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Kaddoura v Hanson: The Alberta Rules of Court Regarding Disclosure Work; Delay Tactics Sourced In Old Rule Logic and Old Rule Opinion Do Not

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Case Commented On: *Kaddoura v Hanson*, 2015 ABCA 154

In *Kaddoura v Hanson*, 2015 ABCA 154, the Alberta Court of Appeal eliminated from current and future consideration several old arguments regularly advanced under the old Rules of Court by parties wanting to avoid complete record disclosure and wanting to use the available motions process and its concomitant rights of appeal to delay the discovery process. In a case concerning the record disclosure obligations of third-partied lawyers alleged by straw buyers in mortgage fraud schemes to bear concurrent or exclusive responsibility for the plaintiff bank's losses, the Court of Appeal solidified an understanding that the "new" Rules were meant to improve efficiency and reduce cost, in particular by limiting the delay and avoidance tactics previously available and oft-used by litigants under the old Rules. The message to litigants in Alberta is that the new Rules are unambiguous, and they work. Recycled arguments previously used to limit the application of the Rules to current discovery obligations will fail.

Obligations of "Mortgage Fraud" Litigants

Although it seems unlikely that the unanimous Court (Justices Martin and Slatter, JJ.A., and Justice Yamauchi, J. (ad hoc)) intended to narrow the compass of its decision such that it apply only to cases involving mortgage fraud litigants, the Court did open with a clear statement of a very narrow issue, namely (at para 1):

> These two consolidated appeals raise issues about the obligations of "mortgage fraud" litigants to produce documents that are in the possession of lawyers sued in that litigation...

Most of what is decided here undoubtedly applies generally to the interpretation and application of the disclosure rules, but some of it may well only apply to particular cases as they are set out in particular, unique pleadings.
After setting out that limiting statement of the issue, the Court then defines mortgage fraud, sets out the various participants, and then explains why knowing the various participants is important for these matters of documents disclosure (at paras 2-5).

The Royal Bank sued two straw buyers in separate lawsuits. Those straw buyers then third-partied the lawyers involved, alleging that they knew or ought to have known that the underlying real estate transactions were not legitimate.

What then makes it possible that the decision is intended to apply narrowly is the description of the documents regarding which disclosure is sought and their intended use during the discovery process, namely, a creative application of the similar fact evidence rules as applied in the civil context.

The claims of the straw buyers against the lawyers are based on allegations regarding either their complicity in the mortgage scheme, their actual knowledge of the underlying facts, or their failure to realize that the transactions were illegitimate and to advise the straw buyer clients accordingly. In order to prove that portion of the claim, the straw buyers seek access to other client files in their lawyers' offices relating to similar transactions. As the Court says (at para 11):

> The respondents' proposed line of argument is that if the lawyer was involved in numerous other files involving the same main fraudster, it would support an inference that the lawyer actually knew, or "ought to have known" that something illegitimate was going on. In other words, the straw buyers seek to use circumstantial evidence to prove the state of mind or state of knowledge of the lawyers. Irregularities in any one real estate file may simply be an aberration; a pattern of files with similar irregularities arguably calls for an explanation. In order to support this line of argument, the straw buyers seek production of other client files in the lawyer's offices involving the same alleged main fraudster or bank loans officer. The argument is that if those files disclose a pattern of irregularities, it will assist the straw buyers in proving one of the issues in the litigation.

The Court then cited two old cases decided before *R. v. Handy*, 2002 SCC 56, in support of the proposition that while similar fact evidence is more commonly used in criminal trials, it can be used in civil ones (*Mood Music Publishing Co. v De Wolfe Ltd.*, [1976] Ch 119, [1976] 1 All ER 763 (CA); *Greenglass v Rusonik*, [1983] OJ No 40 (CA), cited at paras 12-13). The brief summaries of the reasoning in those cases demonstrate that they were throw-backs to a time when *Makin v. Attorney-General for New South Wales*, [1894] AC 57 (PC), was the leading case regarding the admissibility of otherwise inadmissible character evidence.

If the current case ever comes to trial, the inclusionary judicial discretion created by the Supreme Court of Canada in *Handy* will apply, and, on the logic set out in the quoted para 11 above, admissibility will not be an issue, as probative value will almost certainly exceed prejudicial effect and pass the other limiting tests set out in the *Handy* decision.

Rule 5.2: Litigants Must Disclose that which is Relevant and Material; the Old Limiting Arguments No Longer Apply and Should not Be Argued [Ever Again]

The Court was obviously satisfied, as were the two courts below, that proof of such similar conduct evidence easily met the requirement of Rule 5.2 of the *Alberta Rules of Court* that all documents must be disclosed which: "could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings, or to ascertain evidence that could reasonably be expected to significantly help determine one or more issues raised in the pleadings.

The Court was surely correct in that conclusion. If, upon a review of the lawyer's real estate files, a pattern of conduct is discoverable that demonstrates the kind of mental state needed to prove liability for complicity in mortgage fraud, the test is obviously met. Without those files,

and all of them, nothing could be harder than proving liability of lawyers on such allegations. There would almost certainly be no direct evidence, leaving only circumstantial evidence of the type described. Unless the practical approach promoted by the Court here is taken to the application of Rule 5.2 to these facts, the discovery process itself would cause the premature defeat of what might otherwise be a good claim.

Without such persuasive circumstantial evidence, the requirement, set out by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, that trial courts assess the inherent probabilities and inherent improbabilities of the likelihood of certain conduct or facts before a court finds that the standard of proof has been met would almost certainly foreclose the possibility of a finding of liability against a lawyer. In accordance with the understanding set forth by the SCC regarding "inherent improbabilities", a trial judge would be reticent to find liability of such a blameworthy nature regarding a lawyer, who, by virtue of his or her position as a barrister and solicitor having sworn an oath to uphold the law, renders inherently improbable such defalcation. (See my prior post on this subject here).

Historically, arguments accepted under the old Rules of Court to limit the disclosure obligations of litigants sometimes worked just that way, that is, to defeat claims really before they ever got started. In *Kaddoura v. Hanson*, the appellants tried to use all of the arguments from the old Rules to defeat this neat application of Rule 5.2.

Fortunately for all who wish to see renewed efficiency in the discovery process, the Court appears to have eliminated four of the most popular and most successful arguments from bygone days for refusing even to disclose relevant and material records:

- There is no longer any value, if there ever was, in arguing that a litigant need not disclose documents of "secondary" or "tertiary" relevance (at para 15). Those terms, the Court states conclusively, are "not helpful" and are too imprecise to assist in determining relevance. The Court does state that there are limits to what may be relevant and material at the disclosure stage, but they are not understood, if they ever could have been, by the old terminology. Rather, the language used in *Dow Chemical Canada ULC v Nova Chemicals Corp.*, 2014 ABCA 244 (CanLII) at para 21, now sets the limit: "Production of records is not required just because some remote and unlikely line of analysis can be advanced, and it will not be ordered to support lines of pretrial discovery that are unrealistic, speculative, or without any air of reality".

- The Court similarly dispatched the argument by an intervenor, the Law Society of Alberta, that the relevant documents need not be disclosed because the straw buyers "already know the answer" (at para 16). Referring to the discovery purpose of obtaining admissions to eliminate trial issues, the Court put paid to that argument. With luck, it will never be used again in one of these applications.

- With equal efficiency and verve, the Court eliminated one of the favourite opinions of many masters and judges along the way, that the litigant need not disclose records because the party opposite was on a "fishing expedition" (at para 17). Nice image but it has no application to the discovery and disclosure of records in litigation in Alberta. Look to the Rules, the Court says, in short. The "fishing expedition" defence has always been an improper reversing of the onus onto the litigant entitled to disclosure and discovery. As the Court says (at para 17), "the onus is on the other litigant to review its own records and prepare an affidavit of records listing relevant records that do exist" (citations

removed). That historical reverse onus was good for overall efficiency. Applied as it would have been here by the appellants, it would have resulted in the similar conduct evidence, if any, being buried and in the third party claim being eliminated, denying the straw buyers the ability to try to develop their arguments based upon circumstantial evidence. Thus that old argument was "efficient", because it brought to an end many cases for lack of proof by many a plaintiff, but it was fundamentally unjust and almost surely incorrect at least on some occasions, such as it would have been if applied here, and perhaps on most occasions.

- Finally, the Court eliminated the ultimate argument of desperation by disclosing litigants that "there are other ways" for the party to obtain the information they seek (at para 18). Here, for example, the third party lawyers argued that the straw buyers could conduct research at Land Titles. The Court simply pointed them back to the Rules, which create "an efficient, structured, and comprehensive method of obtaining relevant and material information in litigation" (at para 18). The Rules create an **obligation** to disclose, which obligation creates a concomitant **right** in the other litigant to receive the disclosure, which right does not include compromising obligations to go to the local library or any other local government office to try to make up its own discovery process before being entitled to assert the right so created.

It would be a benefit to us all, particularly to those who seek access to justice through an efficient process of discovery, if none of these arguments were ever made again. By so concisely dispatching them, the Court of Appeal has sent a clear message to litigants to stop wasting time with them.

Privilege and Confidentiality

The appellant lawyers and the intervenor Law Society then argued several more old arguments designed to thwart the efficient, structured, and comprehensive method for the disclosure of relevant and material records, namely, as summarized by the Court (at para 20):

> The appellants and the Law Society argue that i) the Master's order compromises the privilege over the files; ii) the files are third party records and should only be obtained using the procedure under R. 5.13; and iii) the Master's order was made without notice being given to the clients.

After acknowledging, if it were ever in doubt, the fundamental importance of solicitor-client privilege (at para 19), the Court eliminates these arguments by a reference, not to new law or to a change to or to compromise of fundamental principles of law, but to that old bug-bear of parties wanting to delay proceedings: to the matters at issue in the application at bar as raised in the Notice of Motion.

As to privilege, the Court said this, likely in response to hifalutin arguments that tried to persuade them to deal differently with this issue than had the Court below. The problem for the appellants and the Law Society was simple: privilege was not engaged on the application or the appeal from the decision of the Master on that application. Nonetheless, the Court repeated for those who held any doubts (at para 19):

> It is not disputed that solicitor and client privilege is one of the most carefully guarded principles of our legal system: *Canada (Privacy Commissioner) v Blood Tribe*

> *Department of Health*, 2008 SCC 44 (CanLII) at para 9, [2008] 2 SCR 574; *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII) at paras 44, 120; *University of Calgary v JR*, 2015 ABCA 118 at para 19.

Here, the straw buyers had not sought production of documents but only disclosure. From the Master below, they had obtained only disclosure. On appeal to a Justice in Chambers, the appellants got the last protection to which they were entitled, which should have obviated the need to appeal further, namely, the Justice in Chambers ordered that the records be disclosed not with reference to client names but anonymously. The Court of Appeal was very clear in its admonition here, saying (at para 23):

> The chambers judge modified the Master's order to the extent of allowing the files to be disclosed anonymously, **a modification which effectively mitigated any objection that might be made on this ground**. (emphasis added)

The appeal against the disclosure of the records was frivolous.

The Master's Order, the Order of the Chambers Justice, and, now, the Order of the Court of Appeal clearly preserve any and all arguments against the production of privileged documents. This application was not about production but about disclosure. The Court could not have been clearer than in this decision that all relevant and material documents must be disclosed. All arguments regarding the non-production, as opposed to the disclosure, of records were "premature" (at para 24).

Arguing against even mere disclosure on the basis of privilege has often been a proper shortcut, giving proper deference to efficiency: why bother disclosing records that will never see the light of day? The consequence of that type of shortcut-thinking has been the analytical fusion of the two concepts, with parties refusing to disclose on the basis that they are pretty sure that they will not have to produce later on. When applied unthinkingly as though non-production automatically follows, such fused thinking is an error.

In certain circumstances such as this one where the similar conduct evidence may exist but has yet to be discovered, that shortcutting has two effects, one apparently positive, one certainly negative: 1) it lightens the disclosing party's obligation under the discovery rules, which is likely a very good thing; 2) it eliminates the possibility of arguments based upon circumstantial evidence and results in the defeat of a case before it really gets started, which may well be unjust.

On these facts, the disclosure will not be of all of the files of the third partied lawyers. Only those documents that may tend to prove the alleged knowledge component by way of the similar conduct evidence will be disclosed. Once the universe of relevant and material but privileged documents has been delimited and enumerated (after some possibly difficult work by the disclosing party), the arguments about privilege and its application to that limited universe of documents can be had. Until that work is done, and done on the basis of clear pleadings that set out the matters at issue, the arguments propounded by the appellants and by the Law Society were premature.

That the Court was eager to eliminate, once and for all, hopeless old arguments that demonstrated a failure to understand the manner by which the Rules were meant to operate is shown in para 25. The argument was made that the Court could not rule on matters of privilege or touching privilege because notice had not been given to those persons to whom the privilege

belonged, that is, any other straw buyers who might have been clients of the third-partied lawyers and who might have been victimized in similar mortgage fraud schemes as might be demonstrated once the files of the third partied lawyers are reviewed for the purpose of identifying such clients, if any. The Court said (at para 25):

> There is a chicken-and-egg aspect to the appellants' position. The respondents do not want to see or review every file in the offices of the defendant lawyers. They are only interested in real estate files involving the same alleged main fraudster and bank loans officer. If the respondents were really required to proceed under R. 5.13 relating to the production of documents of third parties, and if they could only proceed on notice to the other straw buyer clients, how would they know which clients to serve with the application? If they are not entitled to a list of the relevant records, they would be forced to give notice to every client of the lawyers. Under the Master's order, there will be a discrete target list of clients who have files that are said to be within the scope of relevance. This is undoubtedly why the Rules require that even privileged documents be listed, with issues of production and privilege deferred until later.

Again, the Court is saying to the appellants and to the Law Society: read the Rules. Do not argue issues that do not yet apply. Do not appeal because the Court below did not give you the relief you sought for arguments that do not yet apply and that are obviously, on the basis of the clear and unambiguous reasoning of the Court below as it clearly and unambiguously applies to the pleadings, premature.

"Control"

The Court also eliminated this old argument, that is, that even though copies of the relevant and material documents are in the lawyer's files, the lawyer does not have "control", because their production requires the consent of a third party, by the actual client in that relevant and material transaction. The Court looked to the word "control", saw that it did not require an element of sole control, found the undeniable, which is that, if it is in the lawyer's file, the lawyer is in control of it, and required that it be **disclosed**. The Court again reminded the appellants (at para 35) that disclosure of such documents in their control is not production of them, which issue would be argued at another application, to which production was relevant:

> On the face of it, the lawyers have control of the client files, because they have them in their possession. In a physical sense, they could produce them for inspection at any time. The appellant's argument is rather that since the files are in some respects the property of the clients, the lawyers are not entitled or authorized to disclose them. The Rules of Court, however, distinguish between the obligation to disclose the files, and a second obligation to produce them for inspection. Questions about entitlement to view the files are more properly examined in the context of claims of privilege and confidentiality. The appellants' arguments about "control" are, in the present context, merely another version of their arguments about privilege, confidentiality, and the related duty of the lawyer to maintain privacy over the client's business.

Ditto.