

Scope Of Pre-Trial Document Production Under The New BC Supreme Court Rules Discussed

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As I've previously discussed, one of the biggest changes under the New BC Supreme Court Civil Rules is the test relating to pre-trial document production. Under the former rules parties had to disclose documents "relating to every matter in question in the action". Under the new rules this test has been changed to "all documents that are or have been in a parties possession or control that could be used by any party to prove or disprove a material fact" and "all other documents to which a party intends to refer at trial".

This new test is supposed to be narrower in scope than the old one. Reasons for judgement were released last week by the BC Supreme Court, Vancouver Registry, interpreting the new test for the first time.

In last week's case (Biehl v. Strang) the Plaintiff sued the Defendants claiming damages for breach of contract. The alleged contract between the parties was based in part on a verbal agreement and partly based on the parties actions over the years. The events in dispute occurred over a 4 year period. The Plaintiff was alleged to have a history of illicit drug use during part of this period. The Defendants challenged the reliability of the Plaintiff's recollection and argued that this was hampered due to drug use.

The Defendants wished to further explore this issue and brought an application to force production of the Plaintiff's personal diary as this apparently made reference to some of the Plaintiff's illicit drug use. The Defendant argued that this was material evidence because the reliability of the Plaintiff's memory is a central issue in the lawsuit. The Plaintiff opposed arguing that his diary is not material in the action. Mr. Justice Punnett ultimately granted the motion for production. In doing so the Court defined what "Material Fact" means under the new Rules of Court. Mr. Justice Punnett provided the following reasons:

What is a Material Fact?

[16] In Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada, 2009) at para. 2.50, relevance is distinguished from materiality:

§2.50 A distinction has also been drawn between relevance and materiality. Evidence is material in this sense if it is offered to prove or disprove a fact in issue. For example, evidence offered by a plaintiff in a conversion action to prove a loss of profit is not material since loss of profits cannot be recovered in such an action, and evidence that an accused charged with forcible entry is the owner of the land is immaterial since the offence can be committed by an owner. This evidence may very well be immaterial, but it is also simply irrelevant. This excluded evidence is no more required to make out the case than is evidence that the accused owns three other properties or owns a black dog for that matter. There is no probative connection between the fact to be proved and the facts in issue as determined by the substantive law. Little is added to the analysis by adding a concept of materiality, as different results do not depend on the distinction. The concept of materiality, however, requires the court to focus on the material issues in dispute in order to determine if the proffered evidence advances the party's case.[Footnotes omitted. Emphasis added.]

In other words, the requirement that the disclosure relate to a material fact limits the breadth of what is relevant.

[17] The authors of *The Law of Evidence in Canada* define relevance at para 2.35:

§2.35 A traditionally accepted definition of relevance is that in Sir J.F. Stephen's *A Digest of the Law of Evidence*, where it is defined to mean:

... any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

Pratte J. in *R. v. Cloutier* accepted a definition from an early edition of *Cross on Evidence*:

For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

...

[18] In January 2009, Rule 14.01(1)(a) of the Nova Scotia Civil Procedure Rules changed document production in Nova Scotia by requiring a judge to determine relevancy "by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document ... relevant or irrelevant".

[19] The Nova Scotia Supreme Court in considering the new rule in *Halifax Dartmouth Bridge Commission v. Walter Construction Corporation*, 2009 NSSC 403, 286 N.S.R. (2d) 179 at para. 18, stated:

[18] ... As to what is meant by relevancy, in *Sydney Steel v. Mannesmann Pipe* (1985), 69 N.S.R. (2d) 389 (S.C.T.D.), Hallett, J. (as he then was) stated, at paras. 14-18:

...

[17] In *The Law of Evidence in Civil Cases* by Sopinka and Lederman, at p. 14 the authors also make reference to the quotation from *Stephen's Digest* as to the meaning of relevance and make the following statement that is applicable and worthy of consideration when assessing the relevancy of the documents that are before me on this application:

"The facts in issue are those facts which the plaintiff must establish in order to succeed together with any fact that the defendant must prove in order to make out his defence. It is seldom possible to prove a case or establish a defence solely by direct evidence as to the facts in issue and, therefore, the law admits evidence of facts, which, although not themselves in issue, are relevant in the sense that they prove or render probable the past, present or future existence (or non-existence) of any fact in issue.

"The facts in issue are controlled by the date of the commencement of the action. All facts essential to the accrual of a cause of action must have occurred prior to commencement of the action but evidence may be tendered as to facts occurring after the commencement of the action if they merely tend to prove or disprove the existence of the facts in issue. On the other hand any fact giving rise to a defence need not have occurred before the commencement of the action. An admission after the issue of the writ by one of the parties is admissible and conduct which is tantamount to an admission is equally admissible.

"The state of mind of a party may be proved as a fact in issue or as tending to prove or disprove a fact in issue. Thus the knowledge of a party may be directly in issue or relate to a matter directly in issue." [emphasis by Hallett J.]

Is the Reliability of the Plaintiff's Memory a Material Fact?

...

[25] The defendants argue that the reliability of the plaintiff's evidence, given the potential memory loss from drug use, is at issue in this case. The plaintiff asserts that reliability includes credibility and a line cannot be drawn between reliability and credibility. Therefore the information relates only to credibility and as such is a non-material collateral fact.

[26] "Reliable" is defined in the *Concise Oxford English Dictionary*, 11th ed., as the "able to be relied on." Credibility relates to whether or not the court accepts or believes the evidence. In assessing credibility, the court may consider how reliable the evidence is.

[27] In my view, the error in the plaintiff's position is conflating reliability and credibility when the former is but part of the latter. The ability of the plaintiff to remember is, in my opinion, relevant to proof of a material fact, namely the existence of a contract based on oral terms.

[28] Frequently courts take into account factual considerations, such as the ability of a witness to see or hear what occurred, in determining whether evidence is reliable and should be accepted. Surely, if an individual has suffered damage to his cognitive or memory functions, that is equally a relevant fact.

[29] I am satisfied that, if otherwise admissible, the requested production is relevant and could prove or disprove a material fact. Rule 7-1 does not restrict production to documents that in themselves prove a material fact. It includes evidence that can assist in proving or disproving a material fact.