arising out of the production of all Framatome Canada documents referred to in its notice of motion, and to pay the costs of such further cross-examination; and

(d) granting Framatome Canada leave to amend its notice of application.

[2] For the reasons that follow, the motion is granted.

A. OVERVIEW

[3] Mr. Cooper is a former executive and employee of Framatome Canada. By termination letter dated November 4, 2020, Framatome terminated Mr. Cooper. The termination letter included the following:

> Please return all Company property, information, records or documents in your possession to Human Resources no later than November 15, 2020. We remind you that your fiduciary obligations and your obligation to maintain the confidentiality of Company information continue despite the termination of your employment.

[4] At the time of termination, Mr. Cooper had in his possession a company laptop (the "Laptop"). It is not disputed that Mr. Cooper did not immediately return his laptop to Framatome Canada.

[5] On December 21, 2020, Mr. Cooper commenced a Small Claims Court action against Framatome Canada seeking payment of alleged outstanding business expenses. Framatome Canada responded with a Defendant's Claim seeking the return of Framatome Canada property in Mr. Cooper's possession, including the Laptop.

[6] On December 3, 2021, Mr. Cooper commenced an action in this court against Framatome Canada and others seeking damages for wrongful dismissal and to enforce a royalty agreement. (the "Employment Action"). The defendants include Framatome Canada and three related Framatome companies, located in the United States, Germany and France.

[7] All of the defendants in the Employment Action other than Framatome Canada dispute the jurisdiction of this court and have refused to attorn to its jurisdiction. Jurisdiction motions are pending and are currently scheduled to be heard in March 2025.

[8] Framatome Canada has delivered a *pro forma* defence in the Employment Action that provides as follows:

> Framatome Canada delivers this *pro forma* Statement of Defence at this time strictly to prevent being noted in default. Framatome Canada intends to amend this Statement of Defence to plead essential material facts and defences. Framatome Canada also intends to amend this Statement of Defence to assert a Counterclaim against [Mr.] Cooper.

[9] Following negotiations between counsel for Mr. Cooper and counsel for Framatome Canada for the return of the Laptop, the Laptop was ultimately returned to Framatome Canada on or about March 14, 2022.

[10] Mr. Cooper acknowledges that he has retained copies of 922 documents that were on the Laptop that was returned to Framatome Canada. Mr. Cooper's position is that the laptop was returned to Framatome on the express agreement that he would retain the 922 documents, which would not be used for any purpose other than the litigation between the parties, and that the documents would be destroyed at the conclusion of the litigation. Framatome Canada disputes that

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it agreed to allow Mr. Cooper to keep the 922 documents from the Laptop, or any Framatome property at all.

[11] On June 15, 2022, Framatome Canada brought this application seeking a judgment and mandatory order requiring Mr. Cooper to disclose and deliver up, and then permanently delete, all privileged communications between Framatome Canada and its lawyers (the "Privileged Communications") and all third-party communications belonging to Framatome Canada that Mr. Cooper is not entitled to possess (the "Third-Party Communications").

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B. ISSUES

1. Is Mr. Cooper required to disclose and produce for inspection the documents and files from the Laptop that he has retained in his possession?
2. Is this motion by Framatome Canada an abuse of process?
3. Should Mr. Cooper be ordered to reattend for cross-examination at his own expense?
4. Should Framatome Canada be granted leave to amend its notice of application?

C. LAW AND ANALYSIS

(i) Scope of cross-examination of deponents and production for applications and motions

[12] In *Ontario v. Rothmans*, Justice Perell outlined the applicable principles with respect to the scope of cross-examination of deponents for applications and motions, which include the following:

- Relevancy is a key determinant of a proper question, and relevancy is determined by reference to the matters in issue in the motion or application in respect of which the affidavit has been filed and by the matters put in issue by the deponent's statements in the affidavit;
- The questions must be relevant to: (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence; and
- If a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court.[1]

[1] *Ontario v. Rothmans*, 2011 ONSC 2504 ("*Rothmans*") at paras 142-143.

[13] In addition to the principles outline above, subrules 34.10 (2) and (3) of the *Rules of Civil Procedure* provide as follows:

> ***Person to be Examined Must Produce Required Documents and Things***
>
> (2) The person to be examined shall produce for inspection at the examination,
>
> …
>
> (b) on any examination, including an examination for discovery, all documents and things in his or her possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to produce.
>
> ***Notice or Summons May Require Documents and Things***
>
> (3) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to produce for inspection at the examination,
>
> (a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or
>
> (b) such documents or things described in clause (a) as are specified in the notice or summons.

[14] In this case, Framatome Canada served a notice of examination on Mr. Cooper in advance of his cross-examination that included the following requests for production for inspection:

- Copies of the "more than 900 documents" retained in Mr. Cooper's possession, referred to in paragraph 26 of his February 15, 2023 affidavit and paragraph 6 of his July 26, 2023 affidavit, or a list of those documents, including filenames and dates.

- A list of all files from the Laptop or Framatome Canada retained in Mr. Cooper's possession, including filenames and dates thereof.

[15] Mr. Cooper submits that there is no evidence he had any contractual obligation to return any documents to Framatome Canada after his termination. Relying on *ORBCOMM INC. v Randy Taylor Professional Corporation*,[2] he submits that this motion in effect seeks an order pursuant to s. 104 of the *Courts of Justice Act* and that, therefore, the applicable test is the three-part injunction test. Mr. Cooper also submits that Framatome Canada does not succeed on any part of the three-part test because it has failed to show that there is a serious issue to be tried, the balance of convenience favours him, and there is no irreparable harm.

[16] Framatome Canada submits that *ORBCOMM* and *Ecolab* illustrate one means by which a party can seek interim possession of property pursuant to s. 104 of the *Courts of Justice Act* and Rule 44. Framatome Canada argues that in its application it is seeking a mandatory order under

[2] 2017 ONSC 2308 ("*ORBCOMM*"); see also *Rae v. Ecolab Co.*, 2023 ONSC 5995 ("*Ecolab*") at paras 36-47

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Rule 40 for the permanent recovery of its property, and that neither the application nor this motion are seeking interim possession of property.

[17] In my view, given that this motion does not seek interim possession of property, the principles outlined in *ORBCOMM* and *Ecolab* are not applicable, and I need not apply the three-part injunction test. The arguments Mr. Cooper makes about the test for the return of property may ultimately be relevant to the issues on the application, but that is an issue that will have to be argued at the return of the application and determined by the applications judge.

[18] In the present case, Mr. Cooper's affidavit evidence includes numerous statements about Framatome Canada documents that he has retained and which he asserts are relevant to the Employment Action. He denies that he has retained any Privileged Communications or Third Party Communications. Based on the relevancy principles outlined in *Rothmans* and the relevant *Rules of Civil Procedure*, absent a finding that the motion is an abuse of process (discussed below), Framatome Canada is entitled to production of the documents Mr. Cooper has retained because: (a) Mr. Cooper made specific reference to them in his affidavit and thereby put them in issue; and (b) the precise nature of those documents is relevant to an issue on the application, namely whether Mr. Cooper has any Privileged Communications or Third Party Communications.

[19] Framatome Canada is not required to accept Mr. Cooper's evidence denying that the documents he has retained are not Privileged Communications or Third Party Communications. It is entitled to test Mr. Cooper's assertions through cross-examination. Ultimately, the court will have to determine whether Mr. Cooper is in wrongful possession of documents based on the evidence, including evidence obtained through the cross-examination of Mr. Cooper. I expand on this point in my analysis of the "abuse of process" issue, below.

[20] I also find that, absent a finding that the motion is an abuse of process, Mr. Cooper should provide a list and produce for inspection all files and email messages from the Laptop or Framatome Canada retained in Mr. Cooper's possession, or that were forwarded to his lawyers. In my view, such documents would be relevant to the issues to be determined on the application. It is also appropriate follow-up given Mr. Cooper's evidence on cross-examination that, following his termination by Framatome Canada, he preserved a replication of the Laptop on an external hard drive because he was of the view that there was evidence on the computer that he might need. While Mr. Cooper's evidence is that the external hard drive has since been destroyed, he has no record to confirm that. In any event, Framatome Canada is entitled to test Mr. Cooper's evidence with respect to the files and email messages from the Laptop that he has retained in his possession or downloaded from the Laptop.

(ii) Is the motion an abuse of process?

[21] The Court of Appeal has explained the doctrine of abuse of process as follows:

> Abuse of process is a broad, flexible doctrine. It serves as an adaptable judicial tool to address circumstances that threaten the fairness and integrity of the court's process and the administration of justice. It is not restricted to preventing the re-litigation of issues or addressing issues that could have been raised in previous proceedings. Rather, it

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becomes engaged "to prevent the misuse of [the court's] procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute."[3]

[22] In Mr. Cooper's responding factum on this motion, he submits that both this motion and the application should be dismissed as an abuse of process. However, during oral argument, counsel for Mr. Cooper acknowledged that the question of whether the application is an abuse of process must be determined by the applications judge.[4] As a result, on this motion, Mr. Cooper is not seeking an order dismissing the application as an abuse of process, but he is seeking an order dismissing the motion as an abuse of process.

[23] In support of his argument that this motion constitutes an abuse of process of this court, Mr. Cooper submits that Framatome Canada is seeking the information that is the subject matter of this motion for three improper reasons:

(a) it wishes to obtain pre-pleading documentary disclosure from Mr. Cooper so that it can tailor its defence;

(b) it wishes to deprive Mr. Cooper of documents he may require to defend the jurisdiction motions being brought by the U.S., German and French Framatome defendants in the Employment Action; and

(c) to generally increase the cost and complexity of prosecuting the Employment Action for Mr. Cooper.

[24] With respect to the second of these alleged reasons, I do not accept that the requested relief would deprive Mr. Cooper of documents he may require to oppose the jurisdiction motions. On this motion, Framatome Canada is merely seeking an order that Mr. Cooper disclose and produce for inspection the disputed documents. This would not deprive Mr. Cooper of the documents.

[25] To the extent Mr. Cooper is suggesting that he may be deprived of the documents if the application is successful (because the relief sought on the application includes an order that Mr. Cooper deliver up and then destroy any copies of the documents in issue), then the argument still fails for a number of reasons. First, it will be open to Mr. Cooper to argue on the return of the application that the application is an abuse of process. Further, for the applicant to be successful on the application, it will have to satisfy the court that Mr. Cooper has no right to retain the documents. If the court makes that determination, it may determine that the documents should not be available to Mr. Cooper for any purpose – whether in support of his opposition to the jurisdiction motions, or otherwise. Alternatively, the court may find that even if Mr. Cooper is not entitled to the documents, they should be available to him as part of any ongoing proceedings he is involved in, such as the Employment Action or the jurisdiction motions within that action. If that turns out

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[3] *La Francaise IC 2 v Wires*, 2024 ONCA 171 at para 8 (citations omitted); see also *Toronto (City) v C.U.P.E.*, Local 79, 2003 SCC 63 at paras 35 and 51

[4] Rule 38.02 provides that "An application shall be made a to judge." Therefore, judges have exclusive jurisdiction to hear applications.

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to be the case, Mr. Cooper will have the right and the procedural means (such as by order of the court, discovery, cross-examination, examination of a witness to a pending motion) to seek a copy of the documents as part of the proceedings (and subject to any terms that may be appropriate or necessary, such as the deemed undertaking rule). But the possibility that Mr. Cooper may, at a later date, have a right to retain or seek a copy of the documents is not a basis to conclude that it is an abuse of process for Framatome Canada to bring this motion for the relief it is seeking. Further, just as it will be open to Mr. Cooper to argue at the return of the application that the relief sought is an abuse of process, it will also be open to him to seek terms with respect to the return and deletion of the documents in order to protect his rights in the Employment Action and the jurisdiction motions. Again, that is something to be determined by the applications judge and not on this motion.

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[26] I also do not accept Mr. Cooper's submission that the motion is an abuse of process because it will increase the cost and complexity of prosecuting the Employment Action. This argument implies that the sole purpose of the motion (and application) is to increase cost and add complexity. If that were the case, it could potentially be a basis for finding the motion to be an abuse of process. However, for the reasons set out above, I find that the information the applicant is seeking meets the relevancy test outlined in *Rothmans* and that the documents and files should be produced for inspection in accordance with the applicable *Rules of Civil Procedure*. To the extent that this increases the cost or complexity of this or other proceedings, that is an ordinary aspect of litigation that will be dealt with as part of the relevant proceedings. It is not a basis to deprive Framatome Canada of the relief it is seeking on this motion.

[27] Mr. Cooper also argues that that Framatome Canada is bringing this motion to obtain pre-pleading documentary disclosure so that it can tailor its defence. Mr. Cooper submits that this is improper and that Framatome Canada should be restricted to the "ordinary" procedure for discovery pursuant to which it would not have discovery of Mr. Cooper until after pleadings are closed and affidavits of documents are exchanged. I do not accept this submission.

[28] Discovery of documents in an action is not always limited to post-pleading discovery through affidavits of documents. Although Rule 30.04(1) contemplates production for inspection of documents in an affidavit of documents, the *Rules of Civil Procedure* also allow for a request to inspect in other circumstances. For example, subrule 30.04(2) provides as follows:

> (2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, *pleadings or an affidavit served by the other party*. [emphasis added]

[29] Therefore, under subrule 30.04(2) a party has a right to inspect documents before pleading where those documents are referred to in a pleading. As another example, pre-pleading production for inspection may be required or ordered in connection with an affidavit filed on a pre-pleading motion.

[30] I recognize that this is a motion within this application and not within the Employment Action. Nevertheless, I do not accept the responding party's argument that the sought-after

inspection would effectively require pre-pleading production that could never be possible within the Employment Action. While there may be circumstances where a pre-pleading motion for production is an abuse of process, I do not find that to be the case here. In this case, the sought-after documents are relevant to the issues in the application through which the applicant is seeking relief with respect to records over which it claims a proprietary interest.

Is the motion an abuse of process because the application has no merit?

[31] Mr. Cooper also submits that Framatome Canada brings this motion because, in view of the evidence from the cross-examinations, it realized that the application was fatally flawed and would fail. He submits that the application itself has no merit and, therefore, the motion is an abuse of process.

[32] I do not accept this argument. It assumes that Mr. Cooper has already successfully opposed the application or that it is fatally flawed. But it is premature to draw any conclusion as to whether Framatome Canada will be successful on the application. In this regard, I accept the applicant's submission that the relief requested on this motion is an appropriate means of gathering and testing evidence that may be relevant to the issues on the application. In this regard, it is noteworthy that Mr. Cooper did not oppose the application from the outset by taking steps to have the application declared an abuse of process. Instead, he responded to the application and filed two affidavits in opposition to it, and his counsel conducted cross-examinations on the affidavits filed by the applicant. Both of Mr. Cooper's affidavits refer to documents he retained from the Laptop. His evidence is that the 922 documents from the Laptop that he has retained are not Third Party Communications or Privileged Communications.

[33] The notice of examination the applicant served in advance of Mr. Cooper's cross-examination required him to produce the documents in issue at his cross-examination. Mr. Cooper refused to do so on the basis that:

- the notice of examination constitutes an abuse of process because "the evidence is clear that these 900 documents do not involve the alleged third-party communications that Framatome has brought this application for"

- the documents are not related to the documents that are being sought in this application and, therefore, they are irrelevant.

[34] Mr. Cooper's position amounts to saying that he is entitled to test the applicant's evidence, but the applicant is not entitled to test his evidence because the applicant is going to lose the application and therefore the motion is an abuse of process. This argument is without merit. Contrary to Mr. Cooper's position, the information sought on this motion meets the relevancy test in terms of the issues before the court on the application. Litigants are not required to accept the evidence of an opposing party and are entitled to test it. On this application, the applicant is entitled to test Mr. Cooper's assertion that he did not retain any Third Party Communications or Privileged Communications, as well as his assertion that there is no evidence that he improperly retained any documents. The *Rules of Civil Procedure* provide the means by which the applicant is seeking to test Mr. Cooper's evidence. It would be unfair to allow Mr. Cooper to tender evidence on the

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motion that cannot be properly tested, and there is no basis to find that in doing so the applicant's conduct is an abuse of process.

Is the motion an abuse of process because of an agreement that Mr. Cooper could retain documents relevant to the Employment Action?

[35] Mr. Cooper also asserts that there is an express agreement that he would retain the 922 documents, that he would not use them for any purpose other than the litigation between the parties, and that he would destroy them at the conclusion of the litigation. Framatome Canada disputes that there is such an agreement.

[36] On this motion, I need not determine whether the parties agreed that Mr. Cooper could retain certain documents. Even if there is such an agreement, it would not preclude Framatome Canada from seeking the requested identification and production of documents so that it can test whether the documents are covered by the alleged agreement. Again, the information the applicant is seeking meets the relevancy test outlined in *Rothmans* and the records should be produced for inspection in accordance with the applicable *Rules*, as outlined above. Whether there was an agreement for Mr. Cooper to retain documents, the nature of documents Mr. Cooper may be permitted to retain, and whether the documents Mr. Cooper has retained are within the scope of the agreement (if there was one) are all issues that should be addressed on the application.

Is the motion an abuse of process because it seeks the same relief as in the proposed amended notice of application?

[37] Mr. Cooper also submits that the applicant is requesting the same relief on this motion as it is seeking in its proposed amended notice of application, which is an abuse of process. This is not correct. As noted, this motion seeks disclosure and production for inspection of documents, as well as a reattendance for cross-examination. Unlike this motion, the court will have to determine on the application whether it should grant judgment and make a mandatory order for Mr. Cooper to disclose, deliver up, and then permanently delete all copies of the documents in issue. The relief sought on this motion is different from the relief sought on the application, and it is relevant to the determination of the issues on the application. The motion is not an abuse of process.

(iii) Should Mr. Cooper be required to reattend for cross-examination at his own expense?

[38] Pursuant to Rule 34.15, where a person fails to answer any proper question or produce a document or thing that he or she is required to produce, the court can, among other things: (i) order that the person being examined reattend at his or her own expense and answer the question and any questions arising from the answer (Rule 34.15(1)(a)); and (ii) make such order as is just (Rule 34.15(1)(d)).

[39] Mr. Cooper did not make any argument opposing this relief, other than the general argument that this motion is an abuse of process. In view of my conclusion that the motion is not an abuse of process, Mr. Cooper shall produce the requested lists and documents for inspection and then reattend for cross-examination at his own expense to answer questions about those documents and any proper questions arising from those answers.

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(iv) Should Framatome Canada be granted leave to amend its notice of application?

[40] Rule 14.09 provides that an originating process that is not a pleading may be amended in the same manner as a pleading. Rule 26 provides that the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[41] Mr. Cooper did not make any argument opposing the proposed amendments, other than the general argument that this motion is an abuse of process. In particular, Mr. Cooper made no submission that granting leave to amend the notice of application in the proposed manner would result in any prejudice that cannot be compensated for by costs.

[42] Given my conclusion that the motion is not an abuse of process, leave is granted to amend the notice of application in the form attached as Exhibit "A" to the applicant's amended notice of motion.

D. DISPOSITION AND COSTS

[43] For the reasons outlined above, the applicant's motion is granted.

[44] With respect to costs, the parties agreed that if either party was substantially successful on this motion, then it should be awarded costs in the amount of $27,000. As the applicant was successful on this motion, the respondent shall pay the applicant costs of the motion fixed in the amount of $27,000, inclusive of disbursements and taxes.

[45] I order as follows:

1. The Respondent, William Cooper ("Mr. Cooper"), shall within 30 days of this order disclose and produce for inspection to 1555638 Ontario Inc. o/a Framatome Canada Ltd. ("Framatome Canada") the approximately 900 Framatome Canada documents that Mr. Cooper has retained from the Framatome Canada Laptop in his possession, power, and control after he was terminated on November 4, 2020.
2. Within 30 days of this order, Mr. Cooper shall disclose and produce for inspection to Framatome Canada a list of all files from Framatome Canada retained in his possession, including file names and dates thereof.
3. Mr. Cooper shall reattend at his own expense for cross-examination on, and arising out of the production of, all Framatome Canada documents referred to in paragraphs 1 and 2 of this Order.
4. Framatome Canada is granted leave to amend its notice of application in the form attached as Schedule "A" to its amended notice of motion dated March 20, 2024.

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5. Mr. Cooper shall pay Framatome Canada its costs of this motion fixed in the amount of $27,000, inclusive of disbursements and taxes, within 30 days.

DATE: October 2, 2024

R. Frank Associate J.

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