March 3rd, 2008

Fading to Brown: Limits on Evergreen Discovery in Alberta

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Cases Considered:

Dabrowski v. Robertson, 2007 ABQB 680

This decision by Madam Justice Joanne Veit of the Alberta Court of Queen's Bench clarifies that counsel and parties to litigation in Alberta do not currently have an obligation to provide "evergreen" oral discovery. Counsel may have an obligation to disclose "after-acquired information" if it is requested by opposing counsel, and may have an obligation to correct misleading evidence provided by a witness. However, neither of those obligations requires them or their clients to disclose that the witness's evidence at trial will be different from that given at discovery because the witness's memory of events has now improved. The case also clarifies that while the Law Society remains the "best authority on compliance by its members with its Code of Professional Conduct," "a lawyer's ethical responsibility exists at common law, independently of any Code of Conduct" (para. 22 and 26).

The judgment arose as a result of the unsuccessful Plaintiff's attempt to resist payment of $187,000 in trial costs. The bill of costs included double costs because of the Plaintiff's earlier refusal of an offer of settlement from the defendant. The Plaintiff argued that he should not be required to pay costs on the grounds that the Defendant had given misleading evidence on discovery that had not been corrected prior to trial.

The key issue in the case was with respect to whether the Defendant had caused the Plaintiff to drive into a ditch. The Plaintiff argued that the Defendant had done so because she had stopped in the travel lane or, in the alternative, because she had stepped out of the vehicle into his path. The Court rejected both of these arguments. Based on the Defendant's testimony and that of various witnesses, the court concluded that the Defendant had parked on the shoulder of the highway and had not stepped out of the vehicle.

At discovery, however, the Defendant had testified that after pulling over to the shoulder she had opened her door to clean her windshield. In her initial statement to the police, and at trial, her testimony was that she had not yet left her car when she saw the Plaintiff's vehicle going into the ditch. The Plaintiff was given the Defendant's statement to the police during the first week of trial; no adjournment was requested at that point.

Justice Veit found no misconduct, or conduct warranting a variation in the order of costs, in the Defendant's failure to correct the discovery evidence or otherwise indicate to the Plaintiff the nature of the testimony which would be given by the Defendant at trial. With respect to Chapter 4 Rule 2 of the Law Society of Alberta's Code of Professional Conduct, which requires that a lawyer correct any misleading statements made by the client, Justice Veit noted, first, that the application of this Rule rests largely within the jurisdiction of the Law Society. Moreover, she held that it is not obvious that the Rule has any application here: "A change in discovery evidence about a litigant's memory of an accident may not come within the range of facts or representations intended by the Law Society" – in other words, evidence believed to be true at the time, which an improvement in memory indicates is no longer true, may not be misleading evidence requiring correction. In addition, since it was conceded that the statement to the police was privileged, the Rule (which is subject to confidentiality) may not apply.

Justice Veit also declined to find any obligation on the Defendant or her counsel under the Rules of Court. Unlike many other provinces, Alberta's Rules of Court do not currently require correction of discovery answers that have ceased to be "correct and complete". Further, even in provinces that impose this obligation, it is not obvious that the type of failure to correct that arose here – where there was no prejudice to the Plaintiff – would justify denying the Defendant the otherwise warranted award of costs. The changed evidence was what the Defendant was obliged to provide given her refreshed memory, and it was not evidence that the Plaintiff would have approached differently had he been aware of it: "there was nothing Mr. Dabrowski [the Plaintiff] could investigate, no additional evidence that he could obtain, that could possibly deal with Ms. Robertson's [the Defendant's] change of memory" (para. 32). His only option – whatever the time of disclosure – was to put the Defendant's discovery evidence to her and suggest that it "was more reliable than her trial evidence".

Two ways of looking at this judgment merit consideration. First, it demonstrates an attempt to balance the lawyer's obligation to provide resolute advocacy for her client, and the client's right to test her case through the adversarial system, with the need for a lawyer to help ensure that the justice system functions effectively. If a lawyer and her client have no obligation to ensure the evidence given on discovery is not misleading, or to alert the other side of significant shifts in the evidence or factual position which will be asserted at trial, the justice system will be undermined by gamesmanship and "Rambo" tactics. On the other hand, counsel for the defendant is not obligated to make the plaintiff's case for him: if the plaintiff does not ask follow up questions about the evidence given on discovery then the risks of that may appropriately lie with the plaintiff.

It is questionable, though, whether the balance drawn by the Alberta Rules of Court between resolute advocacy and ensuring the proper functioning of the justice system is appropriate. While the Plaintiff in this case may not have been unduly prejudiced by the shift in the Defendant's evidence, the usefulness of discovery as a tool for avoiding surprise and "ambush" at trial is also undermined by the Plaintiff not being alerted to the shift in the Defendant's position. It may also be undesirable to have the ethics or legitimacy of the conduct of counsel and her client turn so significantly on a parsing of the nature of the difference between what was indicated at discovery

and what is now to be claimed at trial. A more straightforward rule requiring correction of discovery evidence that was “incorrect or misleading” or that “becomes incorrect as a result of new information” – such as has been proposed in Alberta, would be a desirable improvement.

Second, the judgment indicates the uncertain relationship between Canadian courts and provincial law societies with respect to governance of lawyer’s ethical conduct. Courts correctly assert jurisdiction over that conduct insofar as it relates to the functioning of the judicial process; however, as indicated by this decision, they also retain some level of deference to the provincial law society as “the best authority on compliance by its members with its Code of Professional Conduct”. While the regulatory authority of the law societies is not questioned, the historical reluctance of law societies to exercise that authority in any but the clearest cases of misconduct may suggest that the faith of Justice Veit is misplaced, and that the courts should be more willing to exercise their jurisdiction over the conduct (or misconduct) of lawyers appearing before them.