Court File No.: CV-12-9545-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD. 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

BRIEF OF AUTHORITIES OF DOMFOAM INC.

(ON APPLICANTS' MOTION TO ADDUCE EVIDENCE)

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TO: THE SERVICE LIST

Court File No.: CV-12-9545-00CL

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INDEX

1. *Redstone Investment Corp., Re*, 2016 ONSC 513 (Ont. S.C.J.)
2. *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2013 ONSC 6935 (Ont. Div. Ct.)
3. *Catalyst Fund Ltd. Partnership II v IMAX Corp*, [2008] O.J. No. 873 (Sup. Ct. – Commercial List)
4. *Cusac Industries Ltd. v. Erickson Gold Mining Corp.*, (1990) 45 B.C.L.R. (2d) 347 (C.A.)
5. *Brock Home Improvement Products v Corcoran,* (2002) 58 O.R. (3d) 722 (Sup. Ct.)
6. *Zaib v Sandhu*, 2018 ONSC 4671

TAB 1

2016 ONSC 513
Ontario Superior Court of Justice

Redstone Investment Corp., Re

2016 CarswellOnt 2159, 2016 ONSC 513, 263 A.C.W.S. (3d) 590

In the Matter of the Receivership of Redstone Investment Corporation and Redstone Capital Corporation

In the Matter of a Motion Pursuant to Section 101 of the Courts of Justice Act, R.S.O. 1990, C.43, as Amended

G.B. Morawetz R.S.J.

Judgment: January 21, 2016
Docket: CV-14-10495-00CL

Counsel: Grant B. Moffat, Kyla E. M. Mahar, for Investors of Redstone Capital Corporation
Harvey Chaiton, Doug Bourassa, for Redstone Management Services Investors
Justin R. Fogarty, Pavle Masic, for Redstone Investment Corporation Investors

Subject: Civil Practice and Procedure

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Affidavit of documents — Motion for further and better affidavit
Sworn affidavit of B stated that B received offering memorandum and reviewed it before choosing to invest in RCC and then purchased Series A bonds from RCC, specifically because of what he understood to be their preferred position in event of failure of R Group — Representative counsel for investors in corporation RCC brought motion for order seeking leave to deliver sworn affidavit as evidence in continuing motion commenced by court appointed receiver of RIC, RCC and RMS ("R Group") to determine whether the estates of those corporations should be substantively consolidated — Motion dismissed — Sworn affidavit did not meet relevance criteria in R. 39.02(2) of Rules of Civil Procedure — B's motivation for investing in RCC was not relevant to any of considerations set out in test for substantive consolidation — If evidence was not relevant, refusing leave could not be prejudicial to B, as individual creditor.

Table of Authorities

Cases considered by *G.B. Morawetz R.S.J.*:

Atlantic Yarns Inc., Re (2008), 2008 NBQB 144, 2008 CarswellNB 195, 42 C.B.R. (5th) 107, 333 N.B.R. (2d) 143, 855 A.P.R. 143, 2008 NBBR 144 (N.B. Q.B.) — considered

Bacic v. Millennium Educational & Research Charitable Foundation (2014), 2014 ONSC 5875, 2014 CarswellOnt 14545, 19 C.B.R. (6th) 286 (Ont. S.C.J.) — followed

First Capital Realty Inc. v. Centrecorp Management Services Ltd. (2009), 2009 CarswellOnt 6914, 258 O.A.C. 76, 83 C.P.C. (6th) 310 (Ont. Div. Ct.) — followed

J.P. Capital Corp., Re (1995), 31 C.B.R. (3d) 102, 1995 CarswellOnt 53 (Ont. Bktcy.) — considered

Lihou v. VIA Rail Canada Inc. (2006), 2006 CarswellOnt 7050 (Ont. Master) — referred to

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146, 1988 CarswellBC 531 (B.C. S.C.) — referred to

Northland Properties Ltd., Re (1989), 34 B.C.L.R. (2d) 122, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* [1989] 3 W.W.R. 363, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, 1989 CarswellBC 334 (B.C. C.A.) — referred to

PSINET Ltd., Re (2002), 2002 CarswellOnt 1261, 33 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]) — considered

Shah v. LG Chem, Ltd. (2015), 2015 ONSC 776, 2015 CarswellOnt 1305, 124 O.R. (3d) 579 (Ont. S.C.J.) — followed

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 39 — considered

R. 39.02(2) — considered

MOTION by representative counsel for investors of corporation for order seeking leave to deliver sworn affidavit as evidence in continuing motion, brought at request of court appointed received to determine whether estates of corporations should be substantively consolidated.

***G.B. Morawetz R.S.J.*:**

1 Representative Counsel for the investors of Redstone Capital Corporation ("RCC") brought this motion for an Order seeking leave to deliver the Affidavit of Frederick Bach, sworn November 24, 2015 (the "Bach Affidavit") as evidence in the continuing motion, brought at the request of Grant Thornton Limited, in its capacity as the court appointed receiver (the "Court Receiver") of Redstone Investment Corporation ("RIC"), RCC and 1710814 Ontario Inc. o/a Redstone Management Services ("RMS") to determine whether the estates of RIC, RCC and RMS should be substantively consolidated (the "Substantive Consolidation Hearing"), which hearing commenced on October 30, 2015.

2 The hearing is currently adjourned pending the determination of this motion.

3 The Bach Affidavit states that Mr. Bach received an Offering Memorandum and reviewed it before choosing to invest in RCC and he then purchased Series A bonds from RCC, specifically because of what he understood to be their preferred position in the event of failure of the Redstone Group.

4 RCC Representative Counsel submits that because the Substantive Consolidation Hearing has not yet concluded, the applicable test for the admissibility of the Bach Affidavit is in Rule 39.02(2) of the *Rules of Civil Procedure*. Counsel submits that despite the fact that there has not been cross-examination on any evidence, the present circumstances are most akin to the situation set out in Rule 39.02(2).

5 The test under Rule 39.02(2) is set out in *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Ont. Div. Ct.), at para 13:

(1) Is the evidence relevant?

(2) Does the evidence respond to a matter raised in cross-examination, not necessarily raised for the first time?

(3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

(4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the

outset?

6 RMS Representative Counsel and RIC Representative Counsel submit that Rule 39.02(2) is not applicable as no parties have cross-examined, though they have the opportunity to do so. Further, RMS Representative Counsel submits that having delivered the bulk of his arguments on October 30, 2015, his clients would be at a disadvantage if leave was now granted to introduce the Bach Affidavit. Counsel cites case law emphasizing the "fundamental unfairness" of accepting further evidence once submissions have commenced and condemning the attempts of parties to "repair damage" to their positions by submitting new evidence.

7 On the issue as to whether Rule 39.02(2) is applicable, the submissions of RMS and RIC Representative Counsel are supported by the jurisprudence. The referenced cases each involve an attempt by a party to introduce a new affidavit following cross-examination. There is one case in which the use of Rule 39.02(2) was challenged on the grounds that the moving party's counsel did not cross-examine any of the opposing party's deponents: *Lihou v. VIA Rail Canada Inc.*, [2006] O.J. No. 4451 (Ont. Master). However, Master Sprout permitted the use of Rule 39.02(2) since the moving party's counsel had exercised her right of cross-examination within the meaning of Rule 39 as she had attempted but had not completed any cross-examinations. Thus, it is not clear from the case law that Rule 39.02(2) applies in the present context.

8 For the purposes of determining this motion, I need not determine this point. I will proceed on the basis that Rule 39.02(2) does apply.

9 There is a high threshold for admissibility under Rule 39.02(2).

10 *In Shah v. LG Chem, Ltd.*, 2015 ONSC 776 (Ont. S.C.J.) at para. 23, Perell J. summarized the principles that have emerged in Rule 39.02(2) jurisprudence:

> 1. Leave under Rule 39.02(2) should be granted sparingly.
>
> 2. The moving party has a very high threshold to meet.
>
> 3. The rule about the delivery of subsequent affidavits should not be used as a "mechanism for correcting deficiencies in the motion materials"
>
> 4. The rule is designed to fairly regulate and provide closure to the evidence gathering process for motions and applications.

11 RCC Representative Counsel submits that the evidence in the Bach Affidavit is relevant as it shows Mr. Bach's motivation for investing in RCC and the actual prejudice he will suffer in the event of substantive consolidation.

12 The test for substantive consolidation was recently summarized in *Bacic v. Millennium Educational & Research Charitable Foundation*, 2014 ONSC 5875, 19 C.B.R. (6th) 286 (Ont. S.C.J.) at para 113.

> It requires the balancing of interest of the affected parties and an assessment whether creditors will suffer greater prejudice in the absence of consolidation and the debtors or any objecting creditors will suffer from its imposition. Regard must be had to the:
>
> a) Difficulty in segregating assets;
>
> b) Presence of consolidated Financial Statements;
>
> c) Profitability of consolidation at a single location;
>
> d) Commingling of assets and business functions;
>
> e) Unity of interests in ownerships;

f) Existence of intercorporate loan guarantees; and,

g) Transfer of assets without observance of corporate formalities.

Atlantic Yarns Inc., Re, 2008 NBQB 144 (N.B. Q.B.) *Northland Properties Ltd., Re*, [1988] B.C.J. No. 1210 (B.C. S.C.) *Northland Properties Ltd., Re*, [1989] B.C.J. No. 63 (B.C. C.A.) *PSINET Ltd., Re* (2002), 33 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List])

13 In *PSINET*, supra, Farley J. held, at para. 11 that consolidation by its very nature will benefit some creditors and prejudice others and, as a result, it is appropriate to look at the overall general effect. This approach was affirmed in *Atlantic Yarns*, supra. In *J.P. Capital Corp., Re* (1995), 31 C.B.R. (3d) 102 (Ont. Bktcy.) Chadwick J. expressed concern about the consolidation of actions without knowing the effect it will have on all creditors. Chadwick J. wrote, "Although expediency is an appropriate consideration, it should not be done at the possible prejudice or at the expense of any particular creditor." In considering the relevance of *JP Capital* to this matter, I note that the *J.P. Capital* involved an "extremely complex bankruptcy" touching on a number of companies and assets, the parties were in the midst of cross-examination, and there were issues raised with respect to the actual corporate structure of the various companies and the tracing of the assets in relationship to the parties (para.17)."

14 In my view, Mr. Bach's motivation for investing in RCC is not relevant to any of the considerations set out in the test for substantive consolidation. As a result, in determining the overall general prejudice to both sets of creditors, it seems to me that if the evidence is not relevant, refusing leave cannot be prejudicial to Mr. Bach, as an individual creditor. The second part of the Rule 39.02(2) is not applicable as no cross-examination took place and since I have determined that the content of the affidavit is not relevant to the determination of the Substantive Consolidation Hearing, the fourth part of the test need not be considered.

15 Accordingly, since I have concluded that the Bach Affidavit does not meet the relevance criteria of the Rule 39.02(2) test, the motion seeking leave to deliver the Bach Affidavit as evidence in the Substantive Consolidation Hearing is dismissed.

16 The costs of this motion will be addressed on the disposition of the Substantive Consolidation Hearing.

Motion dismissed.

TAB 2

2013 ONSC 6935
Ontario Superior Court of Justice (Divisional Court)

Lockridge v. Ontario (Director, Ministry of the Environment)

2013 CarswellOnt 15491, 2013 ONSC 6935, 234 A.C.W.S. (3d) 34, 322 O.A.C. 345

ADA Lockridge and Ronald Plain, Applicants and Director, Ministry of the Environment, Her Majesty the Queen in Right of Ontario, as Represented by the Minister of the Environment, the Attorney General of Ontario and Suncor Energy Products Inc., Respondents

Harvison Young J.

Heard: September 9, 2013
Judgment: November 12, 2013
Docket: 528/10

Counsel: Justin Duncan, Lara Tessaro, Margot Venton, for Applicants / Moving Party
Jack Coop, Jennifer Fairfax, Lindsay Rauccio, for Respondent, Suncor Energy Products Inc.
Robin Basu, Matthew Horner, Lise Favreau, Kristin Smith, for Respondent, Director, Ministry of the Environment, Her Majesty the Queen in right of Ontario, as represented by the Minister of the Environment, the Attorney General of Ontario

Subject: Civil Practice and Procedure; Evidence

Headnote

Civil practice and procedure --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — Miscellaneous
Applicants sought leave to file seven reply affidavits — Respondents raised number of objections to all or parts of affidavits — Applicants brought motion for leave — Motion granted in part — There could be little surprise or prejudice to respondents at current stage because parties would have opportunity to conduct cross-examinations — Impugned paragraphs were permitted that were not confirmatory but were clarifying evidence or were directly responsive to questions put in issue in respondents' affidavits — Impugned paragraphs were permitted where issues were central to application — Impugned paragraphs were permitted where they were relevant and it was in interests of justice and fairness and focusing of issues — Impugned paragraphs were not permitted where evidence was not appropriate or relevant or was confirmatory — In certain instances, sur-replies were permitted and they should be filed promptly.

Table of Authorities

Cases considered by *Harvison Young J.*:

Abbott Laboratories v. Canada (Minister of Health) (2003), 2003 CarswellNat 4114, 29 C.P.R. (4th) 450, 2003 CarswellNat 4595, 2003 FC 1512, 2003 CF 1512 (F.C.) — considered

Arfanis v. University of Ottawa (2004), 2004 CarswellOnt 3698, 7 C.P.C. (6th) 371 (Ont. S.C.J.) — referred to

Burton v. Oakville (Town) (2004), 2004 CarswellOnt 565, 69 O.R. (3d) 771, 2 M.P.L.R. (4th) 200 (Ont. S.C.J.) — considered

Canada (Attorney General) v. United States Steel Corp. (2011), 2011 CF 742, 2011 CarswellNat 2352, 2011

CarswellNat 3278, 2011 FC 742 (F.C.) — referred to

Cannon v. Funds for Canada Foundation (2011), 2011 ONSC 2960, 2011 CarswellOnt 3950 (Ont. S.C.J.) — considered

Eli Lilly Canada Inc. v. Apotex Inc. (2006), 54 C.P.R. (4th) 199, 298 F.T.R. 70 (Eng.), 2007 CF 953, 2006 CarswellNat 2447, 2006 FC 953, 2006 CarswellNat 5841 (F.C.) — distinguished

First Capital Realty Inc. v. Centrecorp Management Services Ltd. (2009), 258 O.A.C. 76, 83 C.P.C. (6th) 310, 2009 CarswellOnt 6914 (Ont. Div. Ct.) — considered

Friends of Lansdowne v. Ottawa (City) (2011), 2011 ONSC 1015, 2011 CarswellOnt 861 (Ont. Master) — considered

Janssen-Ortho Inc. v. Apotex Inc. (2010), 2010 CarswellNat 132, 2010 FC 81 (F.C.) — considered

Lockridge v. Ontario (Director, Ministry of the Environment) (2012), 2012 CarswellOnt 7116, 68 C.E.L.R. (3d) 27, 2012 ONSC 2316, 350 D.L.R. (4th) 720 (Ont. Div. Ct.) — followed

Mead Johnson Canada v. Ontario (Ministry of Health) (1999), (sub nom. *Mead Johnson Canada v. Ontario (Minister of Health)*) 117 O.A.C. 121, 1999 CarswellOnt 104 (Ont. Gen. Div.) — considered

Melrose Homes Ltd. v. Donald Construction Ltd. (2000), 2000 CarswellOnt 5172 (Ont. Master) — considered

Merck-Frosst - Schering Pharma GP v. Canada (Minister of Health) (2009), 2009 CarswellNat 2762, 2009 FC 914, 78 C.P.R. (4th) 100 (F.C.) — followed

Pollack v. Advanced Medical Optics Inc. (2011), 2011 CarswellOnt 653, 2011 ONSC 850, 16 C.P.C. (7th) 316 (Ont. S.C.J.) — considered

R. v. Krause (1986), 1986 CarswellBC 330, 1986 CarswellBC 761, 7 B.C.L.R. (2d) 273, [1987] 1 W.W.R. 97, [1986] 2 S.C.R. 466, 71 N.R. 61, 54 C.R. (3d) 294, 29 C.C.C. (3d) 385, 14 C.P.C. (2d) 156, 33 D.L.R. (4th) 267 (S.C.C.) — considered

1775091 Ontario Inc. (c.o.b. Canadian Best Auto Inc.), Re (May 29, 2012), Flude Chair (Ont. L.A.T.) — referred to

Rules considered:

Federal Courts Rules, SOR/98-106
R. 312(a) — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.04 — referred to

R. 37-39 — referred to

R. 39.02(2) — considered

R. 68 — referred to

MOTION by applicants for leave to file reply affidavits.

***Harvison Young J.*:**

1 The applicants, Ada Lockridge and Ronald Plain, brought a motion seeking an order granting them leave to file seven reply affidavits, which I heard on September 9, 2013.

2 Initially, there appeared to be two issues. The first issue was whether, in light of the litigation schedule in place pursuant to my order dated November 23, 2012, the applicants were entitled to file reply affidavits at all. The second issue was, assuming that the answer to the first issue is "yes", whether the affidavits filed constituted proper reply.

3 With respect to the first issue, the litigation schedule contemplated that cross-examination would be completed by September 30, 2013. In fact, it has not yet begun. In any event, the parties now agree that my order dated November 23, 2012, did not preclude the filing of otherwise proper reply evidence and I find that that order did not do so. Accordingly, the only issue is whether the reply affidavit evidence filed is proper.

4 The respondents Suncor Energy Products Inc. ("Suncor") and The Director, Ministry of the Environment, Her Majesty the Queen in Right of Ontario, as represented by the Minister of the Environment, the Attorney General of Ontario (the "Director") raise a number of objections to all or many paragraphs in each of the seven affidavits that the applicants seek to file. The grounds the respondents raise are set out at para. 1 of Suncor's factum:

> The vast majority of the Applicants' proposed reply evidence is not proper reply and should not be permitted for one or more of the following reasons:
>
> (a) It consists of confirmatory or clarifying evidence which seeks to expand upon (or quote verbatim from) points already made in the Application Record;
>
> (b) It relies upon documents that were already in existence and available to the Applicants prior to tendering their initial evidence in April 2011, and ought to have been submitted then. In fact, the Applicants, themselves, admit that they had some of these documents in their possession as early as February 2010;
>
> (c) It relies upon additional studies and publications, all but one or potentially two of which predate the Applicants' initial expert reports sworn in April 2011;
>
> (d) It is not responsive to the Respondents' evidence (to which it purports to reply), nor is it responsive or relevant to the issues on the application;
>
> (e) It raises new issues, not previously in issue and not raised by the Respondents;
>
> (f) It seeks to re-introduce evidence that was already struck out by this Honourable Court as inadmissible on an earlier preliminary motion;
>
> (g) It contains improper speculation; and,
>
> (h) The expert reports are longer than, if not the same or similar length as, their original reports. This is a tell-tale sign that something is amiss.

5 This motion is reminiscent of the motion brought by the respondents in 2012 to strike the application or, in the alternative, to strike the affidavits: see *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316, 350 D.L.R. (4th) 720 (Ont. Div. Ct.), in which the respondents took issue with the admissibility of hundreds of paragraphs of affidavit evidence submitted by the applicants. There, as here, I was grateful for the cooperation of counsel in submitting a chart that sets out each paragraph to which the respondents object and indicates the basis of objection. I note that the grounds of objection raised by the respondents were generally consistent as among themselves. I am particularly grateful for the consolidated chart that shows each paragraph with the objections of all respondents on the same chart. The chart submitted is 54 pages in length.

6 At the beginning of the hearing on this motion, I proposed, and counsel agreed, that I would set out the general principles to be applied in considering whether the reply evidence was proper, and then indicate very briefly my ruling on each paragraph objected to on the chart. Accordingly, these reasons will consist of a summary of the principles I apply to the determinations, and the chart containing the rulings with respect to each paragraph will be annexed as Appendix A.

The Parties' Submissions on the Applicable Standard

7 The applicants submit that the court should apply a "liberal and flexible approach", consistent with the rule that any application party can submit affidavits at any time prior to commencing cross-examinations: see *Rules of Civil Procedure*, r. 1.04, 37 to 39, and 68. In support, they cite *Friends of Lansdowne v. Ottawa (City)*, 2011 ONSC 1015 (Ont. Master), and *Melrose Homes Ltd. v. Donald Construction Ltd.*, [2000] O.J. No. 5275 (Ont. Master). *Friends of Lansdowne* involved an application to quash certain by-laws. Master MacLeod noted, at paras. 55 to 56, that "ordinarily either party is at liberty to serve affidavits up until cross-examinations commence," but when a case management order sets out the timing and order for each side's affidavits,

> the parties are intended to proceed in a manner similar to a trial. As such, reply evidence should be limited to proper reply. That is it should respond to evidence raised by the other party and it should not be evidence that ought to have been submitted in the first place. Though that was clearly the intent of the [case management] order [issued there], procedural orders are intended to bring order to the proceedings and ensure fairness. They are not intended to be rigidly applied so as to suppress evidence that may be important. Striking the affidavits is a simplistic response. [Footnotes omitted.]

8 In *Melrose Homes*, the applicant filed a reply affidavit beyond the time permitted in the case management order but before cross-examinations had begun. Master Polika considered only whether the applicant had engaged in improper case-splitting. He declined to exclude the affidavit because, at para. 16, the affidavit responded to new evidence introduced by the respondent's deponent and the respondent had the ability to cross-examine the affiant.

9 The applicants submit that their motion should be allowed because (a) the evidence will assist the court by ensuring a complete record; (b) there can be no prejudice to the respondents because cross-examinations have not yet begun; and (c) the supplementary affidavits constitute true reply, i.e., they introduce no new issues, and respond only to matters raised by the respondents or "to new evidence not previously available to the Applicants".

10 The Director's position as to the applicable standard was not entirely clear. The Director states that the four elements in *Merck-Frosst - Schering Pharma GP v. Canada (Minister of Health)*, 2009 FC 914, 78 C.P.R. (4th) 100 (F.C.), constitute the governing test for determining whether to allow reply evidence. That test looks to whether the reply evidence (a) serves the interests of justice; (b) assists the court in making its determination on the merits; (c) would cause substantial or serious prejudice to the other side; and (d) was available and/or could not have been anticipated as being relevant at an earlier date: *Merck-Frosst*, at para. 10.

11 The Director continues to state that a stricter standard than the one proposed by the applicants should apply, and that the strict standard should reflect the scope-limiting principles found in my reasons in *Lockridge*, supra. The Director does not explicitly endorse the *Merck-Frosst* test as the stricter standard it seeks, and its analysis does not address all of the components of that test. On the other hand, the applicants' arguments do address each of the test's elements, albeit without stating they are doing so.

12 Suncor proposes the strictest test of the three parties on the grounds that the application is already complex and lengthy, a judicial review application should be dealt with expeditiously and the court has established a timetable and case management order. It submits that the court's sole inquiry should be whether the applicants' evidence is "proper reply" as that term is understood in the context of a trial, emphasizing that proper reply evidence is evidence that is responsive to a *new* issue raised by the respondent that the applicant had no prior opportunity to address and which the applicant could not reasonably have anticipated.

13 To that end, Suncor's submissions focus almost exclusively on what it sees as the improper case-splitting and non-responsive features of the applicants' reply evidence. Suncor does not address the *Merck-Frosst* test from the Director's factum. Likewise, Suncor cites the above-quoted language in *Friends of Lansdowne* but does not reflect Master MacLeod's caution that the goal of applying a stricter standard when there is a case management order is to bring order and ensure fairness, and not "to suppress evidence that may be important."

Principles for Adducing Reply Evidence

Proper reply in the strictest sense, i.e., at trial

14 It may be most helpful to begin with the strictest principles for adducing reply evidence, namely, those that apply during a trial or similar hearing on the merits. The rules are well established: see John Sopinka et al, *The Law of Evidence in Canada*, 3rd ed. (Toronto, ON: LexisNexis, 2009), at pp. 1165-68.

a. *Case splitting*: Under the rule against case splitting, reply evidence cannot simply confirm the evidence presented in the party's case in chief. "It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on *prima facie* proof, and when this has been shaken by his adversary, adducing confirmatory evidence": *Allcock, Laight & Westwood Ltd. v. Patten* (1966), [1967] 1 O.R. 18 (C.A.), at p. 21.

b. *New issues*: The reply evidence cannot introduce any new issues; it must respond only to those matters raised by the defendant:[1] see *R. v. Krause*, [1986] 2 S.C.R. 466 (S.C.C.), at p. 474.

c. *Unanticipated need*: The replying party can only offer evidence that it could not have anticipated as being relevant when it presented its case in chief: *Krause*, at p. 474; and *Halford v. Seed Hawk Inc.*, 2003 FCT 141, 24 C.P.R. (4th) 220 (Fed. T.D.), at paras. 15-16 (reserving discretion to admit it anyway).

d. *New evidence not previously available*: On occasion, a party wishes, after the close of its case at trial, to introduce new evidence that was not previously available. This is not strictly reply evidence, but rather newly-discovered evidence. Sopinka, at p. 1170, states that in civil cases the court's discretion to permit this

> should be exercised in light of the broad principles which are the basis for the restriction on reply evidence. These principles are designed to ensure that the defendant knows the case to be met and that the plaintiff is not permitted to split his or her case. The rationale for the latter principle is that trials should not be unduly prolonged by creating a need for surrebuttal. Within these broad parameters, the trial judge has discretion to permit reply evidence when it is the reasonable and proper course to follow.

15 As indicated by Sopinka, these rules are designed to prevent prejudice and unfair surprise to either side and to avoid confusion and unnecessary delay in the presentation of the evidence within the strictures of trial: *R. v. Krause* [1986 CarswellBC 330 (S.C.C.)], at pp. 473-74. When adhering to the above-stated principles, rebuttal "will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other": *Krause*, at p. 474.

Adducing reply evidence on an application prior to trial or a hearing on the merits

16 There is less chance of prejudice, unfair surprise, confusion, and undue delay when reply evidence is offered on an application prior to the hearing on the merits than when the parties have already put their case in chief before the decisionmaker. Indeed, each party's ability to make full submissions and defence at the determination stage depends on each party receiving a fair (and properly scoped) opportunity to develop the record in advance. Thus, as demonstrated below, the standard for permissible reply evidence is less strict when the evidence is introduced well in advance of a hearing on the merits, particularly when cross-examinations have not yet begun.

17 For example, in *Mead Johnson Canada v. Ontario (Ministry of Health)* (1999), 117 O.A.C. 121 (Ont. Gen. Div.), Sharpe J. considered supplemental affidavits filed by the applicant on an application for judicial review before cross-examinations had begun. Sharpe J. stated, at para. 7:

> I would also reject the argument that the impugned material should be struck on the basis that the applicant has

> improperly split its case. The impugned material is filed in response to material filed by Abbott which was not named in the initial application but rather, was added as a party respondent on its own motion. There has been no cross-examination to date and I fail to see how there is any unfairness or prejudice in permitting the applicant to file this material by way of reply. The situation is plainly distinguishable from that which exists at trial where prejudice may well occur if a party does not put its entire case forward in chief; compare *Allcock Laight and Westwood Ltd. v. Patten, Bernard and [Dynamic] Displays Ltd.*, [1967] 1 O.R. 18 (C.A).
>
> [Emphasis added.]

Accord *Melrose Homes*, at para. 16.

18 In *Abbott Laboratories v. Canada (Minister of Health)*, 2003 FC 1512 (F.C.), at paras. 19 and 21, Heneghan J. expressed a similar view:

> In my opinion, the strict test characterizing reply evidence in a trial does not necessarily apply in respect of proceedings taken ... by way of application....
>
> Abbott here is attempting to impose a technical, legalistic meaning on the words 'proper proceeding reply evidence' which is unwarranted. This is an application for judicial review, it is not a trial and the general rules concerning admissibility of evidence do not apply.

19 Even when the proceeding is an action and not an application, some courts have applied a lower threshold for adducing reply evidence before trial. In *Cannon v. Funds for Canada Foundation*, 2011 ONSC 2960 (Ont. S.C.J.) (CanLII), Strathy J. (as he then was) allowed the plaintiffs to file an affidavit as a supplement to their motion record on a motion for class certification, and he gave leave to the defendants to file sur-reply. The plaintiffs had asked the court to apply a more lenient test for reply evidence on a motion than that which exists at trial. Strathy J. stated, at paras. 16 to 18:

> The point is a fair one. The rule against case-splitting, in the trial context, is designed to prevent unfairness to the opposite party who has no chance to reply to the "surprise" evidence. In the motions context, the unfairness can be mitigated by giving the disadvantaged party an opportunity to respond, possibly with appropriate time extensions or costs consequences.
>
> That being said, class proceedings are case managed and important motions like certification or summary judgment are invariably subject to a timetable that requires each party to think carefully about the evidence it will produce. It can be unfair, inefficient and expensive for one party — whether through inadvertence, lack of foresight or deliberate tactics — to introduce new and unanticipated evidence at a late stage in the proceedings.
>
> Ultimately, it is a balancing exercise, with the goal of ensuring that each party has a fair opportunity to present its case and to respond to the case put forward by the other party.

Compare *Pollack v. Advanced Medical Optics Inc.*, 2011 ONSC 850, 16 C.P.C. (7th) 316 (Ont. S.C.J.), in which Strathy J. declined to permit reply evidence on a motion for class certification. In *Pollack*, when the plaintiffs submitted the challenged affidavit, the parties were one week away from the certification hearing, had long ago agreed not to conduct cross-examinations and had exchanged evidence only on a limited issue, and the plaintiffs had already submitted reply evidence once before: *Pollack*, at paras. 6-8, 13. The challenged affidavit raised a new issue, was hearsay and improper opinion evidence and was not, by the plaintiffs' own admission, "reply evidence": *Pollack*, at paras. 13, 30-31, 38, 51. Strathy J. ultimately struck the affidavit "without prejudice to the entitlement of the plaintiffs to move, after certification, to amend the common issues, on a proper evidentiary basis" to include the new issue raised in the struck affidavit: *Pollack*, at para. 54.

20 As a general rule, the parties to an application may exchange affidavits in any order until cross-examinations begin: see Rule 39.02(2); *Friends of Lansdowne*, at para. 55.

21 A case management order may restrain this liberty. Because the case management order is meant to ensure order and fairness to both sides in an otherwise costly and complex matter, the parties subject to such an order "are intended to proceed

in a manner similar to a trial.... That is it [the reply evidence] should respond to evidence raised by the other party and it should not be evidence that ought to have been submitted in the first place": *Friends of Lansdowne*, at para. 56. The court may engage in a balancing test to determine whether the reply evidence should be adduced, weighing the need for the orderly exchange of evidence and fairness to the opposing party against the need not to apply the rules so rigidly as to exclude important evidence: *Friends of Lansdowne*, at para. 56. *C.f. Cannon*, at paras. 16-18. But see *Burton v. Oakville (Town)* (2004), 69 O.R. (3d) 771 (Ont. S.C.J.), at para. 23 (striking a late-filed reply affidavit in a case-managed application to quash election results because the affidavit raised a new issue, contained inadmissible evidence, was not helpful to the court, and given the special need in election result cases to proceed expeditiously and orderly).

22 However, the present case is not one in which it may fairly be claimed that the filing of the reply evidence flies in the face of the case management order. As noted above, my order of November 23, 2012, did not preclude the filing of otherwise proper reply evidence and was silent on the schedule for doing so.

23 Once cross-examinations begin, the standard for reply evidence is higher but still not the same as at trial. Rule 39.02(2) of the *Rules of Civil Procedure* requires that, once a party has begun to cross-examine the opposing party's affiants, that party must obtain leave of the court or consent before adducing any additional affidavits. This rule applies to applications for judicial review as well as standard applications: see *Arfanis v. University of Ottawa* (2004), 7 C.P.C. (6th) 371 (Ont. S.C.J.).

24 When deciding whether to grant leave under Rule 39.02(2), the court must ask the following:

1) Is the evidence relevant?

2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?

3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

First Capital Realty Inc. v. Centrecorp Management Services Ltd. (2009), 258 O.A.C. 76 (Ont. Div. Ct.), at para. 13. "A flexible, contextual approach is to be taken ..., having regard to the overriding principle outlined in Rule 1.04 of the *Rules of Civil Procedure* that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute": *ibid.*, at para. 14.

25 Here, of course, cross-examinations have not yet begun.

26 In the Federal Court, an applicant must seek leave of the court to file a reply or supplemental affidavit in every application: *Federal Court Rules*, r. 312(a). This is a stricter rule than the rule in Ontario because it applies without regard to whether cross-examinations have begun. However, the Federal Court's test for granting leave reflects principles similar to those found in the Ontario jurisprudence.

27 Although *Merck-Frosst*, which the Director cited, applied a four-factor test, the Federal Court has since added undue delay as a fifth consideration: *Janssen-Ortho Inc. v. Apotex Inc.*, 2010 FC 81 (F.C.), at para. 33. Therefore, when evaluating an applicant's request to file reply or supplemental affidavits, the Federal Court judge asks whether the reply evidence

(i) serves the interests of justice;

(ii) assists the court in making its determination on the merits;

(iii) will cause substantial or serious prejudice to the other side;

(iv) was available and/or could not be anticipated as being relevant at an earlier date; and

(v) would cause an undue delay in the proceeding.

Janssen-Ortho, at para. 33. These factors afford the judge "'vast discretion'" that "'is incompatible with a mechanical application of any set test or formula'" (citation omitted): *Canada (Attorney General) v. United States Steel Corp.*, 2011 FC 742 (F.C.), at para. 27. "'The factors mentioned above are not exhaustive and the jurisprudence does not prescribe how they are to be weighed by the judge or the prothonotary. Further, because each decision is discretionary and will be fact-specific, there may be other factors in any given case'" (citation omitted): *ibid.*

28 With respect to the fourth element, the court in *Merck-Frosst*, at paras. 23 to 25, identified a two-step approach to evaluate whether the evidence should have been introduced earlier:

> The first step is to ask whether the proposed evidence is properly responsive to the other party's evidence. It is responsive if it is not a mere statement of counter-opinion but provides evidence that critiques, rebuts, challenges, refutes, or disproves the opposite party's evidence. It is not responsive if it merely repeats or reinforces evidence that the party initially filed.
>
> . . .
>
> If the proposed evidence is found to be responsive, one must then ask whether it could have been anticipated as being relevant at an earlier date. If it could have been anticipated earlier to be relevant, then it is being offered in an attempt to strengthen one's position by introducing new evidence that could and should have been included in the initial affidavit. Such evidence is not proper reply evidence as the party proposing to file it is splitting his case. A party must put his best case forward for the other to meet, he cannot lie in the weed and after the party opposite has responded file additional evidence to bolster his case in light of the defence that has been mounted. It is improper because it could have been filed in the initial instance and the other party now has no opportunity to respond to it.

29 In other words, according to *Merck-Frosst*, concerns about unfairness, inefficiency, and confusion that can result from non-proper reply evidence do not fall away. Purely confirmatory evidence is barred and the evidence must be responsive to the respondent's case for leave to be granted under rule 312(a) of the *Federal Court Rules*.

30 No court in Ontario has applied the Federal Court's test, though one Ontario tribunal has: *1775091 Ontario Inc. (c.o.b. Canadian Best Auto Inc.), Re*, [2012] O.L.A.T.D. No. 173 (Ont. L.A.T.), at para. 10 (concerning reply evidence introduced during a hearing before the Registrar of Motor Vehicles).

The principles to be applied

31 On the basis of the foregoing, the following principles will be applied to the present motion and the respondents' objections. The court will consider the potential prejudice and unfair surprise to the respondents; whether the evidence is responsive to the respondents' case or is merely confirmatory; whether the evidence will assist the court in making its determination on the merits; whether the evidence was available and/or could not have been anticipated as being relevant at the time the application was filed; and the applicants' reasons for their delay in adducing the evidence. To the extent the respondents object on the grounds that the reply affidavits contain irrelevant, speculative, or argumentative evidence, I have applied the principles stated in my judgment on the respondents' earlier motion to strike: see *Lockridge*, supra. The goal will be to ensure that each party has a fair opportunity to prepare its case and its response to the other side's evidence.

32 I decline the respondents' invitation to apply the strict test for reply evidence adduced at trial or (in an application) after cross-examinations are complete. Such a standard is not justified in the present circumstances. There can be little prejudice or unfair surprise to the respondents at this stage of the case, especially because the parties will have the opportunity to conduct cross-examinations. With respect to cross-examination, note that any reference in my dispositions in Appendix A to the parties' ability to cross-examine an affiant on a particular point should not be interpreted as expanding or restricting the scope of otherwise-permissible cross-examination.

33 Suncor has requested leave to file sur-reply to certain paragraphs of the applicants' reply affidavits. I have noted the disposition of these requests in the chart annexed as Appendix A. When sur-reply is permitted, it should be filed promptly. The parties are expected to confer with each other to establish a specific deadline for filing the sur-reply. In the absence of an

agreement on the timeline, the parties may make brief submissions to me in writing or arrange a conference call with me, which might also address other scheduling issues arising in light of the changed timetable.

34 If the parties are unable to agree as to the costs of this motion, they may make brief submissions to me on a timetable to be agreed upon among themselves.

Motion granted in part.

Appendix A

CONSOLIDATED CHART OF THE OBJECTIONS TO THE APPLICANTS' PROPOSED REPLY EVIDENCE OF THE RESPONDENTS, HMQO and SUNCOR

A. Affidavit of Dr. Manuel Reimer

Parties Objecting	***Paragraphs of Affidavit or Question in Reply Report (with reference to pages in Applicants' motion record)***	***HMQO's Objection***	***Suncor's Objection***	***Disposition***
Suncor Energy Products Inc. ("Suncor")	Entire affidavit and report, p. 33		*Entire affidavit and report*—Confirmatory evidence and/or case splitting is not proper reply: *Allcock, Laight & Westwood Ltd. v. Patten* [1967] 1 O.R. 18.	*Permitted.*
	Question posed: Throughout the expert reports filed by the Respondent Suncor, it is asserted that you and other experts retained by the Applicants were working from an improper assumption that the Decision resulted in an increase in refinery production, and ergo an increase in pollution from the entire refinery. This allegation that you misunderstood what the actual Decision related to is repeated at numerous other places in Suncor's expert reports and affidavits. Can you confirm your understanding of the Decision at issue in this case?			*This is not confirmatory but addresses a question regarding Dr. Reimer's premises, which was directly put in issue by the Lynch affidavit.*
			Unresponsive — responding to unspecified evidence: *Eli Lilly Canada Inc. v. Apotex Inc.* 2006 FC 953, 2006 CarswellNat 2447.	
	Response: While your wording in the court document could have been		*Cross-references to Suncor's*	

TAB 3

2008 CarswellOnt 1252
Ontario Superior Court of Justice [Commercial List]

Catalyst Fund Ltd. Partnership II v. IMAX Corp.

2008 CarswellOnt 1252, [2008] O.J. No. 873, 165 A.C.W.S. (3d) 57

Catalyst Fund Limited Partnership II v. IMAX Corporation

Pepall J.

Judgment: March 6, 2008
Docket: 07-CL-7163

Counsel: Robert S. Harrison, C. William Hourigan, Antonio Di Domenico for Applicant / Moving Party
R. Paul Steep, Thomas N.T. Sutton, Sarah-Jane Martin for Respondent

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Miscellaneous issues

Table of Authorities

Cases considered by *Pepall J.*:

Brock Home Improvement Products Inc. v. Corcoran (2002), 58 O.R. (3d) 722, 2002 CarswellOnt 794 (Ont. S.C.J.) — followed

Canadian Royalties Inc. v. Ungava Minerals Corp. (2003), 2003 CarswellOnt 4350 (Ont. S.C.J.) — followed

News Datacom Ltd. v. Love (2004), 50 C.P.C. (5th) 303, 2004 MBCA 98, 2004 CarswellMan 335, 187 Man. R. (2d) 171, 330 W.A.C. 171 (Man. C.A.) — followed

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 241 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 39.02 — considered

R. 39.02(1) — referred to

R. 39.02(2) — referred to

R. 39.03 — referred to

***Pepall J.*:**

1 There are three motions before me. Two are refusals motions and the other is a request by the applicant for leave to conduct Rule 39.03 examinations after it has already conducted its cross-examinations.

2 The applicant is a Canadian investment fund managed by Catalyst Capital Group Inc. which is not a party. In the offering memorandum, Catalyst Capital Group Inc. describes itself as a private equity investment firm that was founded in 2002 and that "specializes in control and/or influence investments in distressed and undervalued Canadian situations."

3 IMAX is an entertainment technology company incorporated pursuant to the provisions of the CBCA. It is a public company. In August, 2006, IMAX publicly disclosed that it was in the process of responding to an informal inquiry by the SEC regarding its revenue recognition practices.

4 The applicant began to invest in IMAX on October 31, 2006. It holds in excess of $6 million (U.S.) in senior notes issued by IMAX. It became a shareholder in January, 2007.

5 In its amended notice of application, Catalyst requests a section 241 CBCA declaration of oppression (including unfair prejudice and unfair disregard) in that, amongst other things:

1. IMAX put in place a consent solicitation process ("CSP") based on information released by IMAX on the public record that IMAX knew or should have known was false, misleading or incomplete;

2. it prematurely released false or incomplete information to avoid the appearance of being in default;

3. it engaged in a course of conduct designed to suppress or delay information which if provided in a complete and timely manner, would reveal more events of default;

4. it released false or incomplete information knowingly or which it ought to have known;

5. it has announced that none of its previously released financial statements can be relied upon; and

6. it has been unable to put in place sufficient internal financial controls.

6 In the amended notice of application the applicant seeks an order setting aside the consent solicitation, a declaration of default, an order directing an investigation and the appointment of an inspector, and a production order amongst other things.

7 For its part, IMAX maintains that a distinction should be made between the applicant fund which is a limited partnership consisting of sophisticated investors and Catalyst Capital Group Inc., the general manager that is executing an investment strategy. Mr. Steep for IMAX describes Catalyst as a vulture fund that is looking to maximize returns rather than act in the best interests of IMAX, its shareholders or other bond holders. He submits that Catalyst's motions are designed to advance Catalyst's investment strategy and to find a basis to allege default under the trust indenture pursuant to which the notes were issued. Mr. Steep states that the interest payable on the notes is current and the notes trade at par as of the end of January, 2007. He argues that Catalyst is on a fishing expedition designed to trigger a default under the indenture. He urges the Court not to become an unpaid partner in Catalyst's investment strategy.

8 This application engages the oppression remedy. The oppression remedy has a very broad scope and the relief available involves a tremendous amount of discretion. Assuming it qualifies as a complainant, any applicant may be entitled to rely on the provisions of the CBCA and court procedures to pursue its claim. That said, applications can be drafted with a broad brush and our *Rules of Procedure* and the law governing production can easily be manipulated to achieve objectives unrelated to the underlying policy rationale that supports the oppression remedy. Such proceedings can be very expensive, extremely time consuming and distracting, particularly for a company in circumstances of financial distress. The more motions, examinations and time limits, the greater the pressure on the respondent. A judge should not prejudge the merits of an application for oppression. That said, a distinction should be made between that which

is truly relevant and that which is speculative — a fishing expedition that is designed to hook the gills and pull at the innards of some respondent with a view to uncovering new grounds of complaint.

9 As mentioned, there are three motions before me. In this endorsement, I am disposing of the leave motion. Endorsements on the other two motions will follow at a later date. The applicant requests letters of request and the issuance of a commission to a New York court reporter to take the evidence of two New York residents, Mr. R.J. Schwartz, the President and CEO of the brokerage firm, Bear Stearns, and Jared Felt of Credit Suisse First Boston. Bear Stearns is a broker for one of IMAX's noteholders, Plainfield Asset Management, and Credit Suisse was IMAX's solicitation agent for the CSP.

10 In its application, the applicant seeks to set aside the CSP. Under the trust indenture that governs the issuance of the senior notes, IMAX must make timely filings of its financial statements with the OSC and the SEC. If IMAX was late and was served with a notice of default that it was unable to correct within 30 days, it could be faced with an acceleration whereby all $160 million of the senior notes outstanding would have to be paid. IMAX faced delays in filing its financial statements on a timely basis. It accordingly sought the consent of a majority of noteholders to a waiver of its anticipated default. It publicly initiated the CSP on April 3, 2007. Beforehand, it entered an agreement with Plainfield.

11 In that agreement, Plainfield represented that it was in a position to and would vote $53.1 million worth of senior notes in favour of the waiver sought by IMAX. On April 3, 2007, IMAX announced that it had commenced the CSP seeking consents from holders of its senior notes and, based on the Plainfield agreement, stated that two-thirds of the required consents had already been obtained. Although ultimately $53.1 million worth of notes did consent, in fact Plainfield did not control $25.1 million worth of these senior notes.

12 The applicant says, amongst other things, that IMAX's representation was false, oppressive and unfairly prejudicial. The applicant states that the particular factual issues in respect of which the evidence of Messrs. Schwartz and Felt is important are: when did IMAX know that the aforesaid representation was false; did Credit Suisse tell IMAX to recommence the CSP; how did the $25.1 million get voted, and was this as a result of the involvement of Bear Stearns, Credit Suisse or both.

13 At the argument of this motion, both counsel agreed that Rule 39.02 is the applicable Rule. Rule 39.02(1) provides that cross-examinations may take place after a party has served the affidavits on which it intends to rely and after it has completed all examinations under Rule 39.03. Rule 39.02(2) provides that a party who has cross-examined may not conduct an examination under Rule 39.03 without leave or consent. The court shall grant leave where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of a transcript of an examination conducted under Rule 39.03.

14 IMAX filed numerous affidavits in response to the notice of application including one from the Managing Director and General Counsel of Plainfield. There have been three weeks of cross-examinations of 13 witnesses in five different cities, three states and two countries. Rule 39.02 is there for a reason. It imports principles of fairness and economy. The examinations that are permissible are explicitly addressed in the Rules. Under Rule 39.2(2), the onus is on the moving party to establish that leave should be granted. In *News Datacom Ltd. v. Love*,[1] the Manitoba Court of Appeal in describing a comparable Rule in its Rules of Procedure, stated that leave should be granted sparingly and that the moving party has a "very high threshold to meet". I agree.

15 The factors to be considered on a motion for leave pursuant to Rule 39.02(2) are not limited to relevance. They are set forth in *Canadian Royalties Inc. v. Ungava Minerals Corp.*.[2] They are: is the evidence relevant; is the evidence responsive to something raised in cross-examination; is there prejudice; and is there a satisfactory explanation for not having included this evidence at the outset.

16 As stated by Stinson J. in *Brock Home Improvement Products Inc. v. Corcoran*,[3]

Rule 39.02(1) and (2) are an important and integral part of the procedural code governing the conduct of motions and applications. These Rules are designed to place finite limits on the evidentiary element of those proceedings, an element that is all-too frequently time-consuming, expensive and drawn-out. These Rules oblige the parties to consider the issues and to put all relevant evidence forward before embarking upon cross-examination of the opposite party's witnesses. This is the approach mandated by the Rules to achieve the "just, most expeditious and least expensive determination" of motions and applications. Consistent with that approach, it is only in exceptional cases that resort should be had to rule 30.02(2).

I believe that the words "ought to be permitted to respond" found in Rule 39.02(2) impose a burden on a party who seeks leave to show more than an absence of non-compensable prejudice to the opposite party. In my view those words import a requirement for the party who seeks leave under Rule 39.02(2) to provide, by way of evidence on the motion for leave, a satisfactory explanation for its failure to include the proposed additional evidence as part of its pre-cross-examination case. The court should scrutinize carefully the reasons for the omission and the evidence offered in support of that explanation. To approach the issue otherwise undermines the integrity of the evidentiary framework for motions and applications that is mandated by the Rules. Absent some reasonable explanation for the original omission, leave should be refused.

17 Having considered these factors, I have concluded that the applicant should not be granted leave. It was apparent well in advance of the cross-examinations that IMAX had made a misstatement [4] and that Credit Suisse and Bear Stearns might have relevant information. Credit Suisse is identified as the solicitation agent for the CSP in the press release of which the applicant complains and Bear Stearns is identified as Plainfield's broker in the affidavit sworn by Mr. Fritsch of Plainfield and filed by IMAX. The applicant chose to proceed as it did by application and by seeking information relating to Credit Suisse and Bear Stearns through IMAX and Plainfield. This is evident from the notices of examination and amended notices of examination that were served before the cross-examinations. In my view, a satisfactory explanation for why it did not seek this information prior to the cross-examinations has not been provided. I am not satisfied that the applicant ought to be permitted to respond as it requests and I decline to grant it the order it seeks. Catalyst's motion for leave is dismissed.

Footnotes

1 (2004), 50 C.P.C. (5th) 303 (Man. C.A.).

2 2003 CarswellOnt 4350 (Ont. S.C.J.).

3 2002 CarswellOnt 794 (Ont. S.C.J.).

4 See paras 2(n) and (p) of the amended notice of application.

TAB 4

1990 CarswellBC 99
British Columbia Court of Appeal

Cusac Industries Ltd. v. Erickson Gold Mining Corp.

1990 CarswellBC 99, [1990] B.C.W.L.D. 951, [1990] C.L.D. 482, 20 A.C.W.S. (3d) 1074, 45 B.C.L.R. (2d) 347

CUSAC INDUSTRIES LTD. v. ERICKSON GOLD MINING CORP.

Anderson, Proudfoot and Hinds JJ.A.

Heard: March 1 and 2, 1990
Judgment: April 3, 1990
Docket: Vancouver No. CA010094

Counsel: *M.P. Carroll* and *G.F. Gregory*, for appellant.
B. Williams, Q.C., and *O.W. Ilnyckyj*, for respondent.

Subject: Contracts; Natural Resources; Property

Headnote

Estoppel --- Estoppel in pais — Estoppel by conduct — Standing by and silence (where positive duty to speak)
Mines and Minerals --- Ownership and acquisition of mineral rights — Options — Extent of rights under option
Energy and natural resources — Mining — Mining contracts — Option agreements — Court finding division of profits formula set out in mining option agreement to be clear and unambiguous — Plaintiff entitled to recover profits from defendant in accordance with plaintiff's correct interpretation of contract — Plaintiff not estopped from asserting claim whether or not it was aware of defendant's erroneous interpretation — Plaintiff having no duty to inform defendant of its error.
Contracts — Interpretation — Court finding division of profits formula set out in mining option agreement to be clear and unambiguous — Plaintiff entitled to recover profits from defendant in accordance with plaintiff's correct interpretation of contract — Plaintiff not estopped from asserting claim whether or not it was aware of defendant's erroneous interpretation — Plaintiff having no duty to inform defendant of its error.
Estoppel — Estoppel by conduct or representation — Silence — Court finding division of profits formula set out in mining option agreement to be clear and unambiguous — Plaintiff entitled to recover profits from defendant in accordance with plaintiff's correct interpretation of contract — Plaintiff not estopped from asserting claim whether or not it was aware of defendant's erroneous interpretation — Plaintiff having no duty to inform defendant of its error.
The plaintiff granted the defendant an option to acquire a 100 per cent interest in the plaintiff's mineral property which the defendant agreed to develop. The option could be exercised either when the defendant commenced commercial production or on payment of four annual $100,000 instalments and a specified expenditure on the property. Under the "commercial production method", net profits were to be split and commercial production was deemed to commence after 12,000 tons of ore had been milled. The defendant made two instalment payments, then after 12,000 tons of particularly rich ore had been removed, gave notice that it was exercising its option under the commercial production method. The plaintiff claimed entitlement to the $2,274,096 worth of mineral that had been extracted from the first 12,000 tons. The defendant contended that under the contract the division of profits applied to all production, not just commercial production. The plaintiff brought an action and recovered judgment for $2,274,096. The defendant appealed.

Held:

Appeal dismissed.
The terms of the agreement were clear and unambiguous. Division of net profits would commence once commercial production had been reached. By the terms of the agreement, that would occur the day after 12,000 tons had been milled. Moreover, the division of net profits pertained only to the net profits derived from commercial production. The defendant was wrong in interpreting the contract as providing that profits from "production" rather than "commercial

production" were to be divided. Although the plaintiff may have been aware of the defendant's erroneous interpretation from an early date, it had no duty to inform the defendant that its interpretation was wrong. Accordingly the plaintiff was not estopped from asserting its claim based on a correct interpretation.

Table of Authorities

Cases considered:

Litwin Const. (1973) Ltd. v. Kiss (1988), 29 B.C.L.R. (2d) 88, (sub nom. *Litwin Const. (1973) Ltd. v. Pan*) 52 D.L.R. (4th) 459 (C.A.) — *distinguished*

Saskatoon Sand & Gravel Ltd. v. Steve (1973), 40 D.L.R. (3d) 248, affirmed 97 D.L.R. (3d) 685 (Sask. C.A.) — *applied*

Appeal from judgment interpreting gold mining option agreement and granting judgment for $2,274,096.

The judgment of the court was delivered by *Hinds J.A.*:

1 This appeal raises two main issues, first, the proper construction of a gold mining option agreement, second, the applicability of a defence based upon estoppel.

2 The plaintiff (respondent) Cusac Industries Ltd. ("Cusac") held mineral claims in northern British Columbia. Between 1977 and 1984, it spent almost $3 million on the exploration, development and administration of those claims. Cusac was a relatively small mining company. It needed a larger company to develop the claims to their full potential. After lengthy negotiations it entered into an option agreement ("the agreement") dated 22nd November 1984, with the defendant (appellant) Erickson Gold Mining Corp. ("Erickson"). The latter company was larger than Cusac and held numerous mineral claims in the same area as Cusac's claims, and it operated a mill in the general area of the claims.

3 The agreement was drafted by the in-house solicitor of Erickson and was reviewed by a solicitor experienced in mining law retained by Erickson. It was also reviewed by a solicitor retained by Cusac.

4 The agreement granted to Erickson an option to acquire a 100 per cent interest in the "property", which term was defined in the agreement to mean the Cusac mineral claims. The option could be exercised in one of two ways. First, by payment by Erickson to Cusac of four annual instalments of $100,000 each and by the expenditure by Erickson on the property of $1,225,000 within four years of the date of the agreement. Second, upon Erickson commencing "commercial production" upon the property. The term "commercial production" was defined in the agreement. The former method was referred to as the "payment/work expenditure method"; the latter was referred to as the "commercial production method". Erickson had the choice of which method to use to exercise the option.

5 The agreement further provided that on the occurrence of commercial production, Erickson would pay Cusac 40 per cent of the net profits from commercial production from the property until $3 million had been paid and thereafter it would pay 30 per cent of the net profits to Cusac.

6 Pursuant to the agreement, Erickson entered upon the property and carried out development work. It made the first two instalments of $100,000 each. In the course of the development work, Erickson discovered two veins unexpectedly rich in gold content. It decided to mine those veins by an underground rather than by a surface method.

7 On 1st July 1986, Erickson commenced production on the property. Ore was removed and was milled. By a letter, dated 2nd October 1986, Erickson sent Cusac an accounting summary for the period extending from 1st July to 31st August 1986. The summary confirmed the suspicion held since approximately 1st July 1986, by Guilford H. Brett, the directing mind of Cusac, that Erickson was intending to exercise the option to acquire the 100 per cent interest in the property by means of the "commercial production method". It was also apparent from that statement, and from a further statement sent on 23rd October 1986, covering the period from 1st September to 30th September 1986, that Erickson considered the net profits derived from the first 12,000 tons of ore should be split 40 per cent to Cusac and 60 per cent to Erickson.

8 On 7th November 1986 Cusac wrote to Erickson and advised that it disagreed with Erickson's interpretation of the agreement. Cusac maintained that it alone was entitled to the first 12,000 tons of ore removed from the property and subsequently milled, and that the division of the net profits did not occur until after "commercial production" had commenced.

9 By a statutory declaration sworn on 14th November 1986, and forwarded to Cusac, Erickson formally notified Cusac that it had exercised the option by the "commercial production method". As of that date, the cash payment of $100,000 to be made on 22nd November 1986 and 22nd November 1987, had not been paid — they were not yet due. It was therefore clear that Erickson had not exercised the option by the "payment/work expenditure method".

10 By the date of trial, the parties had agreed that $2,274,096 represented the amount payable to Cusac for the first 12,000 tons of ore produced and milled if its interpretation of the agreement was found to be correct.

11 The trial judge construed the terms of the agreement in a manner favourable to Cusac. He rejected the defence of estoppel advanced by Erickson. He granted judgment for $2,274,096 plus prejudgment interest. Erickson appealed that decision.

12 Consideration will be given first to the submission that the trial judge erred in his interpretation of the terms of the agreement. That will involve a consideration of some of the more important paragraphs contained in the agreement. It was a sophisticated contract containing 32 paragraphs and 5 schedules, extending in all to approximately 28 pages.

13 Paragraph 1(a) to (h) dealt with details of the "payment/work expenditure method" by which Erickson could exercise the option to acquire a 100 per cent interest in the property. It dealt with the four annual payments of $100,000 and the expenditure of $1,224,000 on development work on the property, to which reference has earlier been made.

14 Paragraph 5 provided:

> 5. Upon completion by Erickson of the conditions set forth in Paragraph 1 or upon Erickson commencing commercial production on the Property, whichever occurs first, a 100% right, title and interest in and to the Property shall vest in Erickson free and clear of all charges, encumbrances and claims, save and except for the obligations of Erickson under Paragraph 8 and Cusac shall deliver instructions to the Escrow Holder to deliver the escrow document referred to in Schedule "D" hereof to Erickson; *Commercial production shall be deemed to have commenced on the first day after Twelve Thousand (12,000) tons of ore from the Property have been milled.* Upon the commencement of commercial production Erickson's obligation to make the expenditures required pursuant to sub-paragraphs 1(d), (f) and (h) shall cease and the amount of the payments required to be made by it pursuant to sub-paragraphs 1(e) and (g) shall be reduced by the amount of the net profits from commercial production payable to Cusac in accordance with Paragraph 8 in the year immediately preceding the date that the payment is to be made. [emphasis added]

15 Paragraph 7 provided:

> 7. During the currency of this Agreement, Erickson, its servants, agents and independent contractors, shall have the exclusive right to explore, develop and put the Property into *production* which right shall include but not be limited to bringing and erecting buildings, plant, machinery and equipment upon the Property. [emphasis added]

16 Paragraph 8(a) provided:

> 8.(a) *If and when commercial production commences*, Erickson will pay to Cusac 40% of all net profits from commercial production from the Property calculated as set forth in Schedule "B" hereto until the sum of Three Million Dollars ($3,000,000) has been paid. Upon payment of Three Million Dollars ($3,000,000) Erickson will pay Cusac 30% of all net profits from commercial production from the Property calculated as aforesaid. [emphasis added]

17 Schedule "B", para 1. stated:

> 1. The "Net Profits" *derived from commercial production from the Property (as defined in the Agreement)* for any calendar year shall mean the Net Revenue, as defined below:
>
> "Net Revenue" shall mean the gross receipts obtained from the production and sale of ore and concentrate from the Property provided that in the case of gold and silver the Net Revenue shall be calculated as being the gross receipts upon sale to a refinery or smelter, or, if the product is to be tolled the value of the product using the London morning fix for gold on the day the gold is received at the refinery times the actual fine gold shipped in troy ounces and the value of silver as quoted by Handy and Harman on the day of receipt at the refinery times the actual fine silver shipped in troy ounces.
>
> **Less:**
>
> All costs and expenses whatsoever incurred by Erickson in conducting exploration and development work on the Property, in putting the Property into production, carrying on production operations on the Property and marketing the ores and concentrates produced from the Property including reasonably prorated capital expenditures and further including, without restricting the generality of the foregoing, the items listed below, but not including the cash payments to be made to Cusac pursuant to the provisions of subparagraphs 1.(a) and (c) of the Agreement. [emphasis added]

18 It is noted that para. 5 provided that Erickson could exercise the option by means of the "payment/work expenditure method" or the "commercial production method". "Commercial production" was defined in para. 5.

19 The wording of para. 8(a) is significant. It was only "if and when commercial production commences ... " that 40 per cent of the net profits from commercial production from the property were to be paid to Cusac. Moreover, it referred to 40 per cent of the net profits from *commercial production* from the property not merely *production*. The distinction between those terms is demonstrated by reference to para. 7 where the word "production" appeared and not the words "commercial production".

20 Paragraph 8(a) stipulated that the net profits were to be "calculated as set forth in Schedule B". The important portion of Sched. "B" is repeated:

> The "Net Profits" *derived from commercial production from the Property (as defined in the Agreement)* for any calendar year shall mean the Net Revenue, as defined below:
>
> "Net Revenue" shall mean the gross receipts obtained from the *production* and sale of ore and concentrate from the Property ... [emphasis added]

It was submitted on behalf of Erickson that the use of the word "production" in the above paragraph indicated that the division of net profits applied to *all* production whether or not it was "commercial production". That submission cannot prevail. The opening words of Sched. "B" make it clear that it pertains to net profits from commercial production. It was unnecessary to include the word "commercial" in conjunction with the word "production" in the second paragraph of Sched. "B". After commercial production had commenced there was no other type of production involved on the property.

21 The terms of the agreement are clear and unambiguous. Division of the net profits would commence once commercial production had been reached. By the terms of para. 5, that would occur the day after 12,000 tons of ore from the property had been milled. Moreover, the division of net profits pertained only to the net profits derived from commercial production.

22 Until Erickson exercised the option to acquire the property, it had no title thereto. It had no title to any ore removed therefrom. As Erickson exercised the option by the "commercial production method", title to the first 12,000 tons of ore removed and milled remained in Cusac.

23 The trial judge did not err in his interpretation of the agreement. The appeal fails on that ground.

24 The second major issue raised on the appeal involves the defence of estoppel. Counsel for Erickson submitted that the trial judge erred in not upholding Erickson's defence based on that principle.

25 The case for the appellant on this issue, assuming that all findings of fact are made in its favour, is as follows:

26 (1) Brett (Cusac) was aware in the summer of 1986 or earlier that Erickson was going into "commercial production".

27 (2) Brett was aware, according to his interpretation of the agreement, that if Erickson exercised its option by going into "commercial production", the first 12,000 tons of ore would belong to Cusac.

28 (3) Brett did not inform Erickson of his interpretation of the agreement because he knew that if he alerted Erickson to his interpretation of the agreement Erickson would probably exercise its option under cl. 1 of the agreement, the "payment/work expenditure method", and thereby deprive Cusac of the first 12,000 tons of ore.

29 Counsel for Erickson submits that the failure of Brett to speak in the above described circumstances constituted estoppel within the meaning of *Litwin Const. (1973) Ltd. v. Kiss* (1988), 29 B.C.L.R. (2d) 88, (sub nom. *Litwin Const. (1973) Ltd. v. Pan*) 52 D.L.R. (4th) 459 (C.A.). He was unable to cite any cases supporting his position. Counsel for Cusac referred us to *Saskatoon Sand & Gravel Ltd. v. Steve* (1973), 40 D.L.R. (3d) 248, affirmed 97 D.L.R. (3d) 685. In that case, Bayda J. (as he then was) said at p. 257:

> I find that the defendants were not *innocently* and in ignorance conducting themselves with reference to the processed gravel in a manner inconsistent with the plaintiff's title. The defendants were parties to the agreement and in full possession of the facts. In these circumstances there was no legal duty on the part of the plaintiff to inform the defendants of their wrong interpretation of that agreement. It follows that the defence of estoppel by silence or inaction is unavailable to the defendants.

While the Court of Appeal affirmed the judgment of Bayda J., they made no reference to the estoppel issue.

30 All the cases, including *Litwin*, refer to the failure of the party sought to be estopped from knowingly, or unknowingly, asserting its legal rights. Thus in all the cases, where the plea of estoppel has succeeded, the party sought to be estopped, has "lulled the other party to sleep" by failing to assert a legal right. There is nothing in any of the cases which suggests that there is any duty to tell the other party that, in the view of the party sought to be estopped, the other party has wrongly interpreted the contract. There are, of course, cases where both parties have wrongly interpreted the contract. In those cases, however, the plea of estoppel has succeeded because the party sought to be estopped has unknowingly failed to assert its legal rights.

31 In commercial cases where both parties are of equal bargaining strength, there is no compelling reason why the modern doctrine of estoppel, as expressed in *Litwin*, should be extended to cases where the party sought to be estopped has failed to advise the other party that in its opinion the other party has misinterpreted the contract.

32 The law of contract is designed to create certainty in the market place and to accede to the argument of counsel for Erickson would be to create uncertainty where none now exists. Accordingly, the modern doctrine of estoppel is applicable only to cases where the party sought to be estopped has "lulled the other party to sleep" by failing to assert its legal rights.

33 In the case on appeal there is no evidence that Cusac induced Erickson to act to its detriment by failing to assert its legal rights. Failure of Cusac to express its interpretation of the agreement did not amount to a failure to assert its legal rights.

34 For the foregoing reasons, I would dismiss the appeal with costs.

Appeal dismissed.

End of Document

TAB 5

2002 CarswellOnt 794
Ontario Superior Court of Justice

Brock Home Improvement Products Inc. v. Corcoran

2002 CarswellOnt 794, [2002] O.J. No. 931, 112 A.C.W.S. (3d) 230, 58 O.R. (3d) 722

Brock Home Improvement Products Inc. v. Simon Joseph Corcoran (also Known as Joseph Corcoran and Joe Corcoran), James Landeen, Erna Landeen et al.

Stinson J.

Judgment: March 7, 2002
Docket: 01-CV-213588CM2

Counsel: *Edmund Anthony Clarke*, for Plaintiff/Applicant
Edward John Cottrill, for Defendants/Respondents

Subject: Civil Practice and Procedure

Headnote

Practice --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — Supplemental or further affidavits

Plaintiff served defendant with Anton Pillar order — Matter of execution of order was raised — Plaintiff later cross-examined defendant on his affidavit — Plaintiff brought motion for leave to file further affidavit in response to information gleaned from cross-examination — Motion was dismissed on basis that information received at cross-examination was not new and related to ongoing issue of manner of execution of order matter and nothing suggested that material was unavailable when first affidavit was filed — Plaintiff appealed — Appeal dismissed — Rule 39.02(02) does not ask whether evidence is new while considering applications for admission of evidence — Test is whether party should be allowed to admit it and that includes consideration of non-compensable damage to opposing parties — Party seeking to admit new evidence is also required to provide satisfactory explanation for its failure to include evidence at earlier date — New evidence related to execution of order and matter had been raised prior to cross-examination — Plaintiff failed to demonstrate it was reasonable to admit evidence late in action.

Table of Authorities

Cases considered by *Stinson J.*:

McLelland v. Metropolitan Toronto Condominium Corp. No. 757, 50 C.P.C. (3d) 5, 8 O.T.C. 319, 1996 CarswellOnt 2682 (Ont. Gen. Div.) — considered

Nolan v. Canada (Attorney General), 1997 CarswellOnt 5421, 17 C.P.C. (4th) 356, 38 O.R. (3d) 722 (Ont. Gen. Div.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 26.01 — considered

R. 39.02(1) — referred to

R. 39.02(2) — considered

R. 39.03 — referred to

R. 53.08(1) — considered

Words and phrases considered

ought to be permitted to respond

I believe that the words "ought to be permitted to respond" found in rule 39.02(2) impose a burden on a party who seeks leave to show more than an absence of non-compensable prejudice to the opposite party. In my view those words import a requirement for the party who seeks leave under rule 39.02(2) to provide, by way of evidence on the motion for leave, a satisfactory explanation for its failure to include the proposed additional evidence as part of its pre-cross-examination case. The court should scrutinize carefully the reasons for the omission and the evidence offered in support of that explanation....[a]bsent some reasonable explanation for the original omission, leave should be refused.

APPEAL of order refusing application for permission to file further affidavit.

***Stinson J.*:**

1 The plaintiff appeals the decision of Master Polika dated February 12, 2002 in which the Master refused leave under rule 39.02(2) for the plaintiff to deliver an additional affidavit on the pending motions, subsequent to the cross-examination of the opposite parties. That rule prohibits the delivery of further affidavits or further rule 39.03 examinations subsequent to cross-examination, except on consent or with leave of the court. The court is required to grant leave, on such terms as are just "where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination."

2 In reaching his conclusion, the Master followed a number of decisions in which rule 39.02(2) has been applied, most notably that of Somers J. in *McLelland v. Metropolitan Toronto Condominium Corp. No. 757*, [1996] O.J. No. 2494 (Ont. Gen. Div.). In that case Somers J. declined to permit a party to deliver an additional affidavit where he was not satisfied that it related to a new matter raised on cross-examination.

3 The Master expressly declined to follow the decision of Quinn J. in *Nolan v. Canada (Attorney General)* (1997), 38 O.R. (3d) 722 (Ont. Gen. Div.), in which Quinn J. disagreed with the approach articulated in *McLelland* to the application of rule 39.02(2). Quinn J. observed that the rule does not expressly provide that the additional evidence may be proffered only where *new* matters arise on cross-examination. Rather, it permits additional evidence, with leave, in response to *any* matter raised on cross-examination. Quinn J. went on to enumerate a four part test to determine whether the further evidence should be received. The *sine qua non* of that test is whether the opposite party would suffer non-compensable prejudice if leave were granted.

4 The Master raised the following concern about the approach adopted in *Nolan*:

> If the test set out by Quinn J. is applied, in every case where the affidavit is responsive to any matter raised in the cross-examination, regardless if it was previously addressed in the affidavits and/or Rule 39.03 examinations, leave would have to be granted subject only to costs and perhaps other terms. The cycle would then start again. This I cannot accept as the test for exercising discretion under Rule 39.02(2). The consequence is that in every instance leave would be granted subject only to costs and/or other terms. Put another way, it paves the way for the possibility of a never ending interlocutory motion.

5 While I do not agree with it entirely (as explained below) in my view the approach taken by Quinn J. has merit. I do not believe that the party who seeks to proffer further evidence to respond to a matter raised on cross-examination need establish that the matter so raised was "new". Simply put, that is not what the rule provides.

6 Three rules in the *Rules of Civil Procedure* direct the court to grant leave in specific circumstances, being rules 26.01 (amendment of pleadings), 39.02(2) (delivery of post-cross-examination affidavits) and 53.08(1) (trial evidence admissible only with leave). All three rules contemplate granting leave "on such terms as are just." Only rules 26.01 and 53.08(1), however, refer to "prejudice" to the opposite party, something that is expressly omitted from rule 39.02(2). Instead, rule 39.02(2) imposes the requirement that the court be "satisfied that the party ought to be permitted to respond."

7 Logically, where the proposed additional evidence for which leave is sought would cause non-compensable prejudice to the opposite party, the court would not be satisfied that the requesting party should be permitted to tender it. This is precisely what Quinn J. concluded. In my respectful view, however, that is not the end of the enquiry under rule 39.02(2), in light of the very different language contained in the rule.

8 Rule 39.02(1) and (2) are an important and integral part of the procedural code governing the conduct of motions and applications. These rules are designed to place finite limits on the evidentiary element of those proceedings, an element that is all-too frequently time-consuming, expensive and drawn-out. These rules oblige the parties to consider the issues and to put all relevant evidence forward before embarking upon cross-examination of the opposite party's witnesses. This is the approach mandated by the rules to achieve the "just, most expeditious and least expensive determination" of motions and applications. Consistent with that approach, it is only in exceptional cases that should resort should be had to rule 39.02(2).

9 I believe that the words "ought to be permitted to respond" found in rule 39.02(2) impose a burden on a party who seeks leave to show more than an absence of non-compensable prejudice to the opposite party. In my view those words import a requirement for the party who seeks leave under rule 39.02(2) to provide, by way of evidence on the motion for leave, a satisfactory explanation for its failure to include the proposed additional evidence as part of its pre-cross-examination case. The court should scrutinize carefully the reasons for the omission and the evidence offered in support of that explanation. To approach the issue otherwise undermines the integrity of the evidentiary framework for motions and applications that is mandated by the rules. Absent some reasonable explanation for the original omission, leave should be refused.

10 In the present case, the proposed additional affidavit addresses principally the manner in which the original Anton Piller order was executed at Mr. Corcoran's home. That is a topic that was addressed by Mr. Corcoran in his affidavits sworn on September 10 and September 27, 2001, in which he deposed that the plaintiff did not execute the order in accordance with its terms. In December 2001 counsel for Mr. Corcoran served notice on counsel for the plaintiff that he would be seeking to exclude from evidence all information gathered through the execution of the Anton Piller order on the grounds that the plaintiff failed to comply with its terms. Thus, the issue to which the proposed new affidavit speaks was raised squarely on the record prior to the conduct of the cross-examinations, which did not take place until mid January 2002. When he was cross-examined by plaintiff's counsel Mr. Corcoran elaborated on the details of how, in his view, the plaintiff's representatives failed to comply with the order.

11 Plainly, this is not a case where the matter to which the proposed evidence responds arose initially on the cross-examination. The plaintiff was aware of the issue and had the means and opportunity to proffer its own evidence on the point prior to embarking on cross-examinations. It opted not to do so. Before me, the only explanation for that decision was that the plaintiff did not consider the affidavit evidence of Mr. Corcoran on the point to be sufficiently persuasive to merit a response. Instead, the plaintiff chose to test that evidence by cross-examination. Now, having found Mr. Corcoran more resilient under cross-examination than anticipated, the plaintiff seeks to bolster its case, in effect, by reply evidence. Not only is the plaintiff splitting its case, but the inevitable result will be another round of cross-examinations, and possible additional rule 39.02(2) motions. That is precisely what rules 39.02(1) and rule 39.02(2) are designed to prevent.

12 In my view, the plaintiff has failed to demonstrate that it should be permitted to respond further to any matter raised on the cross-examination of Mr. Corcoran. In the result, I agree with the conclusion reached by the Master that leave should be refused under rule 39.02(2). The appeal is therefore dismissed.

13 The defendant is entitled to its costs on a partial indemnity basis. If the parties are unable to agree on the appropriate amount, they should contact my secretary to set up a telephone conference call to make submissions to me so that I can fix those costs.

Appeal dismissed.

TAB 6

2018 ONSC 4671
Ontario Superior Court of Justice

Zaib v. Sandhu

2018 CarswellOnt 13081, 2018 ONSC 4671, 295 A.C.W.S. (3d) 520

SABAH ZAIB (Plaintiff) and PRITPAL KAUR SANDHU, MALIK FINANCIAL CONSULTANTS, MAQSOOD MALIK aka MAC MALIK, EASY ACCESS HOME COMFORT, NOSHIN ASGARI, OMEGA CONSTRUCTION & LANDSCAPING INC., SAHER HANNA aka CAMARAN HANNA (Defendants)

Thomas A. Bielby J.

Heard: July 3, 2018
Judgment: August 7, 2018
Docket: CV-15-2297-00

Counsel: V.K. Sharma, for Plaintiff
A. Sidhu, for Defendant, Sandhu

Subject: Civil Practice and Procedure; Evidence

Headnote

Civil practice and procedure --- Summary judgment — Evidence on application — General principles

One defendant brought motion for summary judgement seeking dismissal of action against her — Motion had been adjourned several times — Plaintiff brought motion seeking leave to file additional evidence — Motion dismissed — It was clear that court had been attempting to move motion for summary judgement along and had imposed various time limits and/or restrictions on filing of evidence — Court had authority to grant leave for filing of material but in this case granting leave would violate earlier orders that set specific time limits — Material that plaintiff wished to file was important, it appeared to be relevant, and court had interest in seeking truth and merits of any action after hearing relevant evidence — However, courts expected their orders to be followed, and time limits were set out for filing of evidence — Plaintiff's explanation for waiting so long to bring motion was not satisfactory.

Table of Authorities

Cases considered by *Thomas A. Bielby J.*:

Shah v. LG Chem, Ltd. (2015), 2015 ONSC 776, 2015 CarswellOnt 1305, 124 O.R. (3d) 570 (Ont. S.C.J.) — considered

Skrobacky v. Frymer (2011), 2011 ONSC 3295, 2011 CarswellOnt 4143, 70 E.T.R. (3d) 44, 16 C.P.C. (7th) 199 (Ont. S.C.J.) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 39.02 — considered

R. 39.02(2) — considered

R. 39.03 — considered

MOTION by plaintiff seeking leave to file additional evidence on summary judgment motion.

***Thomas A. Bielby J.*:**

1 The Defendant Pritpal Kaur Sandhu, in September, 2016 placed before the court a motion for summary judgement in which she sought the dismissal of this action as against her.

2 The motion was adjourned a number of times, and was finally scheduled to be heard on July 3, 2018.

3 The Plaintiff also has a motion before the court seeking leave to file additional evidence, including affidavits and transcripts.

4 In order to consider the motion for leave, it is necessary to review the various attendances in court in regards to the motion for judgment.

5 The motion for judgment, originally brought in 2016, was scheduled to be heard as a long motion on July 5, 2017. The parties appeared before Shaw J. on that date and consented to an adjournment of the motion to February 14, 2018. As part of her endorsement, Shaw J. ordered that all expert reports and further affidavits to be relied upon are to be served and filed by October 1, 2017. Any cross-examinations were ordered to be conducted by December 1, 2017.

6 On February 14, 2018, the parties appeared before McSweeney J. and the long motion was adjourned two weeks, to February 28, 2018, to allow for the cross-examination of Ms. Sandhu, which was scheduled for the afternoon of February 14th.

7 McSweeney J, also endorsed the following:

> "Accordingly I direct that any additional material to be relied on at the return of the motion shall be filed by 2:00 pm on Friday, February 23, 2018."

8 On February 28, 2018, the parties again appeared before McSweeney J. However, the motion could not proceed because there was no judge available to hear it. The motion for summary judgement, was adjourned to July 3, 2018.

9 On that occasion McSweeney J. endorsed that no further materials were to be filed without leave of the Court and the matter was noted to be pre-emptory against both parties.

10 The Plaintiff's motion for leave to file additional materials was not prepared and served on the solicitors for Sandhu until June 20, 2018. The affidavit material sought to be filed includes the report of a handwriting expert, dated June 7, 2018, which report was allegedly sent to counsel for Sandhu on June 11, 2018.

11 The expert was not retained to complete the report until sometime late in May, 2018.

12 Counsel for the Plaintiff submits that the export report resulted in part from answers provided by Ms. Sandhu on her cross-examinations held on February 14, 2018. She was questioned about a handwritten document allegedly signed by her on April 2, 2014, in which she acknowledged owing the Plaintiff $60,400. Apparently she denied or placed in doubt, the authenticity of the document.

13 It is the opinion of the expert retained by the Plaintiff that the April 2, 2014, document was written and signed by Ms. Sandhu.

14 However, the need for such a report was known to the parties in 2017. As noted above, on July 5, 2017, Shaw J. ordered that all expert reports were to be filed by October 1, 2017. I accept that the reference to expert reports included reports of handwriting identification experts.

15 It is clear from the endorsements that the court has been attempting to move the motion for summary judgement along and for that reason have imposed various time limits and/or restrictions on the filing of evidence.

16 Noting that Ms. Sandhu was to be cross-examined on February 14, 2018, McSweeney J. provided a specific date by which additional material was to be filed; February 23, 2018.

17 Nevertheless, the Plaintiff did not commission the expert report until months later, and while requiring leave to file additional material as per McSweeney J.'s endorsement, waited until two weeks before the pre-emptory hearing of the summary judgement motion to serve his motion to file further evidence, returnable on the return date of the summary judgment motion.

18 Counsel for Ms. Sandhu submits that if leave is granted and the additional material is filed, he will require further time to file new responding material.

19 Rule 39.02(2) of the *Rules of Practice*, states that a party who has crossed-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under Rule 39.03.

20 I accept that I have the authority to grant leave for the filing of such material but in this case, the granting of leave would violate earlier orders which set specific time limits, although McSweeney J. in her last endorsement left the door open for the granting of leave.

THE LAW

21 *Skrobacky v. Frymer*, 2011 ONSC 3295 (Ont. S.C.J.) is a decision of Corrick J. in which he heard a motion seeking leave to file new evidence.

22 At paragraph 12 of the ruling, Corrick J. set out the factors to be considered on a motion for leave pursuant to Rule 39.02(2). They are:

a. Is the evidence relevant?

b. Does the evidence respond to something raised on cross-examination?

c. Will the granting of leave result in non-compensable prejudice?

d. Is there a satisfactory explanation for not presenting the evidence at the outset?

23 It would appear that the evidence is relevant and to some extent is in response to something raised on cross-examination. Ms. Sandhu, when cross-examined on February 14, 2018, put into issue the authenticity of the handwritten document dated April 2, 2014, and it is submitted by counsel that as a result he retained a handwriting expert for an opinion as to the April 2nd document.

24 However, I also note the earlier endorsement setting out the time limits for the filing of expert witnesses and accept that handwriting evidence would be part of this trial.

25 In regards to prejudice, had the matter proceeded on the 14th or 28th of February, as ordered, the evidence for which counsel seeks leave would not have existed. Accordingly, the Defendant Sandhu can claim non-compensable prejudice if leave is granted.

26 Further, the admission of this evidence would conflict earlier endorsements which set out timelines for the filing of material.

27 For example, knowing that Ms. Sandhu was to be cross-examined on February 14th, McSweeney J. ordered that any new material, presumably arising from the cross-examinations was to be delivered by February 23, 2018, because the motion for summary judgment was adjourned to February 28th for argument.

28 The Plaintiff waited until June 20th to deliver this motion to seek leave, to be heard on the same day scheduled for the summary judgement motion. The explanation provided by counsel for the Plaintiff for waiting so long was less than satisfactory. He did not adequately explain why he did not retain his expert until some months after the last court attendance. Had he sought leave by a motion within weeks following cross-examination, counsel for the Defendant Sandhu would have known if he had to respond to the new material.

29 *Shah v. LG Chem, Ltd.*, 2015 ONSC 776 (Ont. S.C.J.) is a decision of Perell J. on a motion brought under Rule 39.02(2) seeking leave to file a further affidavit.

30 At paragraph 22 Perell J. references the text, *The Law of Civil Procedure in Ontario* and noted,

> "The procedure for a motion provides for closure or limits the delivery of evidence for the motion. The Rules require that all parties must submit their evidence before any cross-examinations of opposing parties proceed . . . "

31 At paragraphs 38 and 39 Perell J. wrote,

> "As noted above, however, the Plaintiffs submit that it is in the interests of justice to grant leave because the Court itself would be prejudiced by the absence of the additional evidence because the Court would be missing important information relevant to the jurisdictional analysis.
>
> However, in the context of an adversarial system of justice, where there are rules of civil procedure and rules of evidence, I do not see how the Court can be said to be prejudiced if it enforces the rules of civil procedure and the law of evidence."

32 Perell J. also considered the feeble explanation offered with respect to why the material was not filed prior to cross-examinations in support of the motion to leave (para. 34).

33 I accept that the material which the Plaintiff wishes to file is important to her. It is relevant to the authenticity of a loan document in an action where the she is seeking to be repaid monies.

34 It can be said the court has an interest in seeking the truth and merits of any action after hearing the relevant evidence.

35 Conversely, the courts expect their orders to be followed. Time limits were set out for the filing of evidence.

36 Apart from Rule 39.02, Justice McSweeney ordered that there can be no further filings without leave. This is after an endorsement two weeks earlier setting a time limit for the filing of material relating to the cross-examinations of Ms. Sandhu.

37 On that background it seems to me that the threshold for granting leave is even higher than the threshold in regards to Rule 39.02(2).

38 I find that the explanation offered as to why the information sought to be filed was not delivered to be less than satisfactory. Counsel for the Plaintiff argues that he did not know prior to cross — examination that Ms. Sandhu would not agree to the authenticity of the April 2, 2014, document. As I stated to him, the fact that Ms. Sandhu was seeking summary judgment on grounds that the debt owed to the Plaintiff by her has been paid, and in an amount much less than set out in the document of April 2, 2014, brings the authenticity and/or *bona fides* of the document in issue from the beginning.

39 I also accept that the issue of handwriting experts had been known for some time and is the subject of an order for the filing of expert reports within a certain time frame.

40 In general terms, courts should not expect orders to be adhered to unless they are prepared to enforce such orders.

41 I recognize that parties who have missed time limits are often allowed to file their material, however such opportunities are not endless and a line has to be drawn.

42 Even accepting the material is in response to something raised in cross-examinations although, as noted, I believe the "something" was already known to the Plaintiff, and leaving aside the prejudice issue, I reject the explanation for requesting leave, to be less than satisfactory and on that ground alone the motion for leave can be dismissed.

43 The Plaintiff's motion for leave dated June 20, 2018, and returnable on July 3, 2018, is dismissed.

44 When the motion for summary judgement proceeds before me on October 15, 2018, the issue of costs in relation to the leave motion can be addressed.

Motion dismissed.

End of Document

Court File No. CV-12-9545-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD. 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding Commenced at Toronto

BRIEF OF AUTHORITIES OF DOMFOAM INC.

(ON APPLICANTS' MOTION TO ADDUCE EVIDENCE)

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