Court of Queen's Bench of Alberta

Citation: Rieger v Plains Midstream Canada ULC, 2019 ABQB 666

2019 ABQB 666 (CanLII)

Date: 20190828
Docket: 1201 07932
Registry: Calgary

Between:

Suzanne Rieger and Darin Rieger

Plaintiffs

- and -

Plains Midstream Canada ULC

Defendant

Reasons for Decision on Application to Compel Undertaking Responses of the Honourable Mr. Justice G.H. Poelman

---

I. Introduction

[1] This application is made in a proposed class action commenced on June 22, 2012.

[2] The defendant was the owner and operator of an oil pipeline, part of which was located near Sundre, Alberta near the Red Deer River. The plaintiffs allege that the pipeline ruptured near Sundre, releasing light sour crude oil into the river and ultimately into Gleniffer Lake. The action seeks relief in strict liability, negligence, nuisance and trespass.

[3] The plaintiffs filed an application for certification on March 26, 2013. It is scheduled to be heard early next year.

[4] The parties have conducted cross-examinations on affidavits filed in preparation for the certification hearing. This application seeks to compel responses to undertakings refused by Greg Filipchuk, the deponent in affidavits submitted on behalf of the defendant.

II. Legal Principles

[5] Important differences between cross-examinations on affidavits and examinations for discovery (both of which are now, confusingly, called "questioning" in the *Alberta Rules of Court*) explain why there are different tests for whether a witness may be compelled to give an undertaking to provide answers not immediately known or produce documents not present at the examination. Someone who is cross-examined on an affidavit is a witness for the purpose of a pending application, very much like a witness at trial: *Rozak Estate v Demas*, 2011 ABQB 239, 53 Alta. L.R.(5th) 368, para 38. The affidavit takes the place of a direct examination. The deponent is not, except incidentally, a party but a witness giving evidence relevant to the application.

2019 ABQB 666 (CanLII)

[6] In contrast, someone examined for discovery answers questions as a party or, in the case of a corporation, the representative of that party or someone closely affiliated with the party (such as present or former employees and present or former auditors): rule 5.17. On an examination for discovery, the party is expected to be fully informed to answer questions on all matters relevant and material to the issues in the action: rules 5.25, 5.30 and 5.2(1). The broad scope of the questioning and the fact that the process is for the benefit of the examining party requires a more liberal approach to requiring undertakings to provide information not within the immediate knowledge of the party being examined: rule 5.30(1).

[7] Thus, witnesses cross-examined on affidavits are treated "with greater restraint as to undertakings" than parties being examined for discovery: *Rozak Estate*, para 41. Undertakings should only be directed where the deponent referred to information or documents in the affidavit (or must have reviewed information or documents to make the statements in the affidavit); or the undertakings relate to an important issue in the application and answering them would not be overly onerous and "would likely significantly help the court in the determination of the application": *Dow Chemical Canada Inc. v Shell Chemicals Canada Ltd.*, 2008 ABQB 671, 97 Alta. L.R. (4th) 182 (M), para 5.

[8] The approach taken to requesting a defendant to disclose information before certification of a class action is consistent with Alberta's restraint in requiring undertakings when being cross-examined on an affidavit. Many cases hold that there is no general right to pre-certification disclosure, because it would overburden and delay the steps toward a certification hearing: *Matthews v Servier Canada Inc.*, 1999 CarswellBC 411 (BCSC), paras 5 and 6; *Charlton v Abbott Laboratories Ltd.*, 2013 BCSC 21, para 44. Part of the concern is ensuring that pre-certification procedures do not become "bogged down" in issues going to the merits of the alleged causes of action: *Murray v Alberta (Minister of Health)*, 2007 ABQB 231, para 13.

[9] The court has discretion whether to order pre-certification disclosure: *Pro-Sys Consultants Ltd. v Microsoft Corp.*, 2013 SCC 57, 364 D.L.R. (4th) 573, para 119. In judicially exercising that discretion, British Columbia cases hold that the court will require the party seeking production to demonstrate that the records are "necessary in order to inform the certification process": *Matthews*, para 5; *Charlton*, para 35.

[10] Thus, both the general test on whether to enforce undertakings arising from cross-examination on an affidavit and the test for disclosure before certification of a class action require focusing on the issue to be determined at the application. In contrast to other jurisdictions, in Alberta there is a presumptive right to cross-examine on an affidavit: rule 6.7. Thus, for practical purposes disclosure requests before certification hearings usually arise in the context of undertaking requests made during the cross-examination. In my view, there is no material difference between the *Dow Chemical* rule that the undertaking answer would likely significantly help in determination of the application and the British Columbia rule that the party seeking production must demonstrate that the information is necessary to inform the certification process.

[11] Relevance for the purpose of certification is determined by the five requirements set out in section 5(1) of the *Class Proceedings Act*, S.A. 2003, c. C-16.5. In brief, certification requires that the pleadings disclose a cause of action, there be an identifiable class of two or more persons, the claims of the prospective class members raise one or more common issues, a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, and there is an appropriate proposed representative. The first requirement can be addressed by examining the pleadings; there must be a sufficient evidentiary record for the remaining four requirements: *Murray*, para 11.

[12] Section 5(2) includes a list of factors which, at minimum, the court must consider when determining whether a class proceeding would be the preferable procedure (the fourth requirement identified in section 5(1)). Those factors include consideration of other proceedings or other means of resolving the claims. The preferability inquiry must be conducted in the context of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice, but the ultimate question is whether other available means of resolution are preferable, not whether a class action would fully achieve those goals: *AIC Limited v Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, paras 22 and 23. The party seeking certification has the onus of showing that the class proceeding would be a fair, efficient and manageable method of advancing the claim and that it would be preferable to any other reasonably-available means of resolution: *AIC*, para 48.

III. Findings

A. Overview

[13] The undertakings seek documents and information about communications between the defendant and members of the proposed class about an extensive claims and settlement process implemented after oil was released into the Red Deer River. Affidavits sworn by Mr. Filipchuk and documents he provided in response to uncontested undertakings indicate that the defendant took steps to control the effects of the release and work with authorities, community members, landowners and residents on a clean-up and remediation program. It also very quickly implemented a settlement process.

[14] These steps included issuing a series of “Information Updates” available to all interested persons. Settlements were concluded with 517 residents and property owners, each of whom signed releases of further claims. Copies of the releases, with names, locations and amounts redacted, were provided to the plaintiffs and form part of the record on this application.

2019 ABQB 666 (CanLII)

[15] The undertakings that remain in dispute seek documents and information about communications between the defendant and members of the proposed class about the claims and settlement processes. If answered, the undertakings would disclose contents of the emails from persons communicating with the defendant about claims, the names of people who called a toll-free line established by the defendant, the list of contacts through a portal on the defendant's website, the total compensation paid to the 517 claimants who settled, and the "top and bottom" compensation paid to individuals.

[16] As indicated earlier, it must be determined whether the requested information would likely significantly help determine the certification application or, which is the same thing, is necessary to the certification process. Thus, the disputed undertakings should be considered in the context of the five requirements for certification identified in section 5(1). It cannot seriously be contended that the requested information significantly bears on whether the pleadings disclose a cause of action, whether there is an identifiable class of two or more persons or whether there is a proper representative plaintiff. In any event, I am satisfied that these will not be a basis for the defendant's objection to certification.

[17] Likewise, it does not seem that whether there are common issues will be a serious point of contention. The plaintiffs submit that settlements and their details (including location of lands owned or occupied by settling parties) may help establish some basis in fact for wrongdoing, because even *ex gratia* settlements may help to establish the fact of wrongdoing. However, this is not a persuasive argument for necessity of the undertakings. The certification stage does not involve an assessment of the merits of the claim but rather the focus is on the form of the action: *Pro-Sys Consultants Ltd.*, paras 99-104; *AIC*, para 39.

[18] In any event, to the extent the plaintiffs rely on settlements as some evidence of wrongdoing, the affidavits, cross-examination and undertaking responses of Mr. Filipchuk contain extensive information about the process by which settlements were completed and contents of general communications from the defendant to affected residents and landowners. Whether there is a geographical pattern of settlements that might be relevant to establishing liability has no bearing at this stage, because the plaintiffs' proposed class definition involves a broad "imperfect quadrangle" defined by particular highway numbers.

[19] The defendant's main argument at the certification hearing likely will be that a class action would not be the preferable procedure for a fair and efficient resolution of the common issues, because the claims have been the subject of other proceedings, namely the defendant's claims and settlement process, that were fair and advanced the goals of access to justice. As I stated earlier, there have been 517 settlements. Plaintiff's counsel was unable to provide me with an estimated total class size for comparison purposes.

[20] The plaintiffs raise concerns about whether the defendant adequately informed potential class members about their rights before making settlement agreements with them. Part of their concerns relate to whether the defendant should have engaged in settlement negotiations without notifying plaintiffs' counsel because of a *sui generis* relationship between counsel for a proposed representative plaintiff and proposed class members, as addressed in *Lundy v VIA Rail Canada Inc.*, 2012 ONSC 4152, paras 28-39; and *Fantl v Transamerica Life Canada*, 2008 CarswellOnt 2249, paras 49-51 and 78-80. More significantly, there is the question whether a defendant in a proposed class action, if seeking to settle with proposed class members, should disclose the existence of a proposed class action to ensure the alternative resolution procedure is fair and

2019 ABQB 666 (CanLII)

claimants are adequately informed of their rights: *Pearson v Inco Ltd.* (2001), 57 O.R. (3d) 278 (S.C.J.), para 18; *Lewis v Shell Canada Ltd.* (2000), 48 O.R. (3d) 612 (S.C.J.), paras 12-19.

[21] Given the position taken by the defendant, the process it followed in settling with 517 claimants may be relevant at the certification hearing. However, a certification hearing is not the occasion for a detailed inquiry into all aspects of the processes followed by the defendant. More to the point, that is not what is sought on this application to compel undertakings.

B. Disputed Undertakings

[22] I turn now to the specific undertakings on which a ruling is sought. Again, the test is whether the information requested would significantly help in determining the certification issue or is necessary to inform the certification process.

[23] In my view, none of the undertakings seek information that meets the test for compelling answers to undertakings before certification. In particular:

- Undertaking 3 asks for 127 emails received by the defendant in its claims inquiries process. Reviewing the contents of communications would not, in my view, significantly help the court determine whether there is a preferable alternative resolution process.
- Undertaking 5 requests the list of people who called a toll-free line. Identifying individuals who contacted the defendant adds nothing to an analysis of whether this action should be certified.
- Undertaking 10 requests the list of contacts made through a website portal. As with the list of individuals who contacted the toll-free number, these particulars are of no use to the court in deciding whether to certify the action.
- Undertaking 13 requests advising of the total compensation paid. The total settlement amount is of no relevance to the certification hearing. One global number, without taking into account the variables involved in each settlement, is meaningless at this stage of the proceedings. At best, it would be of some limited tactical use to the plaintiffs, but that is not the test for relevance.
- Undertaking 14 requests the "top and bottom compensation paid." Again, these numbers by themselves have no relevance on a certification hearing, and would be of doubtful relevance (except for tactical purposes) if certification is granted. There are too many variables involved in each settlement to make this information relevant.

[24] Some of the concerns raised by the plaintiffs are not the subject of the requested undertakings. Thus, the undertakings do not request information about whether the claimants who settled were given information that a proposed class action had been commenced or whether the settling claimants were otherwise aware of that information. If those facts are important to the certification hearing, the parties must make their arguments based on the record before me. The arguments might include submissions on who has the onus of proof on that point and what inferences, adverse or otherwise, should be drawn from the evidence in hand.

2019 ABQB 666 (CanLII)

[25] For the reasons given, the plaintiffs' application to compel undertaking responses is denied.

Heard on the 30th day of July, 2019.
Dated at the City of Calgary, Alberta this 28th day of August, 2019.

2019 ABQB 666 (CanLII)

G.H. Poelman
J.C.Q.B.A.

Appearances:

E.F.A. Merchant, Q.C. and J.E. Merchant
for the Plaintiffs

K. Osaka
for the Defendant