

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

William Harding

Plaintiff

– and –

Fairwater Capital Corporation

Defendant

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)
) *Peter Jervis and Sophie Chase, for the*
) Plaintiff

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) *Richard Nixon and Titus Totan, for the*
) Defendant

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) **HEARD:** June 10, 2026 by video conference
with additional submissions by
teleconference on June 16, 2026.

ASSOCIATE JUSTICE P.J. BARNES

REASONS FOR DECISION

OVERVIEW

[1] The motion before the Court is brought by the defendant Fairwater Capital Corporation (hereinafter "Fairwater").

[2] The underlying litigation stems from an employment law dispute. The plaintiff William Harding (hereinafter the "plaintiff") commenced employment as President and Chief Investment Officer (CIO) of Fairwater on January 2, 2020. He was subsequently terminated from his role as President and CIO by the defendant on or about June 29, 2020. Mr. Harding claims wrongful dismissal damages against Fairwater totaling \$990,000 plus interest and costs.

[3] In the motion at bar, Fairwater seeks an Order compelling the plaintiff to answer two questions (or effectively one question and potentially one undertaking, depending on the answer to the disputed question was) that were refused by Mr. Harding's counsel on his examination for discovery. The question in dispute related to whether Mr. Harding filed an income tax return in

Canada in 2019. A copy of said 2019 tax return documentation was requested by Fairwater's counsel as an undertaking if a tax return for that year had been filed by the plaintiff.

[4] Fairwater also moves for an Order compelling the plaintiff's completion of one undertaking with respect to the provision of his February 2020 Rogers cell phone records, which it maintains is incomplete. Both parties agree that only 4 of 27 pages of the plaintiff's Rogers cell phone records from February 2020 have been provided to Fairwater's counsel. Fairwater maintains that it is entitled to the remaining 23 pages that have been withheld by the plaintiff.

[5] Fairwater further moves for leave to conduct an additional 2 hours of oral discovery of the plaintiff focused solely on questions related to undertakings and improper refusals that were provided by the plaintiff at and subsequent to his initial oral discovery.

[6] The plaintiff opposes Fairwater's motion, arguing that: a) the refusal regarding the question and undertaking request about his Canadian income tax return in 2019 is irrelevant to the litigation at hand; and b) that the undertaking for the plaintiff's cell records from February 2020 has in fact been completed.

[7] With respect to the cell phone record dispute specifically, the plaintiff maintains that the 23 pages of his withheld Rogers cell phone records from February 2020 relate to telephone numbers and calls made by his spouse and children on their individual cell phones (which are all included on his Rogers account), which he claims are also irrelevant to the litigation at hand. The plaintiff maintains that the 4 pages that he has produced to Fairwater constitute the entirety of his relevant cell phone records that were the subject of the undertaking that was granted on discovery.

[8] The plaintiff further denies that Fairwater is entitled to the 2 additional hours of oral discovery and maintained in his written materials that the transcript of his discovery reflected a "complete examination" of him, and that there is otherwise no identifiable line of proper follow-up inquiry arising from the answers or the undertakings given.

DISPOSITION

[9] For the reasons that follow, Fairwater's motion to compel the plaintiff's production of the refusals in dispute, and for further oral examination of the plaintiff is granted.

THE LAW

[10] My colleague Associate Justice Glick recently issued a decision on a refusals motion in *Ebube v. Hendricks*, 2026 ONSC 3108, which stemmed from records that were refused to be produced by a plaintiff's counsel in a personal injury action.

[11] AJ Glick set out the relevant law regarding the relevance of productions that are obligated to be produced by a party at paragraphs 10-12 of *Ebube* as follows:

[10] As Associate Justice Robinson stated at paragraph 5 of *Aidoo v. Durbejai*, [2026 ONSC 1951](#), "it is now trite law that relevance is determined by

reference to the pleadings, which set out the issues in dispute. Documents relevant to those issues must be produced. The documents that the parties are entitled to have produced is a matter of law. It is not a matter for the exercise of discretion: *Denault v Alplay*, [2016 ONSC 1618](#) at paras. 11-13.”

[11] Rule 29.2.03 further applies to a determination by the court as to whether a party must answer a question or produce a document. Rule 29.2.03 requires a court to consider whether:

- a. The time required for the party or other person to answer the question or produce the document would be unreasonable;
- b. The expense associated with answering the question or producing the document would be unjustified;
- c. Requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- d. Requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- e. The information or the document is readily available to the party requesting it from another source.

[12] In addition to those considerations, the Court is also, pursuant to Rule 29.2.03(2), to consider whether an order to produce documents would result in an excessive volume of documents required to be produced.

[12] I agree with the reasoning of Associate Justice Robinson in *Aidoo* and Associate Justice Glick in *Ebube*, that relevance regarding whether a discovery question and/or an undertaking request is proper and relevant is to be determined by referral to the pleadings, which set out the issues in dispute. I also acknowledge the considerations mandated by Rule 29.2.03 with respect to whether a party must answer a question or produce a document.

ANALYSIS

2019 Income Tax Return documentation

[13] A review of the Amended Statement of Claim reveals at paragraphs 4, 5, and 6 that the plaintiff has placed his professional qualifications, employment background and business reputation at issue.

[14] More specifically, the plaintiff has pleaded at paragraphs 5 and 6 that at the time that he was approached by Fairwater to take on its President and CIO role in the Fall of 2019, an executive search firm had already been retained to vet qualified candidates, and also noted that he had operated his own successful business for a number of years.

[15] At paragraph 7, the plaintiff has further pleaded that "on (his) understanding that his position would be full-time, exclusive, and permanent, and considering his long history with the board, he commenced his employment as President and CIO on January 2, 2020."

[16] These pleadings, in my view, are more than simple background information to the litigation as the plaintiff argues. On a fair reading of the Amended Statement of Claim, although they do not explicitly state that there was an inducement by Fairwater to the plaintiff to take on their President/CIO role, they certainly suggest that there was an inducement by Fairwater to the plaintiff to enter its employ from a previously successful financial and business career. In my view this places the issue of inducement at issue in the pending litigation, which is certainly germane to what the appropriate calculation of the plaintiff's wrongful dismissal damages will ultimately be. Thus, the plaintiff's purported earnings in the year prior to his hire by Fairwater in my view are probative for the purpose of the litigation.

[17] I otherwise disagree with the plaintiff's contention that the January 2025 and March 2025 endorsements from Justice Merritt directing that the plaintiff produce his income tax returns for 2020-2022 inclusive is dispositive of the potential relevance of the 2019 Canadian tax return documentation that is being sought by the plaintiffs. Justice Merritt was merely dealing with Fairwater's request for a further and better affidavit of documents from the plaintiff and pre-discovery production obligations from a series of case conference attendances, and did not specify (or in my view, even imply) that her decision on what was to be included in the plaintiff's further and better affidavit of documents constituted the totality of tax return or other documentation that the plaintiff was obligated to produce to Fairwater throughout the entire discovery process.

[18] To accept the plaintiff's interpretation of Justice Merritt's endorsements as being dispositive of the time period relevance for all of the plaintiff's tax returns (or any other pre-discovery productions, for that matter) would be to effectively usurp Fairwater's ability to request undertakings for further additional relevant documents as the plaintiff's oral discovery progressed and further evidence was elicited from the plaintiff about his pre-Fairwater employment and business activities, among other subject areas that were relevant to the litigation.

[19] In my view, the plaintiff's argument on this point would constitute an untenable extrapolation of the ambit of Justice Merritt's previous case conference endorsements and would effectively handcuff Fairwater from being able to request further documents/information from the plaintiff that its counsel deemed relevant, as evidence was elicited from the plaintiff during the course of his oral examination.

[20] Otherwise, the plaintiff's contention that his 2019 tax documentation is not relevant to "any live issue in the action" ignores the settled law on this point, outlined by Associate Justice Robinson in *Aidoo* and Associate Justice Glick in *Ebube, supra*, that relevance of a documentary request is to be determined by reference to the pleadings, not simply to what counsel may deem a "live issue" in the litigation, or based on what a party may have testified to under oath during oral discovery.

[21] Counsel for the plaintiff has not otherwise referred me to any authority that contradicts the well-settled law on point, that question and undertaking relevance is only or primarily driven by what are deemed to be the "live issues" in an action.

[22] As I have indicated above, the plaintiff's pre-hiring employment and business history has been placed at issue in the Amended Statement of Claim, which in my view makes his 2019 income tax declarations fair game for the purpose of the litigation.

[23] The fact that the plaintiff provided evidence about his business activities in the 2019 calendar year during his oral discovery does not make the initial question about whether he filed a 2019 tax return irrelevant. The justification of the refusal by plaintiff's counsel to provide his client's 2019 Canadian tax return documentation (if it exists) considering what the plaintiff ended up testifying to on his oral discovery is otherwise grounded in hindsight and ignores the settled law on this point, that relevance is determined by a fair reading of the pleadings.

[24] The question that was posed to the plaintiff about whether he filed a 2019 tax return, based on the contents of the pleadings at paragraphs 4-7 of the Amended Statement of Claim, was a reasonable and relevant question to be asked at oral discoveries by Fairwater's counsel. As such, Fairwater counsel's subsequent request for a copy of only the plaintiff's 2019 tax return documentation was in my view neither disproportionate nor excessive.

[25] Producing the plaintiff's 2019 tax return (if one was filed) would not result in an unreasonable amount of time being expended obtaining the document, and it would also not consist of an excessive amount of documentation. Nor would the expense be unjustified. Further, it would not cause the plaintiff undue prejudice or otherwise interfere with the orderly progress of the action. If not already in the plaintiff's possession, his tax return should otherwise be readily available from his own records, from his accountant (if he has one), from a web-based tax filing service (if one was used by then plaintiff to file a 2019 return), and/or from the Canada Revenue Agency website directly (which permits downloads of an individual's Notices of Assessment for any year where a return has been filed).

June 12, 2026 email to counsel and the Court

[26] Subsequent to the arguing of the motion, counsel for the plaintiff sent an email to counsel for Fairwater, and copied the Court (by way of uploading to Case Center), indicating that his client would "not be arguing at trial that he had a business in Switzerland in 2019 and was induced by the defendants...to leave that business and move to Toronto to take up the position with Fairwater". The remainder of the email reiterated evidence given by the plaintiff on discovery about him having no active business in Switzerland in 2019 and his decision to accept the position with Fairwater.

[27] I convened a telephone case conference on June 16, 2026, to take submissions from the parties about how this email may affect the relief being sought by Fairwater on the motion that had been argued the previous week, as I did not specifically request that any undertaking be reduced to writing during or subsequent to the arguing of the motion on June 10, 2026, or direct that documentation to this effect was to be uploaded to Case Center.

[28] Counsel for the plaintiff maintained that his email to Fairwater’s counsel was a confirmation of his oral undertaking to counsel (and the Court) that he had made during my questions posed to him during oral submissions on the original return of the motion, confirming that his client would not be arguing that he had been induced to leave Switzerland and take up the President/CIO position with Fairwater. During these follow-up submissions, counsel for the plaintiff otherwise reenforced his original argument that as the referenced pleadings in the Statement of Claim (at paragraphs 4-7) did not specifically use the word “inducement”, that these pleadings thus did not constitute a pleading of inducement, and that therefore, production of his client’s 2019 tax return documentation was irrelevant for the purpose of the ongoing litigation.

[29] Counsel for Fairwater argued to the contrary during the June 16, 2026 teleconference that plaintiff counsel’s email of June 12 did not confirm that the issue of inducement was “off the table” for the purpose of the motion (or the action as a whole), noting that the plaintiff had not amended his pleadings (or indicated an intention to formally amend his pleadings) to clarify the inducement issue ever since oral discoveries had concluded.

[30] In support of this argument, Fairwater’s counsel cited *Fortunato v. The Toronto Sun et al*, [2001] O.J. No. 3382, a decision of Master Birnbaum, as authority for the proposition that a withdrawal of a claim (in that case, a lost income claim) was neither unusual nor inappropriate when there was no evidence that the claim was being withdrawn to “avoid a legitimate line of inquiry in discovery”, and that in these situations, a withdrawal of a pleading was enough for the Court to decline to issue an Order compelling production of a previously provided undertaking for financial documentation. The key to relieving production of the previously provided undertaking being that a formal amendment to the Statement of Claim had been made previously by Fortunato’s lawyer, which distinguishes it from the present case.

[31] Counsel for Fairwater further cited the decision of Feasby J. in *AltaLink L.P. et al v. SNC-Lavalin et al*, 2022 ABQB 585 (a decision of the Alberta Court of Queen’s Bench) as authority for the proposition that the scope of questioning is determined by the pleadings at the time that discovery takes place:

[24] The scope of questioning is determined by the pleadings at the time of questioning: *Collacutt v Briggs Bros Student Transportation Ltd*, [2008 ABQB 505](#) para [37](#) aff’d without comment on this point in *Briggs Bros Student Transportation Ltd v Collacutt*, [2009 ABCA 17](#). There is good reason for the scope of questioning to be determined by the pleadings at the time of questioning. Parties plan their case strategy based on pleadings and prepare for questioning based on the pleadings as the are, not as they might be. A party cannot be allowed to sit back in questioning, refuse to answer relevant questions and refuse to give relevant undertakings, and then amend its pleadings to avoid responding to questions that were proper at the time they were asked. To allow this kind of mischief would make the litigation process more inefficient than it already is.

[32] While the *AltaLink L.P.* decision is not binding on me, I find its reasoning nevertheless persuasive. I agree that the scope of permissible examination for discovery questions and

undertaking requests is (and should be) tied to the contents of the pleadings at the time that the question/request was posed by counsel. The necessity of answering legitimate and relevant questions and undertaking requests made by counsel can be circumvented by a subsequent amendment to the pleading, if the amendment is not being made to avoid a relevant line of questioning or documentary request that was properly “in bounds” at the time that the question or undertaking request was posed. As such, in the case at bar, plaintiff counsel’s June 12 undertaking not to advance a particular argument or aspect of a claim at trial is insufficient to relieve the plaintiff’s obligation to answer the question and complete the undertaking.

[33] Accordingly, I order that if a Canadian tax return was filed by the plaintiff for the 2019 calendar year (which plaintiff’s counsel may confirm to Fairwater’s counsel in writing), the plaintiff is to provide that documentation (which would consist of the tax return itself along with any Notices of Assessment and Reassessment from the Canada Revenue Agency) to counsel for Fairwater forthwith.

February 2020 Rogers bill

[34] At the plaintiff’s examination for discovery, his counsel agreed to provide to Fairwater his client’s personal cell phone records for February 2020 as an undertaking. The plaintiff’s total Rogers bill for February 2020 encompassed 27 pages, of which only 4 non-consecutive pages purportedly related to the plaintiff’s own cell phone use, according to counsel. The remaining 23 pages of the Rogers bill purportedly related to the cell phone numbers and calls of the plaintiff’s spouse and children.

[26] Counsel for the plaintiff confirmed that he had withheld the remaining 23 pages of the February 2020 Rogers bill as these pages contained the particulars of the phone numbers and calls of the plaintiff’s spouse and children, which he deemed irrelevant to the litigation at hand. On that point, the plaintiff maintains that the 23 withheld pages (of 27 pages in total) that are in dispute contain the personal phone information of his spouse and children, which include the numbers of people contacted, as well as the duration and location of where the calls came from and/or were directed to. The plaintiff’s overall position is that the 23 withheld pages of the February 2020 Rogers bill constitutes documentation that “falls squarely within the category of private and personal material”, which should rightfully be withheld from Fairwater.

[27] In support of this contention, the plaintiff has cited the *McGee v. London Life Insurance Co.*, 2010 ONSC 1408, and *Jones v. I.F. Propco*, 2019 ONSC 23 decisions as authority for the proposition that he is entitled to withhold the bill 23 pages in dispute from the undertaking that has been granted.

[27] At paragraph 9 of *McGee*, Justice Strathy (as he then was) stated that:

The whole of a relevant document must be produced except to the extent it contains information that would cause significant harm to the producing party or would infringe public interests deserving of protection. I respectfully adopt as applicable in Ontario the statement of Lowry J., as he then was, in North American Trust Co.

v. Mercer International Inc. (1999), [1999 CanLII 4550 \(BC SC\)](#), 36 C.P.C. (4th) 395, [1999] B.C.J. No. 2107 (S.C.) at para. 13:

Under the rules of this court, a litigant cannot avoid producing a document in its entirety simply because some parts of it may not be relevant. The whole of a document is producible if a part of it relates to a matter in question. But where what is clearly not relevant is by its nature such that there is good reason why it should not be disclosed, a litigant may be excused from having to make a disclosure that will in no way serve to resolve the issues. In controlling its process, the court will not permit one party to take unfair advantage or to create undue embarrassment by requiring another to disclose part of a document that could cause considerable harm but serve no legitimate purpose in resolving the issues. [emphasis added]

[28] Further, at paragraph 10 of the *McGee* decision, the following clarity was provided by Justice Strathy as to the nature of information that could permissibly be redacted as part of an undertaking:

In the cases to which I have been referred, litigants have been relieved from disclosing the whole of a document related to a matter in question where, but only where, the part withheld has been clearly not relevant to the issues and, because of its nature, there has been good reason why that part should not be disclosed. With reference to the decisions of this court specifically, good reason is apparent in the private nature of the affairs of a company recorded in the minutes of its directors' meetings, or the personal sensitivity of a person's medical records, diary notations, or *familial communications*, and much the same can be said where expurgated disclosure of a document has been upheld in the cases cited from other jurisdictions. Statements to the effect that only the relevant parts of a document need be produced, such as in *Jervis Court Development [Jervis Court Development Ltd. v. Ricci]*, [1992] B.C.J. No. 2932 at para. 24 and *[K.L.V. v. D.G.R.]*, [1993] B.C.J. No. 1662 at para. 10, must be read in the context of what was decided. (*emphasis added*)

[29] In *Jones v. I.F. Propco*, another case cited by the plaintiff, Justice Leitch indicated at paragraphs 52-53 (after referring to the *McGee* decision) the following:

[52] Therefore, permissible redaction requires two elements: the information that is sought to be redacted must be irrelevant and *there must be a good reason for its redaction*.

[53] There are a number of good reasons why information should not be disclosed. Privilege is one valid reason for redaction (*King* at para. 12). If the document contains private medical information or *private information on familial communications*, a good reason for redaction will exist. For example, in *Dupont v. Bailey*, [2013 ONSC 1336](#), Master Roger permitted redactions of the plaintiff's psychotherapist's notes, because if the redacted portions were produced it "would

only embarrass and potentially prejudice the plaintiff” and would serve “no purpose in resolving the issues in the action” (para. 25). (*emphasis added*)

[30] When analyzing the decision of Master Roger in *Dupont v. Bailey et al*, 2013 ONSC 1336 in greater detail, I find paragraph 20 of his reasons to be particularly instructive to the dispute at hand:

[20] In many cases such efforts at clearly explaining why portions were required to be redacted might avoid a motion. Otherwise “...the court has a duty to ensure that relevant information is produced and also to ensure that the process is not being used for oppressive or collateral purposes” and a motion should then be brought. The function of the court on such a motion is to distinguish between redacted portions of a relevant document that are either: (1) relevant and therefore that should be produced; (2) irrelevant but innocuous and therefore that should be produced; and (3) “...information that is irrelevant and very sensitive – *sensitive in the sense that the party resisting production would suffer damage or real embarrassment if the irrelevant information were to be disclosed*” which may not be produced.^[3] The analysis at paragraph 20 of *McGee* between innocuous and embarrassing irrelevant portions in a relevant document is revealing. (*emphasis added*)

[31] When the ratios in the *McGee*, *Jones*, and *Dupont* decisions are considered together, the starting point in undertaking redaction disputes is that irrelevance alone is an insufficient ground in which redaction or withholding of part of an undertaking document will be permitted. Furthermore, the party seeking to uphold a redaction from an undertaking bears the onus of establishing that the redaction is necessary to protect an important interest of a party (or non-party) to the litigation.

[32] Further, irrelevant but ultimately innocuous information contained in an undertaking document is generally producible to opposing counsel in unredacted form.

[33] When a Court is asked to permit redaction from an undertaking document, however, the type of information that can be redacted/withheld by counsel must not only be irrelevant to the litigation, but also very sensitive to the party/non-party that is contesting its release. Information that rises to the level of sensitivity where redaction will be permitted is such that the party/non-party resisting production will suffer a material amount of damage or embarrassment if the irrelevant information were to be disclosed to the opposing party.

[34] The example used by Strathy J. at paragraph 20 of *McGee* (referenced by Master Roger in *Dupont*) was that corporate minutes, like a personal diary, could contain information that is both irrelevant and innocuous but also information that is irrelevant and highly sensitive to a person or business. In these situations, information of the latter sort would be properly redactable.

[35] An obvious example where redaction would be permitted, for instance, would be a hypothetical situation where the Coca Cola Company was being sued by a former executive for wrongful dismissal, and undertook to produce the executive’s complete employment file to

plaintiff's counsel, but that part of the executive's employment file also somehow contained trade secrets or material commentary about the highly secretive formula for Coca Cola Classic. In that case, the trade secrets or commentary would clearly be severable from the remainder of the employment file by the defendant. Any other similarly sensitive irrelevant business information that would not be germane to the litigation would also be permissibly redactable from the undertaking document.

[36] Given the extremely wide variety of situations where irrelevant sensitive personal, family, and/or business information could be contained in an undertaking document, it is impossible to provide a more specific "bright line" test of where redactions to an undertaking document will be permitted. However, in situations such as this, I believe that the remarks of Mr. Justice Potter Stewart (of the U.S. Supreme Court) in his concurring decision in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), are helpful to an analysis that a motions judge must make in deciding whether a redaction will be permitted:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that (*emphasis added*).

[37] As such, the decision-making that a motion judge will be tasked with when presented with a dispute over an undertaking redaction scenario will almost always involve a judgment call of some sort that needs to be grounded in the principles noted above.

[38] I do not accept the plaintiff's argument that the basic phone call particulars of his spouse and children contained in the February 2020 Rogers bill should count as "private, personal material" that should prevent it from being disclosed to Fairwater. In my view, this would constitute an overly broad and impermissible interpretation of what private information on familial communication actually constitutes, based on the applicable caselaw.

[39] The exception to the general prohibition on partial redactions to documents produced as an undertaking generally applies, in my view, to the redaction or carving out of substantive information about, *inter alia*, private familial communications. In other words, the information withheld should generally include descriptive particulars or details (whether specific or general) of the purportedly irrelevant, private and/or embarrassing or damaging information that the party (or non-party) wishes to have withheld/redacted.

[40] In my view, the basic call dates/call length/number called/origin and destination information that are contained in the plaintiff's February 2020 Rogers bill do not reach that level or anywhere particularly close to it.

[41] This is not to say that basic unparticularized information (such as call records) will always need to be produced in full, even if the material contained therein is irrelevant to the litigation. When a redaction or withholding of irrelevant information in an undertaking document (that appears on its face to be innocuous) is being sought by counsel, the Court must be provided with

some credible evidence or explanation about how the proposed redacted/withheld information would also cause harm or embarrassment to the party or non-party that it purportedly affects.

[42] For the 23 pages of the Rogers bill in dispute to have been properly withheld from the plaintiff's undertaking, the Court would need to be satisfied that the documentation is not only irrelevant to the litigation, but that its production would also unnecessarily embarrass or prejudice the plaintiff's family members.

[43] In my view, the plaintiff's justification for withholding the 23 pages in dispute is undermined not only by his previous disclosure to Fairwater of all pages of his January 2020 Rogers bill (despite the fact that counsel claimed during oral argument that this was done in error), but also due to the fact that no evidence or explanation whatsoever has been presented by the plaintiff in the motion record of how the information in his January 2020 cell records already released (or how the information in the February 2020 records, if they are released) has caused or will cause any sort of prejudice or embarrassment to his spouse and/or children if seen by the defendant.

[44] Notwithstanding the above, I am also not persuaded that the entirety of the plaintiff's family member cell phone records for February 2020 are entirely irrelevant to the litigation, given the dispute that exists over the plaintiff's whereabouts (i.e. whether in New York or Florida) on a number of days that month, which is relevant to Fairwater's pleading of after-acquired cause.

[45] Upon review of the plaintiff's discovery transcript at pages 212-214, it is acknowledged that there are in fact two William Harding individuals identified on the pages of the Rogers cell bill that had been produced (one being the plaintiff, and the other being his son), and further, that a law clerk at plaintiff counsel's office had likely been "overly exuberant and crossed out things" out of an "abundance of caution". Fairwater should thus be provided with the opportunity to review the plaintiff's entire unredacted Rogers cell phone records from February 2020, so that its counsel can properly understand the whole of the document.

[46] In addition, the phone call particulars of the plaintiff's spouse and children as contained in the February 2020 Rogers bill could conceivably contain information probative to the issue of Mr. Harding's whereabouts over the late February time period in question, which would be materially relevant to the allegation of after-acquired cause by Fairwater, and would thus justify the bill's full production, which is subject of course to the implied undertaking rule.

[47] Further, considering the criteria outlined in Rule 29.2.03, producing the plaintiff's entire February 2020 Rogers bill will not result in an unreasonable amount of time being expended obtaining the document, nor would the expense be unjustified, as his counsel is already in possession of the entire bill for that month. Further, its production would not cause the plaintiff undue prejudice or otherwise interfere with the orderly progress of the action.

[48] Accordingly, I order that the remaining 23 pages of the plaintiff's February 2020 Rogers bill be produced in full unredacted form to counsel for Fairwater forthwith.

Request by Fairwater for additional oral discovery

[49] Fairwater has requested leave to conduct an additional 2 hours of oral discovery of the plaintiff in order to ask him questions related to: a) the 12 undertakings that have been provided by his counsel subsequent to his initial oral discovery that took place between June and September 2025; b) the 12 initial refusals that have since been reconsidered by counsel; c) questions related to the refusals regarding the tax returns and cell phone bill for February 2020; and d) questions arising from a single correction made by the plaintiff subsequent to his oral discovery, which is subject to the right of further discovery by Fairwater pursuant to Rule 31.09(2)(b).

[50] The plaintiff opposes Fairwater's request for additional oral discovery and maintains that "the complexity of the issues and the reasonable time required for discovery do not support granting further examination in this case", pointing out that he has already been examined for nearly 7 hours in total (6 hours and 57 minutes to be precise), and because "there is no identifiable line of proper follow-up inquiry arising from the answers or undertakings given".

[51] That said, plaintiff's counsel nevertheless conceded during oral argument that follow-up questions with respect to the calendar entries that had since been provided to Fairwater's counsel by undertaking would be proper, but maintained these should be carried out by way of written interrogatory, rather than by a continuation of the oral examination of the plaintiff, essentially due to proportionality and the relative straightforwardness of the material contained in the undertaking.

[52] In *Dente et al v. Delta Plug Group et al*, 2023 ONSC 3642, Justice Braid indicated the following at paragraph 26:

[26] The court may make an order for re-attendance at examination if it appears necessary in order to fulfill the purposes of discovery. There may be situations in which the answers appear cursory or incomplete, where they give rise to relevant follow-up questions that have not been asked, or if newly produced documents require explanation: *Senechal v. Muskoka (District Municipality)*, [2005 CanLII 11575](#) (Ont. S.C.), at para. [7](#).

[53] Further, in *Issa v. Kesserwani*, 2019 ONSC 981, Justice Corthorn indicated the following at paragraph 49:

[49] By giving an undertaking to answer a question posed on examination for discovery, the party giving the undertaking acknowledges that the question asked is proper (*S.E. Lyons and Son Ltd. v. Nawoc Holdings Ltd.* (1978), [1978 CanLII 1429 \(ON H CJ\)](#), 20 O.R. (2d) 234 (H.C.J.), at para. [4](#)). An examination for discovery is not complete until all proper follow-up questions have been asked and answered (*Blais v. The Toronto Area Transit Operating Authority*, [2011 ONSC 1880](#), 105 O.R. (3d) 575, at para. [62](#)).

[54] In addition, in *Senechal v. Muskoka (Municipality)*, 2005 Canlii 11575, Master MacLeod (as he then was) stated the following at paragraphs 5-8:

[5] The question of examining "more than once" is in practice a question of whether the examination was actually completed. Improper refusals are an

interruption of the discovery while undertakings are an acknowledgment that the question is a proper one and a promise to obtain and provide the answer. Generally speaking, had the discovery not been interrupted by the refusal or the answer to the undertaking been available, not only would the answer have been given under oath as part of the transcript but the examining party would have been entitled to ask appropriate follow up questions as part of the examination. Arguably then an answer that genuinely gives rise to follow up questions should give rise to a right to complete the oral discovery as if the question has been answered. In *S.E. Lyons & Son Ltd. (1978) v. Nawock Holdings Ltd.*^[1] Master Sandler held that while it was perfectly sensible for parties to agree to provide answers to undertakings in writing, if the examining party insisted upon it, the answers should be given under oath and proper follow up questions could be asked. For those purposes, he ordered a reattendance. *S.E. Lyons* was upheld on appeal and was also specifically approved by the Divisional Court.^[2] While *S.E. Lyons* was decided under the old rules, it has been cited with approval subsequently.^[3] This was the analysis in my own reasoning in *Couperthwaite v. Damboise*.^[4] I have no hesitation in agreeing with the moving party that the party conducting a discovery should generally be entitled to complete the oral discovery once undertakings and questions improperly refused have been answered.

[6] The right to a follow up discovery is not, however, an absolute right. Indeed the right to discovery itself is not absolute and the cases are replete with examples in which the court has restrained ongoing discovery that is found to be onerous or abusive.^[5] In fact it need not be shown that discovery is intentionally abusive. It may be sufficient for the court to find that the proposed discovery will be out of all proportion to the matters in issue. I was referred to *I.C.S. Construction Ltd. v. GKN Birwelco Ltd.* [1991] O.J. No. 597 (Gen. Div.), *Caputo v. Imperial Tobacco Ltd.* [2003] O.J. No. 2269 (S.C.J.), and *Union Gas Ltd. v. A.F. Hall Co.* [2002] O.J. No. 2475 (S.C.J.) in support of the discretion of the court to control the process of examination. The court is therefore not required to order reattendance and a follow up examination simply to allow the sterile exercise of a right if it serves no purpose. I was referred to *Central Guaranty Trust Co. v. Beebe Estate* [1979] O.J. No. 4882 (Master), *Christie Corp. v. Alvarez* [1994] O.J. No. 41612 (Gen. Div.) and *Clustercraft Jewellery Manufacturing Co. Ltd. v. Wygee Holdings, Ltd.* [2004] O.J. No. 2877 (S.C.J.)

[7] Do these later cases contradict the general principle enunciated in *S.E. Lyons & Sons*? In my view there is no contradiction and the principles enunciated in these cases may be resolved as follows:

- As a general principle a party giving undertakings or answering refusals may be required to reattend to complete the discovery by giving the answers under oath and answering appropriate follow up questions. A party being examined may not compel the examining party to accept answers in writing simply by refusing to answer questions or by giving undertakings.

- On the other hand, the court will not automatically make an order for follow up discovery if it serves no useful purpose. Examples in which an order may not be appropriate would be cases in which a full and complete written response has been given to a simple question, in which the answer demonstrates that the question was not relevant or in which the parties have agreed that written answers will suffice.
- The court will generally make such an order if it appears necessary in order to fulfill the purposes of discovery. Examples of situations in which an order would be appropriate are situations in which the answers appear cursory or incomplete, where they give rise to apparently relevant follow up questions that have not been asked, if newly produced documents require explanation, or the discovery transcript supplemented by the answers will not be understandable or useable at trial.
- Even if answers do appear to require follow up, the court has discretion to order answers in writing or to decline to order further examination where it appears the cost or the onerous nature of what is proposed outweighs the possible benefit or where for any other reason it appears unjust to make such an order. Such discretion should be exercised only if the interests of justice require it.

[8] The examples given above are not intended to be exhaustive. The point is that discovery rights are subject to court supervision and are not absolute rights. Discretion should normally be exercised to ensure the purposes of full and fair discovery are served but to prevent abuses of the discovery process. Procedural rules, it has been observed, should be the servants of justice and not its master. This principal is enunciated in Rule 1.04 (1).

[55] Accordingly, it is settled law that a party conducting a discovery has a *prima facie* entitlement to complete oral discovery of the opposite party once undertakings have been provided, and if any questions improperly refused need to be answered, so long as the Court is satisfied that the ongoing oral discovery will not take up a disproportionate amount of time, or that the questioning is only likely to elicit irrelevant, overly onerous, non-probative, and/or abusive or embarrassing evidence from the witness.

[56] The explanation that the subsequent calendar entries provided to Fairwater are "largely self-explanatory" further ignores the fact that Fairwater has a general entitlement to hear the explanation directly from the plaintiff (per the ratio of Master Sandler in *In S.E. Lyons & Son Ltd. (1978) v. Nawock Holdings Ltd.*, referenced in paragraph 5 of *Senechal*).

[57] Accordingly, Fairwater at first glance has the right to insist that its follow-up questions of the plaintiff (which shall be strictly related to questions arising from the undertakings provided to date, the refusals/under advisements that have subsequently been walked back by plaintiff's counsel, questions related to the tax return and cell phone documentation, and any reasonable follow-up questions that arise based on the plaintiff's answers to these questions) be conducted by way of oral examination, rather than by written interrogatory as counsel for the plaintiff suggests.

[58] That said, I must also consider whether the additional oral discovery requested by Fairwater is permissible, as it has used up effectively all of the 7-hour baseline for oral discovery afforded to parties pursuant to Rule 31.05(1), and because both counsel admitted during oral submissions that there was no discovery plan in place that contemplated oral discovery time in excess of the general 7-hour allotment permitted by the *Rules of Civil Procedure*.

[59] The text of Rule 31.05.05(1) and (2) reads as follows:

Not to Exceed Seven Hours

31.05.1 (1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court. O. Reg. 438/08, s. 29.

Considerations for Leave

(2) In determining whether leave should be granted under subrule (1), the court shall consider,

- (a) the amount of money in issue;
- (b) the complexity of the issues of fact or law;
- (c) the amount of time that ought reasonably to be required in the action for oral examinations;
- (d) the financial position of each party;
- (e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;
- (f) a party's denial or refusal to admit anything that should have been admitted; and
- (g) any other reason that should be considered in the interest of justice. O. Reg. 438/08, s. 29.

[60] Applying the seven specific factors to the claim before the Court, I note the following:

- (a) The amount of money claimed in the lawsuit is \$990,000 plus pre and post-judgment interest, costs, and disbursements. This is a significant amount and would land in favour of the time for oral discovery being extended;

(b) The issues to be determined are not terribly complicated. This is a wrongful dismissal action with alleged after-acquired cause alleged by the employer. This would tend to militate slightly against a material extension of time for oral discovery;

(c) It is reasonable in this two-party action, in which the defendant is facing a claim into seven figures (once pre and post-judgment interest and cost/disbursements are factored in) for the examination for discovery of the plaintiff exceed 7 hours in length;

(d) I note that the defendant is a significant investment firm and that the plaintiff, while almost certainly not capitalized to the extent that the defendant is, nevertheless enjoyed a successful business career prior to his hiring by the defendant and appears to be financially stable. The financial imbalance between the parties would thus tend to militate only slightly against a significant extension of time for oral discovery;

(e) From my review of the discovery transcript, I note that a great deal of time was spent during the oral discovery of the plaintiff with cross-talk and argument between counsel over the propriety of questions and the scope of undertakings. The fact that 12 refusals (consisting of 6 refusals and 6 under advisements which turned into refusals after 60 days) were made by the plaintiff's counsel which ended up being walked back after the fact would favour the extension of the time for oral discovery of the plaintiff, as these initial refusals (including the additional specific refusals that were in dispute in this motion) should have been able to be answered during the original 7 hours allotted. This would also favour an extension of time for oral discovery;

(f) The plaintiff's refusal to provide his 2019 tax return documentation and his entire unredacted cell phone record for February 2020 was improper and should have been provided. This would land in favour of the time for oral discovery being extended;

(g) No other reason or factor would be particularly relevant, in my view, for the purpose of deciding this issue.

[61] Taking into account all of the above-noted factors, I am satisfied that leave should be granted for an extension of oral discovery of the plaintiff pursuant to Rule 31.05.1.

[62] However, I am not convinced that an additional 2 hours of oral discovery being requested by Fairwater's counsel is entirely proportionate when considering the relatively limited scope of the additional questions that will be permitted to be asked of the plaintiff and that fact that nearly 7 full hours has already been expended on oral discovery of the plaintiff.

[63] In consideration of the factors outlined above, I am limiting the further oral discovery of the plaintiff to a maximum of 90 minutes and am directing that the continuation of the plaintiff's

discovery take place by way of whatever online platform that the selected court reporting office uses for discoveries, so that counsel and the witnesses are not burdened with having to physically travel to a court reporting office for what will be a relatively short additional oral examination. Of course, if both parties consent to holding the continued discovery of the plaintiff in person at a local court reporting office, that is perfectly within their right as well.

COSTS

[64] I had requested prior to the return of the motion that counsel collaborate and try to come to an agreement on the quantum of costs that should be payable to the successful party on this motion.

[65] Counsel advised at the conclusion of oral argument that there had been some discussions between them about what the appropriate cost quantum should be but that they had not been able to reach an agreement on a specific number or tight range prior to the return of the motion. Both sets of counsel further advised that cost outlines had been prepared and exchanged, but I directed that these not be uploaded to Case Center so that they would not potentially colour my decision-making on the merits of the motion.

[66] In light of the result of the motion, counsel are requested to re-visit the issue of costs and make a fulsome effort reach a resolution of the matter between themselves. If an agreement on costs cannot be achieved, then Fairwater's counsel shall email his cost outline with written submissions consisting of no more than 3 double-spaced pages to my ATC (teanna.charlebois@ontario.ca) by end of business on July 21, 2026. The plaintiff's responding cost outline and submissions shall be emailed to my ATC on or before end of business on July 28, 2026. There will be no right of reply cost submissions from Fairwater's counsel.

[67] If an Order is required reflecting the terms of this endorsement, counsel for Fairwater may email a draft copy of same to my ATC once its form and content have been agreed upon by plaintiff's counsel.

[68] I otherwise wish to commend Mr. Totan and Ms. Chase on the succinct and well-composed motion records and facts that were submitted to in support of this motion, as they were a great help to the Court.

Associate Justice P.J. Barnes

Released: June 29, 2026

CITATION: Harding v. Fairwater Capital, 2026 ONSC 3771
COURT FILE NO.: CV-20-645206
DATE: 20260626

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

William Harding

Plaintiff

– and –

Fairwater Capital Corporation

Defendant

REASONS FOR JUDGMENT

Associate Justice P.J. Barnes

Released: June 29, 2026