Martin v. NWT Power Corp., 2000 NWTSC 17

Date: 2000 03 03
Docket: CV 08000

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

WAYNE MARTIN

Plaintiff

-and-

NORTHWEST TERRITORIES POWER CORPORATION

Defendant

REASONS FOR JUDGMENT

[1] The issue is the selection of the appropriate representative of the defendant corporation for purpose of examination for discovery.

[2] The Rules of Court provide that a party may examine for discovery any other party adverse in interest. With respect to corporate parties, one representative of the corporation, as selected initially by the corporation, is liable to be examined and no other representative may be examined without leave of the court or by agreement. This is found in Rule 238:

> 238(1) Where a corporation is to be examined for discovery, the examining party may examine an officer, director or employee on behalf of the corporation who is chosen by the corporation, but the Court, on application of the examining party before the examination, may order that another officer, director or employee may be examined on behalf of the corporation.
>
> (2) Where an officer, director or employee of a corporation has been examined, no other officer, director or employee of the corporation may be examined without leave of the Court or the agreement of the parties.

The corporate representative has a duty to inform himself or herself as to the matters in issue: Rule 251(2). The examining party is entitled to read in at trial any part of the discovery evidence as part of that party's case against the corporation: Rule 266(1).

[3] These provisions are part of a comprehensive scheme which seeks to achieve, as its aim, a wide scope to pre-trial discovery. As I said in *Fullowka v. Royal Oak Mines Inc.*, [1997] N.W.T.J. No.42 (at para.25):

> The two main purposes of examinations for discovery are to obtain information as to the facts and to obtain admissions which may be used in evidence against the opposite party. The various provisions I noted above reflect, in my opinion, a philosophical approach to the new Rules to widen the scope of discovery by eliminating many of the previous impediments to full disclosure. By the combined action of all the new Rules one can reasonably expect that litigation by surprise will be minimized if not altogether eliminated, that relevant evidence will be uncovered, issues will be focussed, parties will be pinned down in their positions, and settlement will be encouraged because counsel will be able to adequately size up their case before trial.

[4] The plaintiff sues for damages for wrongful dismissal. The defendant has proposed that its representative for discovery be one Rick Blennerhassett who, at the material time, was the defendant's vice-president of operations. Mr. Blennerhassett, however, is no longer an employee of the defendant. He resigned on January 28, 2000 (having given his notice of intention to resign several months earlier). Mr. Blennerhassett, however, is currently retained by the defendant as a consultant and the agreement between the company and Mr. Blennerhassett provides that he make himself available as needed for this action. The defendant wants Mr. Blennerhassett to represent it for discovery purposes and is even prepared to reinstate him as a full-time employee if necessary so he can represent the defendant for examination for discovery in this action.

[5] The plaintiff has applied to have the court designate someone else to represent the defendant. The plaintiff proposes one Dan Roberts, a regional director for the defendant company, and, according to the plaintiff, his immediate supervisor in the months preceding his dismissal. The plaintiff says that Mr. Roberts is "intimately aware" of the matters relating to his dismissal; that he had a detailed discussion with Mr. Roberts regarding the reasons for his dismissal; and, that Mr. Roberts "is the representative of the corporation who had the most significant dealings with

me regarding the events leading up to my termination and the events which followed" (all quotes are from the plaintiff's first affidavit filed on this application).

[6] In response, the defendant has filed an affidavit from Mr. Blennerhassett in which he states that (i) he was personally involved in most of the significant events leading up to the plaintiff's dismissal, including the actual decision to dismiss; (ii) Mr. Roberts, at all material times, reported directly to him and briefed him on all material personnel issues; (iii) he was directly involved in the investigation of the matters that prompted the plaintiff's dismissal, not Mr. Roberts; (iv) Mr. Roberts did not participate in the decision to dismiss the plaintiff; and, (v) he can take steps to inform himself about any other relevant facts. There was no affidavit evidence from Mr. Roberts (who is still employed by the defendant) so I do not know what he thinks he could contribute to the discovery process or even if he is willing to represent the defendant for discovery purposes.

[7] There are two questions to address on this application: (1) Is Mr. Blennerhassett properly an "officer" of the defendant within the meaning of Rule 238(1)? and, (2) If he is, should the defendant's choice of him as the one to be examined be displaced in this case?

[8] The first question can be dealt with briefly. In my view, the fact that the corporate defendant is prepared to have Mr. Blennerhassett represent it, even though he is no longer an "employee" of the corporation, together with the concomitant burden of being bound by his answers, is sufficient to meet the criterion of being an "officer". He has a continuing connection with the corporate defendant as a consultant. He is obliged to make himself available for purposes of this law suit. So, even though in strict legal terms there is no longer an employer-employee relationship, there is still a strong connection to the corporation.

[9] As many cases have noted, it is highly impractical to impose rigid limits on the term "officer" in the context of examinations for discovery. One has to look at the circumstances of the particular case. Generally speaking, I would adopt the test articulated in *Bell v. Klein*, [1955] 1 D.L.R. 37 (B.C.C.A.): "... the person sought to be examined can be regarded as an officer or servant in any permissible sense if he is the one person connected with the company best informed of matters which may define and narrow the issues between the parties at trial" (at p.40). The person ought to be someone who has a certain standing with respect to the corporation who can authoritatively speak on its behalf either because of his or her

formal position within the corporate structure or because of his or her designation as such by the corporate party.

[10] In my opinion, Mr. Blennerhassett qualifies as an "officer" for purposes of discovery. Should his selection by the defendant, however, be displaced in these circumstances?

[11] Counsel provided numerous cases on this hearing dealing with the question of replacing one designated representative of a corporate party with another. All of those cases, however, have to be viewed within the context of the particular procedural rules in force in the jurisdiction from which a particular case originates. All Canadian jurisdictions have specific rules governing the examination of corporate parties. They are uniform in their effect in that a person is designated as an officer of the corporation for the purposes of discovery, that person's answers bind the corporation, and he or she is obliged to inform themselves of relevant facts through whatever means are available within the company (see R.B.White, *The Art of Discovery* (1990), at p.29). But the rules differ in their approach. One of the differences relates to the question of who selects the person to be examined on behalf of the corporate party.

[12] In Ontario, where the rules are similar in most respects to those in this jurisdiction, there is no explicit statement as to who selects the person to be examined. Case law, however, has held that the examining party has the right to select the representative of the corporate party to be examined: see, for example, *Devji v. Longo Brothers Fruit Market Inc.* (1999), 42 O.R. (3d) 683 (Gen. Div.). The same situation applies in British Columbia: *Rainbow Industrial Caterers Ltd. v. Canadian National Railways Co.* (1986), 6 B.C.L.R. (2d) 268 (S.C.). In Saskatchewan, the court designates the representative in the absence of agreement by the parties: *Diehl v. London Life Insurance Co.*, [1982] 1 W.W.R. 673 (Sask. C.A.). Alberta is somewhat peculiar in that, in one rule, the examining party may examine "any officer of a corporate party and any person who is or has been employed by any party to an action" for information purposes (Alberta Rule 200) whereas by another rule a party may only use admissions of a corporate party made by an officer designated for that purpose (Alberta Rule 214). In the first instance the examining party may select the persons to be examined whereas in the second instance it is specifically the corporate party that selects its representative: *Cana Construction Co. v. Calgary Centre for the Performing Arts*, [1986] 6 W.W.R. 74 (Alta C.A.). But, the one common thread, no matter what differences there may be in approach, is that, whoever has the prima facie right to select the

corporate representative for discovery, that right will not be lightly interfered with by the court: Stevenson & Côté, *Civil Procedure Guide* (1996), at p. 926; *Holmested & Watson's Ontario Civil Procedure* (1998), section 31-12.

[13] In *Gibson v. Bagnall* (1978), 22 O.R. (2d) 234 (H.C.J.), Eberle J. (at p. 235) identified the two points to be considered on a motion to substitute one person for another on an examination for discovery: (a) Does the person proffered possess sufficient knowledge to constitute him or her a proper person to be discovered on behalf of the corporate party? (b) Would the person proffered be an embarrassment to the corporate party if examined on its behalf (in the sense of whether the person has any adverse interest to the corporation)?

[14] In this case I am satisfied that Mr. Blennerhassett has sufficient knowledge both through his personal involvement in the subject matter of this litigation and in his ability to inform himself of the relevant facts. The plaintiff, in my respectful opinion, mistakes the question of who in the corporation is most familiar with him with that of who may be in the best position to speak on behalf of the corporation. The test is whether the proposed representative has the required knowledge and the means to answer all relevant questions. I accept as a guiding principle, invoked specifically in reference to Alberta Rule 214 but applicable to this situation as well, the comments of Harradence J.A. (on behalf of the court) in *Leeds v. Alberta*, [1989] 6 W.W.R. 559 (Alta. C.A.), at p. 568:

> When a corporation chooses an officer under R. 214, the corporation's discretion to choose a person who speaks for it should not be lightly interfered with. A court should only interfere where the selection is not made honestly and bona fide or where the officer cannot provide the required information...

[15] There is no evidence that Mr. Blennerhassett's selection was not honestly made, that is, not in good faith. Nor is there any evidence that he would embarrass the defendant (in the legal sense of that word). This is significant because under our rules there is no distinction drawn between the examination of a corporate representative for information purposes only or for the purpose of obtaining admissions. There is one examination of one representative. If that examination proves deficient, there are mechanisms in the rules whereby the court may permit the examination of a second representative or a third party (such as an employee). The rules contemplate that the corporation itself (more accurately its guiding minds) would be in the best position to know who could best represent it. In the case of Mr. Roberts, there is no evidence that he would embarrass the

corporation but, on the other hand, all we have is speculation from the plaintiff as to what information Mr. Roberts may be able to provide.

[16] For these reasons, the plaintiff's application to substitute Mr. Roberts for Mr. Blennerhassett, as the defendant's representative for examination for discovery, is dismissed. Costs will be reserved to the trial judge.

J. Z. Vertes J.S.C.

DATED at Yellowknife in the Northwest Territories this 3rd day of March, 2000.

Counsel for the Plaintiff: Douglas G. McNiven
Counsel for the Defendant: Sheila M. MacPherson