Court of Queen's Bench of Alberta

Citation: MacKenzie v Estate of Michael Gregory, 2022 ABQB 521

Date: 20220802
Docket: 2101 14285
Registry: Calgary

Between:

Eryn MacKenzie, Kelly Schneider and Cody Bonkowsky as representative Plaintiff

Plaintiffs

- and -

Estate of Michael Gregory and The Calgary Board of Education

Defendants

Reasons for Judgment
of the
Honourable Justice M.H. Hollins

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[1] The Plaintiffs have sued for damages arising out of alleged sexual assaults they say were committed by the late Michael Gregory while he was a teacher employed by the Calgary Board of Education (CBE) and they were students. On December 3, 2021, the Plaintiffs served CBE with a Notice to Admit under Rule 6.37 of the Alberta *Rules of Court*.

[2] The Notice to Admit sought 21 separate admissions, which can be grouped as follows: (1) admissions regarding the conduct of Mr. Gregory with minor students; (2) admissions regarding reports received by CBE concerning Mr. Gregory's behaviour and any resulting investigations or preventative steps taken by CBE; and (3) admissions that CBE employees and administrators knew of particular behaviours that Mr. Gregory was engaging in with students and took no steps to prevent or monitor those behaviours.

[3] CBE's reply was that the admissions sought were collectively "irrelevant, improper or unnecessary".

[4] The Plaintiffs now seek a direction from this Court that CBE file a further and better Reply to the Notice to Admit.

[5] The relevant portions of Rule 6.37 read as follows:

> *6.37(1)A party may, by notice in Form 33, call on any other party to admit for the purposes of an application, originating application, summary trial or trial, either or both of the following:*
>
> > *(a) any fact stated in the notice, including any fact in respect of a record;*
> >
> > *(b) any written opinion included in or attached to the notice, which must state the facts on which the opinion is based.*
>
> *(3) Each of the matters for which an admission is requested is presumed to be admitted unless, within 20 days after the date of service of the notice to admit, the party to whom the notice is addressed serves on the party requesting the admission a statement that*
>
> > *(a) denies the fact or the opinion, or both, for which an admission is requested and sets out in detail the reasons why the fact cannot be admitted or the opinion cannot be admitted, as the case requires, or*
> >
> > *(b) sets out an objection on the ground that some of all of the matters for which admissions are requested are, in whole or in part,*
> >
> > > *(i) privileged, or*
> > >
> > > *(ii) irrelevant, improper or unnecessary.*
>
> *(5) A denial by a party must fairly meet the substance of the requested admission and, when only some of the facts or opinions for which an admissions is requested are denied, the denial must specify the facts or opinions that are admitted and deny only the remainder.*

[6] CBE has taken the position that the wording of the Rule means that it can provide a response which simply repeats the words of R.6.37(3)(b)(ii) with nothing more. It also relies on a case from our Court of Appeal, *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220 which it describes as authority for the proposition that no further response is required.

[7] The Plaintiffs say that this is not the way that the rules on admissions were intended to work and that accepting CBE's interpretation renders the entire scheme meaningless. I agree. For the reasons herein, I am directing that CBE provide further information regarding its response.

Rationale for *Rule* 6.37

[8] The predecessor to the current Rule 6.37, prior to our last Rules overhaul in 2010, was Rule 230. Unlike our current Rule, it contained an express reference to a costs penalty for a party

refusing to make an admission which was subsequently proven by the other party at trial. If proven, the party having requested the admission was supposed to be awarded the costs - in any event of the cause - of having to prove that fact, unless the trial judge found that the refusal was reasonable.

[9] Even under the old Rule, the consequences of refusals were seldom consequential. Additional costs were sometimes denied because the party entitled to them had been successful at trial and the trial judge was disinclined to supplement his or her costs award; see *Ellis v Friedland*, 2000 CarswellAlta 1558 at paras.10-11 (although Madam Justice Veit did award additional costs to the already-successful plaintiff in *Waterous Investments Inc v Liberton Holdings Ltd*, 1996 CarwellAlta 303 at paras.31-32).

[10] In other cases, the costs of proving a fact for which an admission was sought were denied because the "evidence was going to be called in any event" and so proving the requested admissions resulted in minimal additional time or expense; *Patterson v Hryciuk*, 2005 ABQB 136 at para. 31.

[11] Although the new Rule 6.37 no longer contains a possible costs penalty within the rule, R.10.33(2)(b) says that a judge may consider a denial or refusal to admit anything that ought to have been admitted as a factor in assessing costs. Our Court of Appeal has identified those provisions as working in tandem; *Stringer v Empire Life Insurance Co*, 2015 ABCA 349 at para.10.

[12] However, the logistical problems persist. It is difficult for a trial judge to dissect the evidence, post-trial, to determine which costs should be attributed to proving facts not admitted. This is reflected in the *Stringer* decision, even though that case dealt with a request to withdraw admissions; *Stringer* at paras.18-19. This is particularly true where a party has opted to serve a Notice to Admit that effectively seeks legal admissions as opposed to discreet factual admissions or where the Notice is served so early in the proceedings that the receiving party cannot properly canvass the evidence in its possession in the time provided for response.

[13] *Dwyer v Fox* was another case about when admissions made could be withdrawn. The Court of Appeal agreed that withdrawal of admissions should be allowed where the issue was important enough to warrant adjudication and sufficient reasons were provided for the erroneous admission in the first place. Although *obiter*, the Court of Appeal commented on the objectives of the Notice to Admit and its failure to live up to those objectives:

> The second reservation is about our apprehension that the rule stated by McDonald J. [allowing counsel to withdraw admissions] may be seen by counsel as an invitation not to deal seriously and promptly with case management tools like the Notice to Admit. *One could argue that the rule could totally undermine one purpose of the Notice. That surely is to require the side opposite to assess its case promptly, within the time provided in the Rules, and thus spare the server of the notice the need to prepare for trial on the stated facts*. If the deemed admission can be nullified after the other side finally gets around to making inquiries, the goal of early resolution is utterly lost. Counsel who receive the Notice may reason thus:
>
> > I shall do nothing. If later I decide the fact is not disputable, no harm done. On the other hand, if later I decide I can challenge it, all I need to

> do is show my newly found evidence to the judge, and I shall be relieved of the admission. Either way, I can safely prepare at the pace I choose and ignore this Notice.
>
> And counsel who consider whether to serve a notice may well decide, because of all this, not to bother. Whatever the reason, the procedure is underused. Perhaps this is why; *Dwyer v Fox*, 1996 ABCA 95 at paras.18-19 [emphasis added]

[14] There is very little jurisprudence demonstrating the successful operation of a Notice to Admit, which unfortunately reflects my experience in practice as well. However, I remain of the optimistic view that carefully drafted Notices to Admit, served at the right time in the litigation, can and should still be an effective tool in narrowing issues for trial, shortening the trial time and saving the litigants money.

Achieving the Objective of *Rule* 6.37

[15] In interpreting Rule 6.37 and laying out the requirements for a party objecting to an admission sought, I begin with the Foundational Rule, Rule 1.2, which says:

> *1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.*
>
> *(2) In particular, these rules are intended to be used*
>
> *(a) to identify the real issues in dispute,*
>
> *(b) to facilitate the quickest means of resolving a claim at the least expense,*
>
> *(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,*
>
> *(d) to oblige the parties to communicate honestly, openly and in a timely way, and*
>
> *(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.*

[16] CBE says that I have no authority to direct it to do anything other than respond that the admissions sought are, collectively, "irrelevant, improper or unnecessary". It says that R.6.37(5) which requires a substantive response is restricted to "denials" which is a reference to R.6.37(2)(a) and not a reference to "objections" in R.6.37(2)(b).

[17] I am not sure it is that clear. In *Andriuk v Merrill Lynch Canada Inc*, 2011 ABQB 59, Martin J (as she then was) was asked to strike a Notice to Admit in a class action proceeding. In refusing to strike the Notice, she referred to the obligation of a party responding to a Notice to Admit to fairly meet the substance of the requested admission without distinguishing between denials and objections. In fact, in the *Andriuk* case, the party had registered objections and not denials:

> Further, Merrill created categories of objection about the type, manner and content of admissions sought including ambiguity, generality, legal determinations, conclusory statements that lack a foundation, improper form and opinions on highly specialized subjects. These objections are not such that they operate to provide grounds to set aside the Notice to Admit. *A party responding to a Notice to Admit is obliged to "fairly meet the substance of the requested admission" but has a full range of response*. If as matters come closer to trial it appears an earlier admission was inaccurate the rules provide that admitted facts can be withdrawn; *Andriuk* at para.23 [emphasis added]

[18] Justice Martin's statement is *obiter* but even if I accept CBE's interpretation of R.6.37(5) – that only a denial is required to fairly meet the substance of the requested admission – that in no way means that a completely meaningless objection is a proper objection.

[19] CBE relies on the statement of Wakeling, JA in *Jacobs v McElhanney* where, in the context of unreasonably delay, he laid out the options for a recipient of a Notice to Admit saying that an objection under R.637(2)(b)(ii) required no explanation; para.126.

[20] However, that case was not about the substance of a proper Reply to Notice to Admit. It was about when a Notice to Admit and/or a response thereto operates to advance an action in the context of an application to dismiss for delay. The Respondent was attempting to rely on its response – a simple objection that the admissions requested were "wholly inappropriate" – as constituting a material step in the action. While the above statement from the *Jacobs* case was *obiter* because the case was squarely about delay, it is interesting to note that even Wakeling, JA characterized the blanket objection as providing "no meaningful response"; para.130.

[21] If we go back to the rationale for the Rule generally, the trial judge must have at least enough information about the objection to assess, post-trial, whether the objection taken was reasonable and thus not deserving of a costs sanction. How could a blanket objection on any one of three separate but unidentified grounds accomplish this? The answer is, it cannot.

[22] I still think it will be a difficult task for a trial judge to decide whether an early objection was reasonable by weighing the basis of the objection when it was lodged against the nature of the evidence led to prove the matter at trial. However, that task certainly won't be helped by alleviating any burden on the responding party to explain the basis for its objection.

[23] Nor is this an undue burden on the responding party. For example, an admission may be improper because it calls for a legal conclusion or interpretation or because it is sought before the evidence necessary to respond is available. It may be unnecessary because it is already contained in a pleading or document of the responding party. It may be irrelevant because it does not relate to any matter raised in the pleadings.

[24] I accept that Rule 1.2 does not allow me to ignore the difference between a denial and an objection in order to "achieve the noble objectives of R.1.2". Rather, as Côté, JA, directed, *Rule* 1.2 is there "to help interpret ambiguous Rules or doubtful points"; *Gallant (Litigation Guardian of) v Farries*, 2012 ABCA 98 at paras.19-20.

[25] Even though Martin, J and Wakeling, JA seem to have had different approaches to these objections – albeit both in *obiter* – it does seem that the drafters intended a different required response where a fact is denied as opposed to where an objection is taken to the question. If one is denying a fact, presumably that person has different facts which are capable of meeting the

substance of the admission sought. When one objects to the nature or form of an admission sought, it is not because that party has facts to the contrary but because the admission sought is legally irrelevant, improper or unnecessary.

[26] However, even allowing for that distinction, Rule 6.37(2)(b)(ii) can only fulfil its objective if the basis for the objection – which is wholly within the knowledge of the responding party - is disclosed. Without it, there is no discernible purpose or intention to the Rule; Rule 1.7(1).

[27] In my view, an objection to an admission sought must: (1) delineate whether the objection is because the admission sought is irrelevant, improper or unnecessary; and (2) offer a basic reason for why that is so, in the view of the responding party. Many of the possibilities have been seen in other cases. For example, in *Andriuk*, the following bases for objections were identified: ambiguity, generality, legal determinations, conclusory statements that lack a foundation, improper form and opinions on highly specialized subjects. In *Canada Southern Petroleum Ltd v Amoco Canada Petroleum Co*, 1994 CarswellAlta 716 O'Leary, J (as he then was) also listed a number of possible responses that could be proper objections e.g. lack of independent knowledge, requiring the interpretation of a document or a legal conclusion, a document that speaks for itself or a request that is too vague to answer; paras.10-14.

[28] While I also refer to my authority under R.4.14(1)(g)(iii) to deal with the issue of admissions in my capacity as Case Management Justice, I do so only to the extent necessary to move this matter forward by outlining the general expectations of a party objecting to admissions sought. While the CBE will need to revise its Reply to the Notice to Admit to identify the basis of and general reason for its objection, a determination of the consequences thereof, if any, will be left to the trial judge.

[29] The Plaintiffs' application is granted. The parties may speak to a new deadline for the CBE Reply and/or to costs of the application if they cannot agree.

Heard on the 16th day of February, 2022.
Dated at the City of Calgary, Alberta this 2nd day of August, 2022.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Jonathan Denis, QC and Mathew Farrell
for the Plaintiffs

Heather L. Treacy, QC and Victoria Lee
for the Defendant, The Calgary Board of Education