Alberta Court of Queen's Bench clarifies rules for amending undertaking responses

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Summary

In November 2021, the Honourable Madam Justice E. Sidnell released a procedural decision regarding amending a party's undertaking responses in the case of *Signalta Resources Limited v. Canadian Natural Resources Limited*, 2021 ABQB 867. The decision relates to an attempt by the defendant, Canadian Natural Resources Limited (CNRL), to clarify or replace five of its undertaking responses (UTRs) several days before trial. The five UTRs in question were given by its former corporate representative several years earlier. The plaintiff had prepared to read-in the defendant's UTRs at trial pursuant to the *Alberta Rules of Court*, Alta Reg 124/2010 (the Rules).

The trial judge refused to allow CNRL's amended UTRs to be read-in at trial and held that CNRL's failure to provide an affidavit, setting out the corrections to CNRL's evidence in accordance with Rule 5.27 of the Rules, created prejudice that could only be overcome by rejecting the amended UTRs.

This decision confirms the requirement for affidavit evidence, as a matter of fairness, when correcting an answer given under Rule 5.27. Parties are entitled to rely on evidence, given under oath during questioning, in preparation for trial and to read-in that evidence at trial. Failure to provide an affidavit setting out any corrections to a party's questioning evidence is fatal to the admission of any corrections at trial. Further, the correcting affidavit must be by the same corporate representative who gave the evidence under oath in the first place. It is not enough to have a new corporate representative swear an affidavit correcting the evidence of a former corporate representative.

Background

At issue was the defendant's objection to five of the read-ins presented by the plaintiff, Signalta Resources Limited (Signalta) at the conclusion of its case at trial. CNRL objected on the basis that it needed to clarify its response to one undertaking and to replace its original responses to four other undertakings.

CNRL's original corporate representative, appointed in 2010, provided 294 responses to undertakings given in questioning conducted between 2014 and 2017. Following an adjournment of the trial originally set for June 2019, CNRL replaced its corporate representative twice, the most recent being in September 2021 less than two months before the rescheduled trial date.

CNRL indicated that during the latest corporate representative's review of the materials, the latest corporate representative noted several UTRs which he believed required explanation or clarification. CNRL amended the five UTRs and provided them to Signalta five days before the trial.

Amending undertaking responses

Rule 5.29(1) of the Rules permits evidence given by a corporate witness to be read-in at trial where the corporate representative, under oath, acknowledges the evidence as the evidence of the corporation. Rule 5.27 of the Rules requires a person who gave answers in questioning to swear to a correcting affidavit if the original answer was incorrect or misleading, or becomes so as a result of new information. The correcting affidavit must be made and served on each of the other parties as soon as practicable after the person realizes that the answer was or has become incorrect or misleading.

Prior to this decision, there was a paucity of case law interpreting rule 5.27. One Alberta case mentioned that an affidavit under rule 5.27 is required in order to advise examining party of the case to be met (*Keyland Development Corp v. Cochrane (Town),* 2014 ABQB 458). Case law from Ontario in *Capital Distributing Co. v. Blakey* (1997), 33 OR (3d) 58 (ONSC)suggested that when a party sought to amend undertaking responses, both the original and amended answer should be allowed into evidence. *Capital Distributing Co.,* however, was decided based on rule 31.09 of the Ontario *Rules of Civil Procedure,* which does not require an affidavit to amend undertaking responses.

The court's decision

The trial judge in this case considered several of the Rules, including rules 5.4, 5.17, 5.27, 5.29 and 5.30. The judge found that the corporate representative has an obligation under Rule 5.4(2) to be reasonably prepared to answer questions on behalf of the corporation, and an equivalent duty to correct an initial answer if that answer was incorrect or misleading. This correction, must, however, be made by affidavit served on each of the other parties in order to maintain the safeguard of evidence given under oath, avoid ambush at trial, and grant the opposing party the opportunity to cross-examine the corporate representative as to why, how and when the evidence changed.

The trial judge held that failure to provide an affidavit in compliance with Rule 5.27 deprives the opposing party of the opportunity to cross-examine on these topics, and may create prejudice. The judge emphasized that parties are entitled to rely on evidence from questioning in preparation for trial and to read-in that evidence at trial.

The judge distinguished *Capital Distributing Co v. Blakey* on the basis that the plaintiff in that case only argued that prejudice would arise if the original response was not read-in along with the corrected response. Given that the parties had been ready to proceed to trial for more than two years in this case, the judge found that the result of the late

amendments was “clearly prejudicial to” Signalta. The evidence Signalta sought to rely on evaporated “on the eve of trial” without an opportunity to cross-examine the affiant on changes to the evidence.

The judge also held that the “person” required to swear an affidavit correcting earlier evidence under Rule 5.27 must be the actual person who gave the evidence under oath in the first place. It is therefore not enough to simply have a new corporate representative swear an affidavit correcting the evidence of a former corporate representative.

Implications

This decision confirms the law in Alberta for correcting responses to undertakings under part 5 of the Rules. Failure to provide an affidavit made under oath, by the same corporate representative, setting out corrections to a party’s evidence may create prejudice that can only be overcome by disallowing the proposed corrections at trial.

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