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CROSS-EXAMINATION ON AFFIDAVITS

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AGENDA

1. Test for Leave to Cross-Examine
2. Use of the Transcript
3. Undertakings and Cross-Examination
4. Scope of Proper Cross-Examination
5. Strategic Considerations

THE TEST FOR LEAVE TO CROSS-EXAMINE

TEST FOR LEAVE

In Saskatchewan, there is no automatic right to cross-examine on an affidavit filed in support of any application including summary judgment. The test for leave is:

- Generally, leave will be granted sparingly
- Cross-examination must assist in resolving the issue
- Cannot result in an injustice
- Often, conflict must exist in the record, or a clear need to pursue clarification must exist
- *Wallace v Canadian Pacific Railway*, 2009 SKQB 178. See also *Cimmer v. Lunemann*, 2021 SKQB 71

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SPECIFIC CONTEXTS

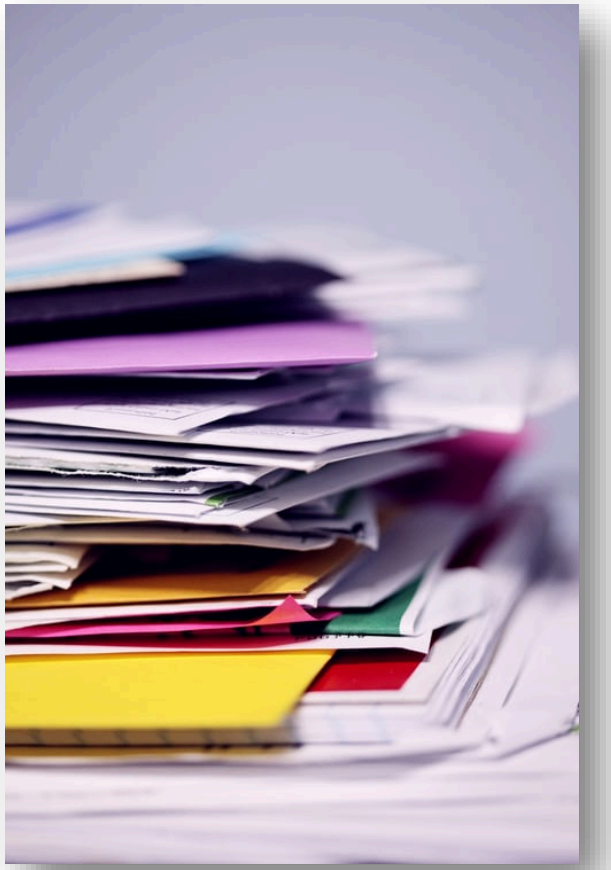
The general reluctance to allow cross-examination extends to family law. See *Heck v. Meszaros,* 2020 SKQB 230, paras 87-90

> "In family law proceedings it does not appear to have been used with the exception of a case involving cross-examination of a psychologist (*Duncan v Duncan* (1993),114 Sask R 157 (Sask QB). There are no reported family law cases where cross-examination was permitted on one of the parties to the proceedings….
>
> Where there is significantly disputed evidentiary material, on an interim application, the practice of the court is to direct the matter onto a pre-trial conference and a trial. In those matters requiring decision, either interim or variation applications, the practice of the court is to set the matter down for a trial of the issue."
>
> Cross examination has been allowed more frequently in class actions. See for ex. *M.R.L.P. v Canada (Attorney General),* 2018 SKQB 248

SUMMARY JUDGMENT

The court may draw an adverse inference from the failure of a party to cross-examine on an affidavit. (Rule 7-3)

- Weighs in favour of granting leave to cross-examine
- Cross-examination may be appropriate to identify a genuine issue that requires trial
- May be necessary to put best evidentiary foot forward
- The lack of opportunity to cross examine can constitute a reversible error



Shephard v. 101093126 Saskatchewan Ltd., 2020 SKQB 346, at para 15. See *also Wells v. General Motors of Canada Company/Compagnie General Motors du Canada,* 2019 SKCA 290, and *McCorriston v. Hunter,* 2019 SKCA 106 at para 47. See *Regional Tire Distributors v. Quality Tire Service Ltd.*, 2016 SKQB 411 (Sask. Q.B.), *Ter Keurs Bros. Inc. v. Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 (Sask. C.A.) at para 28

SUMMARY JUDGMENT

Despite the reasons supporting leave to cross in summary proceedings, it is plainly not automatic. Courts must discourage conduct that unnecessarily or improperly delays proceedings or unnecessarily increases their cost. Granting unnecessary cross-examinations may delay or thwart justice

- Could be contrary to the goal of summary judgement being cost-effective and timely

In *Atrium Mortgage Investment Corp v Koh,* 2020 SKQB 179 at para 28, leave to cross-examine one of two affiants was granted, provided it could be done without undue delay.

See also *Casbohm v Winacott Spring Western Star Trucks*, 2018 SKQB 15 at para 62 and *Regional Tire* at para 9-13

ADDITIONAL FACTORS TO CONSIDER

Factors for leave applications found in Rule 1-3(4):

> **1-3**(4) Resolving a claim justly in a timely and cost effective way includes, so far as is practicable, conducting the proceeding in ways that are proportionate to:
>
> (a) the amount involved in the proceeding;
>
> (b) the importance of the issues in dispute; and
>
> (c) the complexity of the proceeding.

Atrium Mortgage at para 28 and *Regional Tire* at para 11

USE OF THE TRANSCRIPT

CROSS-EXAMINATION TRANSCRIPT

Unlike an examination for discovery

- Parties cannot include whatever portions suit them
- All of the examination transcript must be put in as if it were conducted orally before the court

Abbott Estate, 2021 SKQB 49, at para 14.
Ray v Meota (Rural Municipality No. 468) (1955), 1955 CanLII 240 (SK QB), 18 WWR 513 (QL) (Sask QB) at para 3.

UNDERTAKINGS AND CROSS EXAMINATION

VOLUNTARY UNDERTAKINGS

Undertakings can be voluntarily given by deponents during a cross-examination, *Thorpe v Honda Canada Inc*., 2010 SKQB 136 at para 26

Little Saskatchewan law on whether or not undertakings can be compelled

The Alberta approach is likely to be a guide

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OBLIGATION TO COMPLY

Witnesses that voluntarily undertake to provide more information at a later date must strictly comply

- They must provide precisely and fully the undertaken information

No more than what was undertaken must be done

- Although, there may be strategic benefits to provide more information than strictly required

Alberta (Attorney General) v Alberta Power (2000) Ltd, 2018 ABQB 100.

WHEN SHOULD UNDERTAKINGS BE DIRECTED ON A CROSS-EXAMINATION?

It should be more difficult to have undertakings directed on cross-examination than it would be at discovery examinations

Circumstances where undertakings should be directed:

- The deponent has referred to the sought after information in the affidavit
- Undertakings relate to an important issue in the application
- The provision of information would not be overly onerous
- Information would help in the determination of the application

Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd., 2009 ABQB 671, *Rozak (Estate)*, 2011 ABQB 239.

CROSS-EXAMINATION ON AFFIDAVITS VS. DISCOVERY

Different tests for whether witness may be compelled to give undertaking to provide answers not immediately known

Deponent on an affidavit is a witness for a pending application

- Similar to witness at trial
- Affidavit takes the place of direct examination
- Deponent is a witness giving relevant evidence, not a party

Rieger v Plains Midstream Canada ULC, 2019 ABQB 666.

CROSS-EXAMINATION ON AFFIDAVITS VS. DISCOVERY

Someone answering discovery questions acts as a party or someone closely affiliated

- Party is expected to be fully informed on all relevant matters
- Broad scope of questioning requires more liberal approach to requiring undertakings to provide information not within the immediate knowledge of the party being examined

Rieger v Plains Midstream Canada ULC, 2019 ABQB 666.

SASKATCHEWAN AUTHORITY

McKinnon v Red Lily Wind Energy Corp 2013 SKQB 316

Danyliuk J. refused to order requested undertakings during a cross examination of affiants filed in an assessment of damages arising from an undertaking of damages:

[12] Our rules would appear to require that a person being cross-examined on his affidavit to be treated largely as he would be if he were a witness at trial. It is highly unlikely that such a witness would be subject to undertakings and obtaining documents or knowledge he does not possess while in the witness box. That lack of information may work to his detriment in terms of credibility. It may jeopardize the assessment of the party proffering such witness, for not properly equipping the witness with required knowledge. But the fact remains, the cross-examination of a witness during a trial rarely becomes the type of fact-finding exercise that the traditional examination for discovery had been.

SASKATCHEWAN AUTHORITY

Danyliuk J. followed the Alberta test in *Dow*

Refused to grant undertakings because the Plaintiff had not availed itself of any the Rules to obtain disclosure prior to the cross examination (Rules 5-10, 5-15 and 5-18 to 5-36).

"Finally, the plaintiff has not demonstrated the relevance of such documents in a manner that would meet the proportionality test in the foundational rules, if at all."

SCOPE OF PROPER CROSS-EXAMINATION

NOTEWORTHY PRINCIPLES

Cross-Examination on Affidavit vs Questioning on Discovery

- Questioning on Affidavit is cross-examination
- Questioning on Discovery is in the **nature of** cross-examination
- The purpose and scope of questioning is distinct in each
- Scope of Questioning on Affidavit is framed by the motion that the Affidavit supports
  - *When the motion is the entire law suit, permissible questioning can cover it all*

  When the affidavit puts forth any other matter expressly deposed or exhibited to the Affidavit, cross-examination can extend to it within the principle of proportionality

Alberta (Attorney General) v Alberta Power (2000) Ltd, 2017 ABQB 195.

CROSS & QUESTIONING DIFFERENCES

Scope of cross-examination on affidavit is less than that of questioning on discovery, accordingly there are five differences:

1. The person is examined as a witness, not a party
2. The answers provided are evidence, not admissions
3. Absence of knowledge is acceptable; the witness may be subject to undertakings
4. Production of documents is only required on the basis as for any other witness, i.e. the witness has custody of them
5. Rules of relevance are more limited

Edmonton (City) v Gosine, 2020 ABQB 546 at paras 8-10.

SASKATCHEWAN AUTHORITY ON SCOPE

McKinnon v Red Lily Wind Energy Corp

Undertakings rather than scope was in issue but Danyliuk J. also noted, "While a cross-examination on an affidavit may (and often should) proceed with vigour, and is not strictly confined to the four corners of the affidavit, it is not an examination for discovery."

Wells v General Motors 2019 SKCA 29 at para 19, Justice Leurer confirmed that the scope of a cross-examination on an affidavit is "generally defined by issues of relevance, rather than being confined to the four corners of the affidavit". The scope of the cross-examination is defined by issues of relevance to the application in which the affidavit has been filed.

ADDITIONAL BOUNDARIES ON SCOPE OF QUESTIONS

Cross-examination is not a substitute for oral discovery or an opportunity for premature discovery

Overbroad, "fishing" questions are not permitted

On a cross-examination, questions must be relevant to:

- The issues on that motion
- The matters raised in the affidavit by the deponent, even if they are irrelevant to the motion
- The credibility and reliability of the deponent's evidence

Del Giudice v. Thompson 2021, ONSC 2015, at paras 22-23.

STRATEGIC CONSIDERATIONS

STRATEGIC CONSIDERATIONS

Hryniak v Mauldin 2014 SCC 7

Arising from a June 2001 meeting, the Mauldin Group invested with Robert Hryniak, principal of the company Tropos Capital which traded in bonds and debt instruments; Gregory Peebles, a lawyer, acted for Hryniak and Tropos in the meeting and in subsequent transactions

The Mauldin Group wired US$1.2 million which was pooled with other funds and transferred to Tropos. Tropos forwarded more than US$10 million to an offshore bank, and the money disappeared. Hryniak claimed the Tropos' funds were stolen.

STRATEGIC CONSIDERATIONS

Main Findings on Summary Judgment Application

No evidence to suggest that Tropos had ever set up a trading program.

Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore bank, and then disappeared.

Rejection of Hryniak's claim that members of the offshore bank had stolen the Mauldin Group's money.

STRATEGIC CONSIDERATIONS

The motion judge concluded that a trial was not required against Hryniak to find civil fraud - (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved more complex factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial.

STRATEGIC CONSIDERATIONS

Bruno Appliance v Hryniak, 2014 SCC 8

Bruno met with Peebles on behalf of Tropos but not Hryniak

Bruno invested $1 million but Tropos was found not to have invested it but transferred it to other entities

SCC found there was a genuine issue requiring a trial for Hryniak in this matter

STRATEGIC CONSIDERATIONS

Bruno Appliance v Hryniak

Motions judge found Hryniak was supposed to be in attendance at the meeting, that Hryniak knew of the meeting purpose and that Hryniak's company paid for Peebles' attendance.

SCC found since Hryniak was not present or that anyone was acting as his agent and therefore insufficient evidence to establish that any false statements made at the meeting can be attributed to Hryniak, i.e that he perpetrated any fraud

STRATEGIC CONSIDERATIONS

Nature and amount of the evidence?

Scope of cross examination?

Importance of cross examination to the decisions rendered?

STRATEGIC CONSIDERATIONS

Wise v Abbott Laboratories 2016 ONSC 7275

Proposed class action alleging Androgel, a treatment for low testosterone, was a useless product that caused an increased risk of cardiovascular injury

Individual plaintiff agreed to summary judgment motion in advance of certification. Abbott argued, in part, that Androgel caused no increased risk of harm (no general causation/capacity to cause harm)

11,000 pages of materials, including affidavits, exhibits and transcripts (7,200 pages), factums (292 pages) and case authorities (4,025 pages). Six days of oral argument.

STRATEGIC CONSIDERATIONS

Wise v Abbott

Urologists, family physicians, cardiologists, regulatory experts, epidemiologists, statisticians adduced evidence and many were cross examined

"The summary judgment motion thus became a battle of experts about the epidemiology of hypogonadism and about the proven or not proven risks and benefits of AndroGel™."

Perrel J. granted summary dismissal, "On a balance of probabilities, the case at bar is not a case that permits the inference of general causation to be drawn from the evidence of association and biological plausibility."

STRATEGIC CONSIDERATIONS

Perell J. ultimately concluded none of the expert opinion sufficiently supported a finding that the association between AndroGel™ and serious CV events was causal.

- Differences in cross examination of experts vs fact witnesss
- Expert opinion driven motion more amenable to summary determination?
- Importance of cross examination to the successful defendant in the context of this case

Q&A

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THANK YOU

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