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(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

ALLAN CHRISTOPHER MCLEOD, plaintiff,	)	William S. Gange for the plaintiff
- and -	)	
TRIBAL COUNCILS INVESTMENT GROUP OF MANITOBA, defendant.	)	Eric Blouw for the defendant
	)	Judgment Delivered: November 5, 2026

ASSOCIATE JUDGE GOLDENBERG

INTRODUCTION

[1] This motion arises out of a cross-examination of the Chief Executive Officer of the defendant conducted in connection with the defendant's underlying motion to dismiss the action for delay. During the cross-examination, counsel for the plaintiff sought to question the CEO about the relevance of certain documents in the defendant's revised affidavit of documents. Counsel for the defendant objected to that line of questioning and directed the witness not to answer. The examination was adjourned for the plaintiff to bring the present motion seeking an order compelling answers.

[2] For the reasons that follow, I find that the questions sought to be asked about the relevance of the documents contained in the revised affidavit of documents were not proper.

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BACKGROUND

[3] The plaintiff has sued the defendant, his former employer, for wrongful dismissal. The defendant filed a motion seeking to dismiss the action against the defendant for delay and significant prejudice. That motion is contested and has not yet been heard. It is in the course of that contested motion to dismiss for delay that the within motion to compel answers on cross-examination has arisen.

[4] Near the beginning of her cross-examination, the CEO confirmed that she understood that by swearing the revised affidavit of documents, she was saying that the Schedule A documents were the relevant documents to the lawsuit. Mr. Gange then proceeded to refer to document no. 1 of close to 22,000 documents, and after the CEO acknowledged what the document was, proceeded to ask her how the document was relevant in any way to the termination of the plaintiff's employment.

[5] Mr. Blouw objected to the question being asked and Mr. Gange indicated that he planned to ask the witness about the relevancy not of all 22,000 documents, but a representative sample of the 22,000 documents. The cross-examination ended with an acknowledgment that a motion would be made to an associate judge for a ruling on the propriety of questions regarding relevance of the documents.

ANALYSIS

[6] The motion is brought pursuant to the *Court of King's Bench Rules*, M.R. 553/88 (the Rules) under Rule 34.13(3) which provides as follows:

> Motion for ruling
> 34.13(3) A ruling on the propriety of a question that is objected to may be obtained on motion to the court and in adjudicating the propriety of the question the court will not be limited to considering only the reasons given for and against the objection at the examination.

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[7] The issue in the underlying motion is whether the plaintiff's action ought to be dismissed for delay and significant prejudice pursuant to Rule 24.01. It is in the context of the delay motion that the plaintiff says the defendant representative can be asked questions about the relevance of some of the almost 22,000 documents in Schedule A of the defendant's revised affidavit of documents. Mr. Gange has since confirmed that he intends to ask questions about the relevance of about 112 of the documents included in the revised affidavit of documents.

[8] In his affidavit filed in response to the defendant's motion to dismiss for delay the plaintiff swore as follows at paragraph 21:

> 21. The acts of the defendant in producing an Affidavit of Documents of 110,000 documents in September, 2015, in releasing a report from Lazer Grant on March 8, 2017 and in producing a Revised Affidavit of Documents in excess of 20,000 documents in April, 2019 were steps that appear to have been taken to delay this litigation to prevent the plaintiff from being able to move to trial.

[9] There is no dispute that cross-examination on an affidavit is generally afforded considerable latitude. An examining party is not confined to the precise wording of the affidavit and may pursue matters that bear upon the issues raised by the motion (see ***ABI Biotechnology Inc. v. Apotex Inc.***, 102 Man.R. (2d) 108, at para. 11).

[10] At the same time, that latitude is not unlimited. The question must be fair (see ***ABI Biotechnology Inc.*** at para. 12). The examination must remain connected to issues properly before the court and must not become a substitute for the discovery processes (see ***Del Giudice v. Thompson***, 2021 ONSC 2015 at paras 22 to 23). In addition, refusals to answer questions are justified in a number of circumstances including where the question is disproportionate, that is to say that the question may be relevant but providing an answer still offends the proportionality principle (see ***Del Giudice*** at para. 24).

[11] The plaintiff submits that the questions were proper because they were directed toward the issue of delay. He argues that by paragraph 21 of his affidavit, he has clearly put the issue of delay caused by the defendant at issue and is therefore entitled to explore whether many of the documents included in the revised affidavit of documents were irrelevant.

[12] I accept that, depending on the circumstances, questions concerning the factual basis upon which documents were identified, categorized or disclosed may constitute a proper subject of cross-examination. I do not accept that every question touching upon the relevance of documents is necessarily improper because relevance is ultimately a legal determination. In some cases, questions concerning why documents were collected, reviewed or disclosed may involve factual matters that are capable of being explored through cross-examination.

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[13] While the plaintiff's proposed questioning had an arguable connection to the broader issue of delay raised on the motion, namely whether the defendant contributed to delay in the progress of the action, the specific factual issue the plaintiff sought to pursue was that the defendant contributed to delay by producing substantial numbers of irrelevant or duplicative documents. Paragraph 21 of the plaintiff's affidavit alleged that the production of affidavits of documents containing 110,000 documents and later in excess of 20,000 documents appeared to have been undertaken for the purpose of delaying the litigation. However, the affidavit did not allege that the productions contained substantial numbers of irrelevant or duplicative documents, nor did it state that the plaintiff had reviewed the productions and reached such a conclusion.

[14] The plaintiff has now filed affidavit evidence on this motion stating that he reviewed portions of the productions and identified documents that he considers irrelevant or duplicative. However, that evidence was not before the court on the delay motion. A party cannot retrospectively enlarge the scope of a cross-examination on an earlier motion by filing additional affidavit evidence on a subsequent motion to compel answers.

[15] While cross-examination on affidavit is afforded considerable latitude and is not confined to the four corners of the affidavit, the question must remain relevant to the issue in respect of which the affidavit is filed. I accept that the proposed questioning had an arguable connection to the issue of delay. However, the plaintiff had not, at the time of the cross-examination, advanced any evidentiary foundation for the specific allegation that the defendant contributed to delay through the inclusion of substantial numbers of

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irrelevant or duplicative documents. The issue is not whether the proposed questions were wholly unrelated to the delay motion. Rather, the difficulty is that the factual premise underlying those questions had not been established in the evidentiary record before the court at the time the cross-examination was conducted.

[16] There is a further and independent difficulty with the proposed questioning. In modern litigation, particularly where very large volumes of electronically stored information are involved, document disclosure exercises frequently involve a process that includes clients, counsel and document review specialists. The evidence before me establishes that the preparation of the defendant's affidavits of documents involved the assistance of an e-discovery provider and review by counsel. Although the CEO swore both affidavits of documents, the evidence before me does not establish that she personally undertook the document-by-document relevance assessments that ultimately led to particular documents being included in the affidavit of documents.

[17] Accordingly, even if the relevance of particular documents were an issue on the delay motion, I am not satisfied that questioning the CEO about why specific documents were included in the affidavit of documents was likely to yield reliable or meaningful evidence concerning the decisions that led to their inclusion.

[18] I also accept the defendant's submission that there is a real risk that the proposed inquiry would move beyond a focused cross-examination on the issues raised by the delay motion and become an examination into numerous disclosure decisions made throughout the document review process. The line of questioning proposed by the plaintiff had the potential to evolve into a review of individual disclosure decisions relating to numerous

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documents contained in a production of many thousands of documents. Counsel for the plaintiff acknowledged that questioning the CEO about approximately 112 documents would require a full day of cross-examination. As noted, a cross-examination on affidavit is not equivalent to an examination for discovery, and the court retains discretion to ensure that the cross-examination remains fair and appropriately focused on the issues raised by the motion.

[19] While questioning of this nature may be appropriate on an examination for discovery, it is not appropriate during a cross-examination on an affidavit. On an examination for discovery, the representative being examined has a duty to inform herself and answer on behalf of the defendant. On cross-examination on an affidavit, on the other hand, the deponent has no such duty to inform herself and is answering only as a witness, and not as a party.

[20] It is also noteworthy that the documents which the plaintiff now contends are irrelevant were not in evidence on the delay motion. Instead, the plaintiff's counsel raised the issue of the relevance of the impugned documents during the cross-examination and proposed to present a "representative sample" of the 22,000 documents contained in the defendant's affidavit of documents, one by one, asking her to explain how or whether each document was relevant to the litigation. The revised affidavit of documents was sworn by the CEO more than six and a half years prior to the cross-examination and she had no obligation to have reviewed the documents prior to the cross-examination.

[21] In addition, the CEO joined the defendant after the plaintiff's employment had been terminated. She therefore has no first-hand knowledge of the events giving rise to

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the plaintiff's dismissal and no demonstrated familiarity with many of the documents about which counsel proposed to question her. In all the circumstances, I find that the proposed questions were unfair and therefore improper.

[22] Furthermore, by the plaintiff's own admission, neither he nor his counsel reviewed the Schedule A documents for a considerable period following their production. Indeed, there is no evidence that the plaintiff reviewed the documents and formed a view concerning their alleged irrelevance or duplication until years after they were produced. In those circumstances, even if some documents were ultimately found to be irrelevant or duplicative, the connection between that fact and any delay attributable to the defendant appears weak at best. This further underscores the disproportionate nature of the proposed inquiry.

[23] My ruling should not be understood as holding that questions concerning the disclosure, categorization or relevance of documents can never be asked on a cross-examination on affidavit. Rather, in the circumstances of this case, I am not satisfied that the proposed questioning was supported by a sufficient evidentiary foundation on the delay motion, that the questions are fair, or that the CEO was an appropriate witness through whom to pursue that inquiry. I also find that the questions were disproportionate and would offend the proportionality principle.

CONCLUSION

[24] Having regard to the record before the court on the delay motion, the plaintiff's subsequent attempt to advance a theory that delay was caused by the production of irrelevant or duplicative documents, the limited role that the CEO played in making

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document-by-document relevance determinations, and the fairness and proportionality concerns discussed above, I am not persuaded that the questions objected to were proper questions in the context of this cross-examination.

[25] Accordingly, the motion to compel answers is dismissed. If the parties cannot agree on the issues of costs, counsel may arrange to speak to the matter.

J. L. Goldenberg
Associate Judge

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