Federal Court  Cour fédérale

Date: 20160921

Docket: T-705-13

Citation: 2016 FC 1066

Toronto, Ontario, September 21, 2016

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

MEDIATUBE CORP. AND NORTHVU INC.

Plaintiffs/
Defendants by Counterclaim

and

BELL CANADA

Defendant
Plaintiff by Counterclaim

ORDER AND REASONS

[1] This Order is made in the context of the trial of an action for patent infringement. The defendant:

a) seeks an Order under Rule 289 of the *Federal Courts Rules*, SOR/98-106, ordering that the plaintiffs include, as part of their read-in evidence under Rule 288, corrections to answers to various questions posed during examinations for discovery of the defendant;

b) objects to the plaintiffs' proposal to read in refusals by the defendant to provide answers to various questions during their examinations for discovery; and

c) seeks to limit the evidentiary effect of any documents included by the plaintiffs with any discovery answers that they read in as evidence under Rule 288.

[2] The bulk of the parties' arguments, and the bulk of these reasons, concern point (a) relating to qualifying read-ins under Rule 289. The other two issues are dealt with briefly at the end of these reasons.

I. Qualifying Answers

[3] Rule 288 permits a party to rely on answers given during examination for discovery of an adverse party as evidence at trial. Rule 289 provides that the Court may order additional portions of the examination for discovery to be included if they should not be omitted. Rules 288 and 289 read as follows:

Use of Examination for Discovery at Trial	**Utilisation de l'interrogatoire préalable lors de l'instruction**
Reading in examination at trial	*Extrait des dépositions*
288 A party may introduce as its own evidence at trial any part of its examination for discovery of an adverse party or of a person examined on behalf of an adverse party, whether or not the adverse party or person has already testified.	**288** Une partie peut, à l'instruction, présenter en preuve tout extrait des dépositions recueillies à l'interrogatoire préalable d'une partie adverse ou d'une personne interrogée pour le compte de celle-ci, que la partie adverse ou cette personne ait déjà témoigné ou non.

Qualifying answers	*Extraits pertinents*
289 The Court may order a party who uses part of an examination for discovery as its own evidence to introduce into evidence any other part of the examination for discovery that the Court considers is so related that it ought not to be omitted.	**289** Lorsqu'une partie présente en preuve des extraits des dépositions recueillies à l'interrogatoire préalable, la Cour peut lui ordonner de produire tout autre extrait de ces dépositions qui, à son avis, est pertinent et ne devrait pas être omis.

[4] I agree with the plaintiffs that I should be guided mainly by jurisprudence of the Federal Court in this motion, though similar issues have been dealt with in other courts.

[5] An important discussion on Rule 289 was provided by Justice Michael Phelan in *Weatherford Canada Ltd v Corlac Inc*, 2009 FC 449 [*Weatherford*]. Though Justice Phelan was not dealing with the issue of discovery answers that had been corrected, he stated that the basic principle of Rule 289 is "to ensure that the answers to questions fairly reflect the true response given."

[6] Another statement of the purpose of Rule 289 is found in *Canada (Citizenship and Immigration) v Odynsky*, [1999] FCJ No 1389 (QL) at para 6 (FCTD), quoting from *Oro Del Norte, SA v Canada*, [1991] FCJ No 986 (QL) (FCTD):

> […] to ensure that evidence from a transcript of examination for discovery which is read in as evidence at trial is placed in proper context so that it is seen and read fairly, without prejudice to another party that might arise if only a portion of the content relevant at [*sic*] to a fair understanding of the evidence read in is given.

[7] Returning to Justice Phelan's discussion in *Weatherford*, he went on to describe in narrow terms the right of a party to force an adversary to include certain discovery answers as part of its evidence:

> 2 … Justice Pelletier (as he then was) in *Canada (Minister of Citizenship and Immigration v. Fast)* [*sic*], 2002 FCT 542, summarized the approach to the issue succinctly – whether the additional material showed either that the witness did not understand the particular question or that the portion being read in was misleading in the sense of suggesting that the witness, at that point, was saying one thing when in fact he/she was saying another.
>
> 3 Justice Gibson, in *Almecon Industries Ltd. v. Anchortek Ltd.* (2002), 17 CPR (4th) 74, gave a slightly broader meaning to the Rule and referred to contextualization. I do not take from that decision anything more than that the question and answer must be seen in the context. For example, a simple affirmative response to a question "Did you do it?" lacks context or subject matter.
>
> 4 However, I do not understand Justice Gibson to mean that other questions and answers on the same subject matter had to be added beyond making clear to what the specific answer related.

[8] Based on these passages, I should permit qualifying read-ins only (i) where the witness misunderstood something in the question put to him, (ii) where the passage read-in by the plaintiffs misrepresents what the witness was saying, or (iii) where the passage read-in by the plaintiffs lacks necessary context or subject matter.

[9] If I were to read these criteria strictly, I might be inclined to deny the defendant's motion. The corrected answers do not fit perfectly with any of them: there is no suggestion that the witness misunderstood a question put to him, or that the passages read-in by the plaintiffs misrepresent what the witness was saying, or lack necessary context or subject matter.

[10] However, as stated above, Justice Phelan was not dealing with the issue of discovery answers that had been corrected.

[11] Corrected discovery answers were in issue in *Apotex Inc v Astrazeneca Canada Inc*, 2012 FC 559 [*Astrazeneca*] and in *Marchand v Public General Hospital Society of Chatham*, [2000] OJ No 4428 (QL), 51 OR (3d) 97 (Ont CA) [*Marchand*], which is referred to in *Astrazeneca*. The principal focus of both of these decisions was whether the corrected answers were even admissible as evidence rather than whether they could be read in. However, in both cases the Court, in addition to finding that the corrected answers were admissible, also concluded that they should be treated as read in (see *Astrazeneca* at para 23, *Marchand* at para 85).

[12] I am sympathetic to the plaintiffs' argument that the defendant could adduce its own evidence to contradict the discovery answers it originally gave, and there is therefore no need in these circumstances to force the plaintiffs to include the corrected answers as part of their evidence. However, in my view it would be a greater wrong if the plaintiffs' read-in evidence of the defendant's answers were to omit the corrections and thereby misrepresent what the defendant actually answered in the end. In order to ensure that the evidence read-in fairly reflects the true responses given (as contemplated in *Weatherford* at para 2), the corrected answers must be included. If the defendant indeed has the right to correct its answers (which is agreed), then surely that must include the right to supersede its original answers.

[13] I am not concerned that there is any danger in this case that the defendant is attempting to adduce evidence through discovery and to avoid having to adduce its own evidence. The

defendant has stated repeatedly during the trial that it will put forward witnesses to testify with regard to the corrected answers, and I expect that it will do so. Those witnesses can then be cross-examined.

[14] More importantly, even with the corrected answers admitted as evidence, it remains for me as the trial judge to consider the weight to be given to that evidence in light of the evidence overall and the parties' arguments concerning issues like the timing of the corrections and the answers originally provided.

[15] I am not inclined to exclude references in the corrected answers to the "How it Works" documents provided by the defendant. Though it is well-understood that these documents are not entitled to much weight unless they are discussed by a witness who can be cross-examined, they are referred to in certain of the corrected answers and may indeed be helpful to understanding those answers.

II. Reading In Refusals

[16] I agree with the defendant that a refusal to answer is not an answer that can be read in. However, to the extent that some of the alleged refusals are not outright refusals, and actually provide an answer of some sort (as argued by the plaintiffs), the answer may be read in.

[17] I disagree with the plaintiffs that refusals may be read in for their relevance to costs. If the defendant improperly refused to answer certain questions posed during discovery, the proper recourse was a motion to compel the defendant to answer. An Order on such a motion would

address costs where appropriate. Short of such an Order, the defendant was not required to answer. I cannot see room for cost consequences from a party rightfully refusing to answer a discovery question unless the refusal was later replaced with an answer. In the case of a refusal that was later replaced with an answer, the initial refusal may be relevant to costs and may be read in.

III. Documents Submitted with Read-Ins

[18] There appears to be little disagreement between the parties here.

[19] The defendant expresses concern that the plaintiffs propose to include with their read-ins some documents that, presumably, are relevant to the answers read in. The defendant does not object, but it argues that such documents can only clarify the discovery answers to which they relate and cannot be relied on for the truth of their contents.

[20] The plaintiffs agree that this is the case to the extent that the content of the document in question is inadmissible hearsay.

ORDER

THIS COURT ORDERS that:

1. For any of the defendant's discovery answers that the plaintiffs read-in to evidence, the plaintiffs shall also include as part of their read-ins any corrections that have been provided by the defendant.

2. Refusals by the defendant to answer certain questions on discovery may not be read in as evidence unless the refusal was later replaced with an answer.

3. Documents included in the plaintiffs' read-ins are not thereby evidence of the truth of their contents.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-705-13
STYLE OF CAUSE:	MEDIATUBE CORP. AND NORTHVU INC. v BELL CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 19, 2016
ORDER AND REASONS:	LOCKE J.
DATED:	SEPTEMBER 21, 2016

APPEARANCES:

Robert H.C. MacFarlane Joshua W. Spicer Amrita V. Singh	FOR THE PLAINTIFF MEDIATUBE CORP.
Steven G. Mason Fiona Legere	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Bereskin & Parr LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF MEDIATUBE CORP.
Dimock Stratton LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF NORTHVU INC.
McCarthy Tétrault LLP Barristers and Solicitors Toronto, Ontario	FOR THE DEFENDANT