Federal Court  Cour fédérale

Date: 20150327

Docket: T-705-13

Citation: 2015 FC 391

Toronto, Ontario, March 27, 2015

PRESENT: Prothonotary Kevin R. Aalto

BETWEEN:

MEDIATUBE CORP. AND NORTHVU INC

Plaintiffs

and

BELL CANADA AND BELL ALIANT REGIONAL COMMUNICATIONS, LIMITED PARTNERSHIP

Defendants

ORDER AND REASONS

[1] In this unusual motion and in what can only be described as a vigorously litigated matter, Bell seeks an order to the effect that the representatives of MediaTube and NorthVu attend in person to answer "under advisement" questions posed to date on the examinations for discovery. The examination for discovery of MediaTube and NorthVu so far has extended to some 9,000 - 10,000 questions and it is claimed that there are approximately 1,000 questions either refused or "under advisement". Bell argues that by taking a large swath of questions "under advisement"

MediaTube is trying to orchestrate or script answers by having counsel prepare written answers to those questions. Bell argues that this is entirely improper and that they are entitled on the discovery to a direct answer from the witness without interference by counsel.

[2] Bell argues the tactic of counsel for MediaTube and NorthVu by preventing the witnesses from answering by taking a question "under advisement" is a misuse of the examination for discovery process.

[3] For their part, MediaTube and NorthVu deny any such intention or conduct. They argue that of the questions which were not answered, a substantial portion of them require investigation and inquiry from other sources to obtain information, and it is entirely appropriate to make those inquiries on behalf of the witness and provide written answers. With respect to the "under advisement" questions, MediaTube and NorthVu argue that these also fall into that category of assembling of information to ensure the answers are accurate and need not be further clarified or updated after the fact as is required by the Rules. They argue that they are entitled to speak to their client's representatives with respect to obtaining and finalizing answers to all of these questions.

[4] In an effort to resolve the motion, Bell delivered a proposed settlement on the following terms:

> We are prepared to settle our motion on the following terms:
>
> 1. The parties shall consent to an Order which provides:
>
> a. If prior to the refusals motion, the plaintiffs intend to answer any questions (i) refused or (ii) taken under advisement at the plaintiffs' examinations for

discovery, that such questions shall not be answered in writing, but instead Ross Jeffrey and/or Doug Lloyd shall re-attend at the plaintiffs' expense to continue the examination(s) for discovery.

b. Until such time as Ross Jeffrey or Doug Lloyd re-attends for his continued examination for discovery, or the court determines that a question need not be answered, counsel for the plaintiffs shall not discuss with Mr. Jeffrey or Mr. Lloyd (i) any of the unanswered questions asked at the examinations for discovery or (ii) any proposed or potential responses.

c. For greater certainty, nothing in the order shall preclude plaintiffs' counsel from speaking to Mr. Jeffrey or Mr. Lloyd about the subject matter of the litigation generally or to prepare for the examination for discovery of Bell Canada's witness scheduled to commence December 8, 2014.

2. The plaintiffs will pay the defendants' costs of preparing the motion on an expedited basis, forthwith, fixed in the amount of $10,000.00.

[5] The terms of the proposal were unacceptable to MediaTube and NorthVu and the motion proceeded. At the outset of the motion, counsel for Bell reviewed various categories of questions from a chart found in MediaTube's responding motion record. The exact number of questions of concern to Bell is substantially less than 1,000 and apparently falls into three categories: infringement, validity, and disclosure.

[6] As this is a patent infringement action, there are technical aspects to the questions being asked of the MediaTube and NorthVu witnesses. One such example is as follows:

974 Q. How many channels were you looking for?

A. We could have carried hundreds of channels.

975 Q. Let's just say 100 for the sake of argument. Was it configured to receive all 100 channels into the MPEG video encoder?

A. Encoders.

976 Q. Encoders. All the channels go into the encoders?

A. Yes. There was other equipment there. I don't know it all. Like I said, I am not an engineer.

977 Q. All I can ask you about is what you know. Was it configured so that all of the channels go into the core router?

A. Again, I couldn't answer that question. That would be more of an engineer question.

[7] As is obvious from this question, the witness simply cannot provide an answer to the question. There is no attempt to avoid providing the information save and except that counsel's objection was not an undertaking but "under advisement". As on its face the question appears to be relevant what counsel probably intended was to provide an answer by way of undertaking after further inquiries and investigation as it was a technical question.

[8] The use of the phrase "under advisement" on examinations for discovery to prevent a witness from answering a question has become rampant. There is no provision in the Rules for such a position to be taken in respect of a proper question posed on an examination for discovery. Rules 234-248 establish the procedure for examinations for discovery in Federal Court proceedings. Nowhere in those Rules is the phrase "under advisement" used. Rule 242 governs objections on an examination for discovery. There are four categories of objections as follows:

(a) the answer is privileged;

(b) the question is not relevant;

(c) the question is unreasonable of unnecessary; and

(d) it would be unduly onerous to require the person to make the inquiries to answer the question.

[9] "Under advisement" is not an objection. It may be a useful intervention where the issue of relevance may be a matter for further consideration or discussion with opposing counsel. But it is not a substitute for a properly made objection on the enumerated grounds. It has become misused by counsel and is a glib mechanism to avoid having a witness answer a question which may otherwise be relevant. Counsel should refrain from using this as a backdoor means of objecting. Either object on proper grounds or let the witness answer or, if the question requires information which the witness does not know, give an undertaking.

[10] What does "under advisement" mean anyway? Is it an objection? – No; is it an agreement to answer the question immediately after some consideration? – No; or, is it an indication that some answer will be forthcoming now or in the future? – No. It is nothing other than an interruption of the examination. If there were some explanation as to why it was taken "under advisement" perhaps it might mean something. For example, is it to consider whether the question is clear; to consider whether the question relates to an issue in the case; or, perhaps, to determine whether a document might contain information to assist the witness in answering or whether further investigations must be conducted with the client to obtain the information. The various definitions of "under advisement" include "careful deliberation or consideration" [see, *Random House Kernerman Webster's College Dictionary*, 2010 K Dictionaries Ltd. Copyright 2005, 1997, 1991 by Random House, Inc.]. However, there is nothing in this transcript in the

Court's review of it that is in any way informative of why the questions need "careful deliberation or consideration".

[11] It is helpful to consider another important rule: Rule 241. This Rule concerns the obligation of a witness to inform him or herself of relevant information for purposes of being examined for discovery. That Rule provides as follows:

Obligation to inform self	*L'obligation de se renseigner*
241. Subject to paragraph 242(1)(d), a person who is to be examined for discovery, other than a person examined under rule 238, shall, before the examination, become informed by making inquiries of any present or former officer, servant, agent or employee of the party, including any who are outside Canada, who might be expected to have knowledge relating to any matter in question in the action.	241. Sous réserve de l'alinéa 242(1)d), la personne soumise à un interrogatoire préalable, autre que celle interrogée aux termes de la règle 238, se renseigne, avant celui-ci, auprès des dirigeants, fonctionnaires, agents ou employés actuels ou antérieurs de la partie, y compris ceux qui se trouvent à l'extérieur du Canada, dont il est raisonnable de croire qu'ils pourraient dé- tenir des renseignements au sujet de toute question en litige dans l'action.

[12] While Rule 241 is a positive obligation on a witness on an examination for discovery, given the complexities of patent litigation and this case in particular, it would be impossible for any one witness to inform him or herself of all possible information that might be required to be able to answer the questions on discovery. Until a question is asked a witness will only know in a general sense what the issues in the case are. The questions will crystallize the information sought by opposing counsel. No one has a crystal ball to know with certainty what will be asked.

That is why undertakings to provide answers are one of the basic fundamentals of examinations for discovery.

[13] Examination for discovery is also not a memory contest. A witness should be shown courtesy and provided the opportunity to consult documents where necessary to answer questions. Counsel must be able to assist in helping a witness find a relevant document or relevant information.

[14] Undertakings by counsel to inquire and provide information is the usual process by which information not reasonably or readily within the knowledge of the witness can be provided. Further, Rule 245(1) requires a witness to correct an answer given on a discovery subsequent to the discovery or to complete an answer that is deemed to be incomplete. That Rule also provides that the witness may be subject to further examination in respect of such additional information.

[15] This is not a motion to determine the relevance of any of the questions refused or taken "under advisement" by counsel for MediaTube or NorthVu. Those motions are pending before the Case Management Judge although it is to be observed in passing that a motion to compel answers to 1,000 questions is out of all proportion. Such a motion potentially will take longer than the discovery itself which is an absurd result. That is an abuse of the Court.

[16] Refusals motions have become the scourge of litigation in this Court, particularly, IP litigation. Refusals motions dealing with hundreds of question have become the norm not the exception. Refusals motions that last days on end because counsel move on every single refused

question including the most trivial without considering whether the questions are truly essential or not consume a disproportionate amount of time of the Court in dealing with them to the detriment of other litigants. By and large many of those hundreds of questions are at best marginal and very few ever see the light of day in providing useful information for trial. It has simply become part of the litigation strategy. Refusals motions, except where there are exceptional circumstances, should deal with perhaps no more than 50 or so questions.

[17] Counsel for Bell can certainly point to examples where it would appear that the discovery process was being thwarted. For example, on page 67 of the transcript the MediaTube witness the following exchange took place:

> MR. REDDON: Does the Plaintiff have any knowledge, information or belief of one speck of confidential information that was solicited or given in those meetings that can be identified here and now, today?
>
> U/A MR. SPICER: We will take it under advisement.
>
> MR. REDDON: Or at all?
>
> U/A MR. SPICER: Same position.

[18] While that is one example of a failure to permit the witness to answer, there is another example given by counsel for Bell which is perfectly legitimate in the circumstances. That example is as follows:

> MS. LEGERE:
>
> Q: Can you look at the Response to the Demand for Particulars at page 5, sub (b). Sub (b) discusses the agreement dated December 12, 2005, which we were just

	looking at. When MediaTube asserts that the parties to the agreement agreed not to compete for the development of presentation of a similar product, you would agree with me that Bell Canada did not agree to not compete for the development or presentation of a similar product?
REF MR. SPICER:	We are not going to admit that, Ms. Legere.
MS. LEGERE:	Will you let the witness answer the question?
MR. SPICER:	No. You are asking for admissions. That is a request for an admission.

[19] It must be remembered that examinations for discovery are not cross-examinations although some cross-examination is allowed. The general rule in cross-examination is that the party being cross-examined cannot communicate with counsel for assistance in respect of the examination. But, witnesses in cross-examination are not there to give undertakings or make further inquiries; they are there to answer questions within their personal knowledge. Discovery is in large part a fact finding exercise. One of its main objectives is to allow the opposing party to explore and understand the case it has to meet. While that is the primary purpose of an examination for discovery other purposes include obtaining admissions which will dispense with the requirement for formal proof at trial and to obtain admissions which will defeat the other side's case.

[20] The Court does not support the over abundance of interruptions in an examination by the use of a quasi objection such as "under advisement". Witnesses should be permitted to answer proper questions. If the witness does not know the answer then that is the answer and that is when undertakings are appropriate to make further inquiries and provide answers on a follow-up

examination or by way of writing if the circumstances are such that answers in writing are acceptable to the party examining. Parties to litigation are expected to generally follow the Rules keeping in mind that flexibility, civility and proportionality must be exercised in all cases.

[21] A number of Courts have commented on the conduct of discoveries. In this Court, the Honourable Mr. Justice Fred Gibson in *Andersen Consulting v. Canada (T.D.)*, [1997] 2 F.C. 893, made the following observation at paragraph 15:

> 15. Once again, I am satisfied that the same can be said of examinations for discovery before this Court. Cross-examination on examination for discovery is clearly, if obliquely, contemplated by the *Federal Court Rules* which provide that objection may not be taken to a question put to the party being examined, merely on the ground that the question is in the nature of cross-examination. But that is not to say that examination for discovery that is in the nature of cross-examination is governed by all of the principles applicable in respect of cross-examination at trial. In particular, the generally accepted principle that counsel may not consult with a person being cross-examined during the course of the cross-examination cannot, I conclude, be extended without reservation to examinations for discovery. To preclude access by counsel to an individual being examined, and the converse, particularly where that individual is a nominee rather than a party and the range of the examination for discovery is broad and detailed, would work against the principles governing examination for discovery quoted earlier from the *Crestbrook Forest Industries Ltd.* decision.

[22] To be noted is Justice Gibson's observation that witnesses should have access to counsel during the examination. Given the nature of the issues and complexity of the matters in dispute in this case, a single witness would be hard put to have every single piece of information readily available to answer questions. As noted, discovery is not a memory contest. Just as Justice Gibson ordered in the *Andersen Consulting* case, the witness here should have access to counsel and consult with counsel during recesses and adjournments for advice and assistance in

assembling evidence for examination and correcting inaccuracies or deficiencies in any answers given during the examination. "Under advisement" should not be used as a weapon to interfere in the flow and conduct of an examination.

[23] A useful summary of the principles relating to examinations for discovery can also be found in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2006 CarswellOnt 6532, a decision of Master Calum MacLeod of the Ontario Superior Court of Justice wherein the following Guiding Principles were set out in paragraph 43 of the decision as follows:

> **Guiding Principles**
>
> [43] The following principles emerge from the case law and the above analysis:
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> (1) Counsel representing a party who is being examined is entitled to interrupt the examining party for the purpose of objecting to an improper question, placing the objection on the record and either directing the witness to answer under protest or not to answer. See rule 34.12 and *Kay v. Posluns* at p. 246.
>
> (2) Counsel may also interrupt the examiner if necessary to ensure the witness and counsel both understand the question. See *Kay v. Posluns* at p. 246.
>
> (3) As a practical matter counsel may sometimes wish to answer a question or to correct an answer but if the examining counsel objects then neither of these are permitted. See rules 31.08, 31.09. See *Kay v. Posluns* at pp. 246-47.
>
> (4) Counsel may choose to re-examine his own client in order to correct an answer or to clarify or explain an apparent admission or inconsistency. Alternatively he or she may provide the correction or clarification subsequently in writing. In either case, the examining party is entitled to the evidence of the witness and not that of counsel. It is the duty of the witness and not counsel to

correct the evidence. See rules 31.09 and 34.11; *Kay v. Posluns* at p. 247.

(5) Counsel must respect the fact that discovery evidence will include an element of cross-examination and should not discuss evidence with the witness during a break. See rule 4.04, *Rules of Professional Conduct*; Chapter IX, *CBA Code*.

(6) In a lengthy discovery or series of discoveries, counsel may consider it necessary to discuss evidence with the witness. Generally the intention to do so should be disclosed to opposing counsel and if there is an objection it may be necessary to seek leave of the court. See Commentary, rule 4.04, *Rules of Professional Conduct*.

(7) If there is a break between rounds of discovery, counsel is free to meet with the client to prepare for the upcoming discovery. It may also be necessary to discuss evidence already given to obtain instructions in regard to discovery motions, to advise the client of the duty to correct answers and to answer undertakings. It is prudent to disclose this intention to opposing counsel. [page 459]

(8) Counsel ought not unnecessarily oppose reasonable discussions between counsel and client provided they are disclosed. It is legitimate on the resumption of discovery to ask the witness under oath if he or she was coached in any way as to what answers to give.

(9) Accusations of professional misconduct ought to be reserved for the clearest of cases based on cogent and persuasive evidence and when such a finding is a necessary and inescapable conclusion.

(10) Motions for direction should only be necessary when counsel for the party being examined has refused all requests to conduct him or herself in accordance with the rules and interference has become so extreme as to render the discovery futile.

(11) Generally speaking, the court will eschew findings that a counsel has breached the *Rules of Professional Conduct* as such but will take notice of those Rules in determining what standard is expected of counsel before the courts. The court may have to make findings of fact that could constitute evidence of professional misconduct. In

> such cases counsel should be afforded reasonable procedural protections.

[24] Master MacLeod then concluded his decision on what could only be described as a halting examination for discovery give the number of interjections by counsel on behalf of the witness as follows:

> [44] In conclusion, the court will not give formal direction pursuant to rule 34.14 in the circumstances of this case. It is a breach of the *Rules of Civil Procedure* to continue to interject to answer questions for the witness or to correct answers if the examining counsel requests counsel not to do so. It was an error in judgment to discuss evidence with the party being examined during a break without first disclosing this intention to the examining counsel. The proper application of rule 4.04 of the *Rules of Professional Conduct* to examination for discovery will depend upon various circumstances including the length of the discovery, the time between discovery sessions and the necessity of counsel advising the client or obtaining instructions. In general, however, the discovery should be treated in the same way as cross-examination at trial. The most prudent course is to disclose the necessity to discuss evidence to examining counsel and examining counsel ought not to unreasonably object. In some cases, if counsel cannot agree, it may be necessary to obtain leave of the court, but the need for court intervention or supervision should be rare. [page 460]
>
> [45] It is apparent from the above that the conduct of plaintiff counsel was in error. On the other hand, the accusation of professional misconduct and a motion for directions was an overreaction. There were, however, important questions of practice involved . . .

[25] In all, Master McLeod's observations are applicable here and counsel should be guided by these principles to the extent they apply. In the circumstances of this case, while there was an unusual number of refusals in the guise of under advisements, in the scheme of things that will usually happen to some small extent on discoveries. Bell ought to have as many answers as possible directly from the witness within the limits outlined above. Notwithstanding the terms of

this Order, it is not intended in any way to fetter the discretion of the Case Management Judge in making any Orders or giving any Directions for the continued conduct of the examinations for discovery.

[26] Bell sought fixed costs in the amount of $10,000. In my view, while Bell has been successful on some relief it sought in this interlocutory skirmish they are entitled to some costs but which costs should be in line with those recoverable in the ordinary course according to the Tariff. I assess costs fixed in the amount of $3,000.00 payable forthwith.

ORDER

THIS COURT ORDERS that:

1. Relevant questions taken "under advisement" during the oral examination for discovery of Ross Jeffrey or Doug Lloyd, the witnesses MediaTube and NorthVu and which MediaTube and NorthVu agree to answer, subject to any Order or Direction of the Case Management Judge shall be given by re-attendance and not in writing.

2. On the continued examination for discovery of the MediaTube and NorthVu witnesses and on the examination of the Bell witness, those witnesses may consult with counsel during recesses and adjournments for advice and assistance to assemble evidence for examination and to correct any inaccuracy or deficiency in any answer given by him or her during the examination.

3. The witnesses may also consult with counsel with respect to the matters in paragraph 2 herein during "off the record" discussions with counsel on consent of examining counsel, which consent should not be unreasonably refused.

4. Pursuant to Rule 246(1) counsel for a witness may answer a question or enlarge upon an answer given by the witness during the examination, unless the examining party objects.

5. Counsel shall permit the witness to answer proper questions and not intervene other than for the purpose of objecting to a question pursuant to Rule 242(1).

6. Costs of the motion are to Bell fixed and payable forthwith in the amount of $3,000.00.

"Kevin R. Aalto"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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