COURT FILE NO.: 95-CU-82186CA
DATE: 20030604

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N	)	
	)	
DAVID CAPUTO, LUNA ROTH, LORI CAWARDINE and RUSSEL HYDUK	)	*Robert S. Hart, Q.C.* for the Plaintiffs
Plaintiffs	)	
	)	
-and-	)	
	)	
IMPERIAL TOBACCO LIMITED, ROTHMANS, BENSON & HEDGES INC., RJR-MACDONALD INC.	)	*Deborah Glendinning, Nancy Roberts* for the Defendant Imperial Tobacco Limited
	)	*Steven Sofer, Lynn Mahoney* for the Defendant Rothman, Benson & Hedges Inc.
Defendants	)	*Earl Cherniak, Q.C., Susan B. Wortzman* for the Defendant RJR-Macdonald Inc.
	)	
	)	**HEARD**:

C. CAMPBELL J.

REASONS FOR DECISION

[1] The Plaintiff appeals from a decision of the Master dealing with the extent of follow-up questions which may arise from a motion on refusals and undertakings.

[2] The appeal gives rise to two issues: the first deals with the standard of review of a decision of the Master, the second with the extent to which under the Rules of Civil Procedure, limited written rather than oral examinations may be ordered in respect of questions on a refusals motion.

Background

[3] This is a proposed class action brought on behalf of persons alleged to be addicted to nicotine produced by the Defendant tobacco companies. The action was commenced in 1995 and despite a number of motions, including a decision by the Supreme Court of Canada adopting the

approach, a motion for certification of the proposed class has yet to be brought forward for hearing.

[4] This action has been case-managed by Mr. Justice Winkler of this Court, who has been assisted by the Administrative Case Management Master. In support of the defence to the certification motion, the defence served several affidavits, which were cross-examined on by counsel for the Plaintiffs. The affidavits included those of solicitors in the offices of firms representing defendants and individuals with medical training from the United States put forward as experts.

[5] The thrust of the defence affidavits is that the issue of alleged nicotine addiction and its alleged link to lung cancer is sufficiently complex and individualistic that it would require detailed examination of the medical history of each member of the proposed class such that certification of a class is not the preferable procedure.

[6] In meeting that defence, counsel for the Plaintiffs sought by extensive cross-examination to lay a foundation to undermine the credibility of the defence witnesses and hence the admissibility of their evidence as those of experts. Questions in that line were at some point refused and gave rise to an extended motion before the Master that occupied some five days of hearing leading to a decision in October 2002.

[7] The first set of reasons of the Master was some 93 pages in length, including an elaborate chart dealing with each of the refused questions by witness, including transcript page and question number and for each a ruling. Amending reasons were issued October 15 to deal both with some typographical errors and also directions on how the responses would be made to questions ordered to be answered.

[8] In the first instance, the Defendants were to provide answers in writing within 30 days, giving an opportunity to the Plaintiffs then following to give thought to the need, if any, for follow-up questions and finally, if required, how those follow-up questions would be accomplished, whether in person, by telephone or video-conference for witnesses out of Toronto.

[9] Except for certain questions refused on the examination of Andrea Laing, no appeal was taken from the order of the Master dated October 2 and 15. In respect of that portion that was appealed, the issue was resolved as reflected in an endorsement of Winkler J. dated December 10, 2002, which directed further documentary production.

[10] As the parties were not able to agree to the manner by which further responses would be made, the Defendants brought a further motion for directions, which resulted in an endorsement of the Master dated January 17, 2003.

[11] In that endorsement, the Master reiterated what had been said in his earlier reasons, namely, that he would not limit the right of oral cross-examination before counsel for the Plaintiffs had received written responses and considered their position.

[12] The Master went on to deal with the Defendants' request that follow-up questions be dealt with either in writing or by cross-examination conducted by telephone or video-conference. He went on to say:

> If the follow up questions are few and simple, it is not cost effective to require the witnesses to attend in Toronto or for all counsel to attend where the witnesses reside.

[13] As well, the Master dealt specifically with the issue before the Court on this appeal, namely, whether there can be any limitation on the right to follow-up cross-examination without any disclosure of the nature of the questions.

[14] In view of the importance to this appeal, the following paragraphs from the January 17, 2003 reasons deal with the extent of the questions and manner of the answers as directed by the Master:

> [3] Mr. Hart objects to a procedure that would require him to disclose the questions he intends to ask; a task which he describes as difficult in any event since he can not know what answers he may receive that lead to further inquiries. Given the history of the cross examinations to date and the need for more than 5 days of court time to deal with the original refusals, it is entirely appropriate in my view for the court to impose some discipline on the cross examination process. I agree it is not necessary for the plaintiff to advise the defendants the precise questions to be asked but I am ordering disclosure of the nature of the questions. In any event, I require that information to determine the appropriate procedure to be employed.
> [3] In argument, three types of follow up question were discussed. There are questions which would have been asked in the first instance had the question not been refused and the answer now provided been given. There are questions arising from the answers because the answer requires clarification or suggests a further relevant line of inquiry. Finally, there are questions which seek to challenge the answers because the plaintiffs think they are inaccurate and have "prior inconsistent statements" in the form of transcripts or documents they wish to put to the witness. It is also worth recalling that the relevance of most of these questions is not to the merits of certification as such but rather to the admissibility or weight of the evidence to be used on the certification motion.

[15] No order was taken out and no appeal launched from the decision reflected in the Master's endorsement dated January 17, 2003. I am not aware of any disclosure of the nature of the proposed follow-up questions. It is that direction with which the Plaintiff takes issue.

[16] Further disagreement ensued regarding the extent of follow-up cross-examination. In an endorsement dated April 8, 2003, from which this appeal is taken, the Master noted in paragraph 3:

> I observed in my original reasons that simply because a question was ordered to be answered did not imply that detailed follow up questions would also be relevant or proper.

[17] Prior to dealing with the questions to be followed up with in respect of each individual witness in his April 8 endorsement, the Master outlined the principles by which he was to be guided, as follows:

> [4] This action was commenced in 1995. Since that date the parties have been locked in a struggle over the issue of certification. The certification motion has not yet been heard. Where, as here, the witnesses are not parties, even if they are paid experts, there is good reason not to require more rounds of oral cross examination unless it appears necessary in order to do justice.
> [5] On the other hand, a party which instructs a witness not to answer a question runs the very real risk that an order under Rule 34.15 will be made. I do not subscribe to the defendants' submission that all

> questions should have been asked on the original cross examination. Where a line of questions is cut off by a refusal, it is both proper and appropriate that the examining party be given the opportunity to resume the cross examination and to ask the further questions which might have occurred to him or her had the question been asked in the first instance.
>
> [6] As will be obvious from my comments below, I have concluded that most of these questions fall into the former category and it would be neither helpful nor desireable to generate further transcripts. It is important to remember that the purpose of the cross examinations is to assist the parties to make their arguments and the court to determine the certification motion. There comes a point at which those purposes are no longer served. My rulings are as follows:

[18] The result of the further endorsement gives rise to this appeal and the request for re-attendance of each of the witnesses for further cross-examination to "answer follow-up questions in respect of and/or answer fully and responsively – (individually numbered questions.)"

[19] Of the 14 grounds of appeal outlined in the Notice, the first 5 grounds summarize the position of the Plaintiffs on this appeal:

> With respect to all the questions, there was a denial of justice in that the learned Master requested on January 17, 2003 that the plaintiffs outline the nature of the enquiries for the purpose of determining the preferable procedure for the conduct of the further examinations (*i.e.*, personal attendance, video or teleconference, affidavits, etc.) but instead ruled upon the merits.
>
> When bias, credibility, reliability and expert capacity are in issue in respect a witness, the plaintiffs must be allowed to
>
> (a) orally test the veracity and reliability of the source of the witnesss' apparently **responsive** answers,
> (b) focus the witness's attention to ensure that answers are wholly responsive; and
> (c) ensure that all relevant transcripts of prior relevant testimony is put to the witness.
>
> By preventing the plaintiffs from testing any of the defendants' witnesses' *written* answers (which they had months to answer, which the plaintiffs submit were often self-serving, and/or incomplete, or simply non-responsive), by having to present a list of the areas of follow up questioning, by not being able to ask proper oral follow up questions, the entire process will
>
> (a) be rendered prejudicial and unfair;
> (b) prevent the court from considering a fair and balanced record; and
> (c) prevent the plaintiff from developing evidence that may lead the court to
> (i) strike out the defence witnesses' affidavits;
> (ii) order that the defendants comply with Rule 5(3) of the *Class Proceedings Act*;
> (iii) hold that the defendants' affidavit evidence has little or no weight.
>
> The learned Master erred in effectively ordering that if a question improperly refused appears to have been responsively answered in writing, follow-up questions need not be asked.
>
> The learned Master erred in allowing the defendants' proposed expert witnesses to answer questions in writing, having had months to craft answers, and then preventing the plaintiffs from orally testing their biases, and the reliability of the sources of these written answers.

The Standard of Review of the Decision of the Master

[20] The standard of review from decisions of Case Management Masters has been the subject of several recent decisions of this court and of the divisional court.

[21] The standard of review will, in my view, depend at least in part on what relief the Master is asked to make in an individual case. The cases under the Rules have for decades recognized the power of the Court to control its process, as it relates to matters of discovery. In *Graydon v Graydon* (1921), 67 D.L.R. 116 (Ont. S.C.), Middleton J. stated at pp 118 and 119:

> Discovery is intended to be an engine to be prudently used for the extraction of truth, but it must not be made an instrument of torture, nor should it be regarded as a mere opportunity for solicitors to multiply irrelevant and impertinent questions. Intelligently conducted, an examination should eliminate much waste of time at a hearing, unintelligently conducted and abused by being unduly read at a trial, it is a nuisance well-nigh past endurance.

[22] In *Kingsberg Developments Ltd. v. MacLean et al.* (1985), 3 C.P.C. (2d) at p. 242, Master Peppiatt said in reference to Rule 34.14(1):

> This rule, to some extent at least, codifies the practice which had grown up whereby the Court controlled examinations as part of its own process in certain situations of which *Sonntag v. Sonntag* (1979), 24 O.R. (2d) 473, 11 C.P.C. 13 (Ont. H.C.) is an example.

[23] In *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2000), 48 C.P.C. (4th) 272, Ground J., dealing with a request to produce so-called "hindsight information" recognized the "semblance" of relevance test to documentary production by reference to the *Graydon* case, *supra*, enforced the need to impose some limit on the semblance of relevance in the conduct of managing a large commercial oppression case.

[24] In *Noranda Metal Industries Ltd. v. Employers' Liability Assurance Corporation* (2000), 49 C.P.C. (4th) 336, Nordheimer J. said at p. 341:

> Case Management Masters must have the ability to exercise some reasonable and fair control over the discovery process without being second-guessed by Judges who will normally be very much less familiar with the history of the proceeding. The importance of retaining control over the discovery process was commented on by the Court of Appeal in *Ontario (Attorney General) v. Ballard Estate* (1995), 26 O.R. (3d) 39 (C.A.) at p. 48:
>
> > "The discovery process must also be kept within reasonable bounds. Lengthy, some might say interminable, discoveries are far from rare in the present litigation environment. We are told that discovery of these defendants has already occupied some 18 days and is not yet complete. Unless production from and discovery of non-parties is subject to firm controls and recognized as the exception rather than the rule, the discovery process, like Topsy, will just grow and grow. The effective and efficient resolution of civil lawsuits is not served if the discovery process takes on dimensions more akin to a public inquiry than a specific lawsuit."

[25] In my view, the issue of control of process becomes all the more important where, as here, we are dealing with a proceeding commenced under the *Class Proceedings Act* ("*CPA*").[1] Section 12 of the *CPA* provides as follows:

> *Court may determine conduct of proceeding*
> **12.** The court, on the motion of a party or class member, may make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[1] R.S.O. 1992 c 6

[26] The role of the Case Management Master under Rule 77.02 enables appropriate orders, terms and directions to be made as necessary to carry out the purpose of the Rule (see Rule 77.11(1)(e):

> **77.02** The purpose of this Rule is to establish a case management system throughout Ontario that reduces unnecessary cost and delay in civil litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.

[27] As Pitt J. noted in *Union Gas Ltd. v. A.F. Hall Co.*, [2002] O.J. No. 2475, this Rule together with Rule 35.15, provides "the powers necessary to control the conduct of the proceeding to prevent abuse, and to reduce unnecessary costs and delays."

[28] As will be dealt with in more dealt below, the issue here involves cross-examination on an affidavit and not an examination for discovery. I appreciate that there are differences that must be taken into account but Rule 34 applies to both processes. For the purposes of an interlocutory process such as this, the application of the rule to cross-examination on an affidavit should be substantially the same as for examination for discovery.

[29] Both the *CPA* and Rule 77 recognize the need to demonstrate to the litigants that in addition to being fair and just on the merits, the process must be time-efficient and at reasonable cost to do justice as between the parties.

[30] The approach to the standard of review from decisions of the Master in the modern context starts from the decision of Southey J. in *Marleen Investments Ltd. v. McBride et al.* (1979), 23 O.R. (2d) 125 at p. 128, he said:

> "It is my view that an appeal from an interlocutory order of the Master, even involving the exercise of discretion, should be heard as an appeal, not by way of re-hearing."

[31] What has followed since then is essentially two lines of authority. One line is best exemplified by the decision of Chapnik J. in *Bourgeios v. Bank of Montreal*, [2002] O.J. No. 1405. At paragraph 7 of that decision, she said:

> It is difficult to resolve the proper review standard except on a case-by-case basis based on the context of the issues, the parties' submissions and the particular items being appealed. The approach I intend to take in this matter which to me, flows from the way the questions on appeal are framed, is by way of de novo and therefore, I accept the appellants' submission that the standard should be one of correctness.

[32] The other line is dealt with at length by Nordheimer J. in *Noranda Metal, supra*. At page 340, paragraph 7 of his decision, Justice Nordheimer said:

> My view is that the appropriate standard of review is one of deference or, put another way, that these motions ought to be heard as appeals and not de novo. I come to this view for a number of reasons. First, it does not appear to me to be desirable, or logical, to have two different standards of review from decisions of the Master at least with respect to interlocutory matters which do not involve issues "vital to the disposition of the law suit" such as were considered in Westminer Canada Holdings Ltd. v. Coughlam (1990), 75 O.R. (2d) 405 (Div. Ct.). Secondly, matters involving the production of documents and the appropriateness of questions on examinations for discovery are matters which, under the Rules of Civil Procedure, are normally determined by Masters in the first instance. They are on the "front line" in determining such matters. The expertise that they develop, as a consequence, ought to be entitled to a measure of deference. Thirdly, if these matters are heard de novo, it simply encourages parties to launch such reviews and thereby adds to the

> costs and length of proceedings which is inconsistent with the fundamental purpose of the Rules of Civil Procedure as embodied in rule 1.04(1), namely:
>
> > "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

[33] The importance of this distinction was recognized by Then J. in *Brown v. Slaby*, [2002] O.J. No. 2518, when he granted leave to appeal from an order of a motions judge dismissing an appeal from the Master invoking the discretionary standard set out in *Marleen Investments, supra*. Unfortunately for the ultimate resolution of the standard, the issue was settled before the appeal could be heard, as the appeal was dismissed without costs on consent. (See [2002] O.J. No. 5188.)

[34] In order to deal with the standard of review, it is necessary to look at what was done by the Master in this case.

[35] It is the position of the Plaintiffs that the Master erred in determining what questions would and would not be answered and in so doing, he was ruling on an issue of law. Mr. Hart for the Plaintiffs urges that the limitation by the Master on follow-up questions, which is at the heart of this appeal, deals strictly with a matter of law.

[36] In *Republic National Bank of New York (Canada) v. Normart Management Ltd.* (1996), 31 O.R. (3d) 14, Dambrot J. held at p. 15:

> When reviewing a refusal, a Master must consider whether the question is relevant and also whether it is proper. Relevance is a matter of law, not discretion. Accordingly, where a Master's decision is grounded on a consideration of relevance, I would adopt the approach of Isaac J. and simply determine whether the Master erred. Where a Master decides that a question was or was not proper on a discretionary basis, relating, for example, to vexatiousness or prolixity, then I would only interfere if the Master was plainly wrong.

[37] This basic proposition was endorsed by the Divisional Court in *Hudon v. Colliers Macaulay Nicolls Inc.* (2001), 11 C.P.C. (5th) 258 (Div. Ct.) at paragraph 18 of that decision:

> The standard of review on an appeal from a discretionary order made by a judge is similar to that respecting an appeal from a discretionary interlocutory order of a Master. Judicial discretion should not be interfered with unless it is apparent that the Judge applied erroneous principles that render the result clearly wrong. i.e. the Judge must have acted on a wrong principle or disregarded or misinterpreted material evidence: see *Cosyns v. Canada (Attorney General)* (1992), 7 O.R. (3d) 641 (Ont. Div. Ct.) The standard of review with respect to a question of law is that of correctness: *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.). See also *Attis v. New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 (S.C.C.).

[38] As in that case, I agree that the Master here was involved in both the exercise of a discretion (how best relevant information may be provided) and a question of law (the issue of relevance itself.)

[39] I was referred to several decisions, including *Stickle v. Godin*, [1994] O.J. No. 441 and *S.E. Lyons & Son Ltd. v. Nawoc Holdings Ltd. et al.* (1978), 20 O.R. (2d) 234, aff'd 23 O.R. (2d) 727, for the proposition that in the absence of an agreement between counsel, answers to

undertakings and refusals are to be done orally, not in writing. Counsel for the Plaintiff urges that this supports the entitlement without notice beforehand of follow-up questions.

[40] Those decisions were rendered before we had case management in Ontario and before we had the enactment of the *CPA* and s. 12 thereof. Indeed, the latter-mentioned case was rendered prior to the enactment of the current Rule 1.04(1) which provides:

> These Rules shall be liberally construed to secure the just, most expeditious and least-expensive determination of every civil proceeding on its merits.

[41] In *Renegade Capital Corp. v. Hees International Bancorp Inc.*, [1995] O.J. No. 3648, Farley J. dealt with the scope of the "semblance" of relevance in the context of a motion relating to refusals and undertakings and in this context, after referring to the leading cases on that issue, namely *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (H.C.J.) and *Toronto Board of Education Staff Credit Union v. Skinner* (1984), 46 C.P.C. 292 (H.C.J.), the comments of Farley J. at p. 3 illustrate the problem of attempting to find a balance between removing surprise, defining and clarifying issues and costly time-consuming and oppressive examination.

> While I am attempting to suggest is that proper discovery is a perfectly proper adversarial technique, and overly-sensitive objections, particularly at the early stages of an examination may be irresponsible and professional improper. Counsel must try to avoid both the ambush and the avalanche.
>
> * * *
>
> In the ultimate analysis, it is impossible definitively to furnish guidelines on what is permissible on discovery. It is, as I have said, a professional matter. Each case must continue to be decided on its particular facts, but I venture to hope that the profession may find it possible to make discovery less of a siege than it often seems to be.

[42] The issue here is not strictly one of particular relevance, which would be a matter of law. The position of the Plaintiff is that restricting the right to unlimited follow-up by oral questioning involves a determination of relevance and therefore law.

[43] I have concluded that in the context of this case, the standard of review of deference should and must be given to the decision of the Master. As noted above, it was made in the context of a long, complicated motion with over 200 questions at issue. All refused questions were dealt with and follow-up permitted where appropriate. The issue before the Master was not the relevance of individual questions but overall control of the process.

[44] Even if I am in error on the standard of review, I am satisfied that in the circumstances of this case, the decision of the Master meets the standard of correctness, given his very thorough and careful review and exercise of balance between unlimited questions and the need to proceed with some expedition with a procedural motion.

The Decision of the Master

[45] The CPA is a procedural statute. In an earlier decision in this very case[2] (the reasoning of which was confirmed by the Supreme Court of Canada[3]), Winkler J. stated:

---

[2] *Caputo. v. Imperial Tobacco* (1997), 34 O.R. (3d) 314

> The CPA is a procedural statute, rather than substantive, and creates no new cause of action. A motion for certification under the Act deals only with whether the action ought properly to proceed by way of class action. The procedural nature of the certification motion, and of the Act itself, was affirmed by Montgomery J. in Bendall v. McGhan Medical Corp., supra, at p. 739, 16 C.P.C. (3d) 156 at p. 162 (Gen. Div.); see also Edwards v. Law Society of Upper Canada (1995), 40 C.P.C. (3d) 316 (Ont. Gen. Div.) at p. 321; and Peppiatt v. Nicol (1993), 16 O.R. (3d) 133 at p. 140, 20 C.P.C. (3d) 272 at p. 279 (Gen. Div.).
>
> Accordingly, any inquiry into the merits of the action will not be relevant on a motion for certification. The examination must be confined to those issues on the motion for certification on which the plaintiffs may have relevant evidence to assist the court. While evidence pertinent to the issues on the motion may, on occasion, overlap with evidence going to the merits of the action, this incursion may be permissible if the evidence sought is also relevant to the motion.

[46] Relevance for the purposes of the certification motion will ultimately be determined by the judge hearing that motion.

[47] The Plaintiffs are not foreclosed from seeking to adduce evidence in other ways that they believe relevant for the purpose of dealing with the admissibility of expert evidence on the motion for certification. For example, the Plaintiffs may (1) seek admission of additional material from which inferences can be argued along the lines of the material referred to in the order of Winkler J. of December 10, 2002; (2) if necessary, seek further leave to cross-examine *viva voce* at the return of the certification motion, if it can be established that issues of credibility and admissibility are so crucial; (3) serve a notice to admit with respect to public documents which might then be sought to be relied on for inference purposes.

[48] Since counsel for the Plaintiff did not, as the January 17, 2003 endorsement anticipated, outline further lines of inquiry, relevance could not be determined in advance by the Master. Control of process requires the exercise of discretion. I recognize, as did the Master, that cross-examination on an affidavit where credibility issues are involved is a different circumstance than examination for discovery, where cross-examination on credibility is not permitted.

[49] The Master recognized the difficulty of the balancing process between imposing some discipline on the cross-examination process and not precluding relevant evidence. At paragraph 4 of his January 17, 2003 reasons, he stated:

> It is also worth recalling that the relevance of most of these questions is not to the merits of certification as such but rather to the admissibility or weight of the evidence to be used on the certification motion.

[50] There is no error in this conclusion. The Plaintiffs are not precluded from making any argument regarding the admissibility or weight of evidence on the certification motion. I am satisfied that the Master proceeded properly to balance between the need for further attendance in what might be regarded as tangential areas, where to do so would be costly and time-consuming, and permitting, where appropriate, follow-up questions in writing and written responses, where appropriate.

---

[3] See *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158

[51] In respect of one of the witnesses, Professor Faber, the Master did conclude that it was appropriate to continue the oral cross-examination and so ordered.

[52] Counsel for the Plaintiffs referred to several cases and textual references in support of his argument that it is inappropriate to place limitations on cross-examination, where it may be necessary for counsel to "close the doors" by asking a number of questions in series before a witness may be appropriately trapped and avoid the witness using avenues of escape.

[53] In the course of submissions, I was referred to the *Art of* Tria[4]l at p. 120, where the author states:

> In some cases, the bulk of a cross-examination may be consist of closing off avenues of escape. It may be time-consuming, tedious and lackluster.

[54] I have no quarrel with this general statement, as applied to a trial presided over by a trial judge who can more appropriately determine the scope of relevance for the ultimate trial issue. That circumstance is to be distinguished in my view from the process of placing evidence before the court on a procedural motion, albeit an important one.

[55] In addition, counsel referred to the following quote from *The Law Of Evidence in Canada* 2nd ed.[5]

> **16.99** The oft-quoted words of Wigmore that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth"[6] indicate its great value in the conduct of litigation. Three purposes are generally attributed to cross-examination:
>
> (1) to weaken, qualify or destroy the opponent's case;
> (2) to support the party's own case through the testimony of the opponent's witnesses [Footnote omitted.]
> (3) to discredit the witness
>
> To accomplish these ends, counsel is given wide latitude and there are, accordingly, very few restrictions placed on the questions that may be asked or the manner in which they may be put. Any question which is relevant to the substantive issues or to the witness' credibility is allowed. [Footnote omitted.] It appears that the scope of cross-examination is wide enough to permit questions which suggest facts which cannot be proved by other evidence.

[56] Again, that statement is appropriately applicable to the circumstances of a trial where the trial judge is the arbiter of the latitude to be given in cross-examination for the purposes of admissibility. The author's note again in the context of a trial at p. 16.107 that:

> As a result, a judge must exercise extreme care and caution before interfering with the right to cross-examine before the cross-examiner has had a reasonable opportunity to show the relevance of the cross-examination through answers obtained from the witness.

[57] Even applying this test, I am satisfied that the decision of the Master in this case complies with it. The Master was aware of the purpose for which the questions were advanced, he did permit the cross-examiner reasonable opportunity to establish the relevance and ultimately the

---

[4] Robert B White, Q.C., Canada Law Book (1993)
[5] Sopinka, Lederman, Bryant *The Law Of Evidence in Canada* 2nd ed. (Butterworths:1999)
[6] Wigmore, *Evidence* (Chadbourn rev., 1970) §1367

judge hearing the certification motion can make the determination as to whether relevance for the purposes of admissibility of expert evidence and the credibility to be attached to that evidence has or has not been made out.

[58] Counsel for the Plaintiffs advanced several decisions, among them *Ferrovecchio v. Barbiere* (1979), 10 C.P.C. 1, *I.C.D., International Circulation Distributors of Canada Ltd., c.o.b. Avon Books of Canada et al. v. MacLean Hunter* (1984), 44 C.P.C. 46 and *S.E. Lyons & Son Ltd. v. Nawoc Holdings Ltd. et al, supra*, as support for the proposition that responses to refusals or undertakings, unless otherwise agreed to by counsel, may require a re-attendance to provide answers orally under oath.

[59] There is nothing in our current Rules to mandate that requirement. Since the decisions referred to above, the Rules of Civil Procedure, both in specific terms of Rule 1.04, Rule 77 and as well the *CPA*, have added a general framework of expedition and efficiency to the civil litigation process. It has become routine with respect to answers following on refusals and undertakings that in the first instance, they be made in writing. It is only when the answers are not given, or are not obviously complete, or the need for follow-up is obvious, that further oral attendance is necessary or required. The process of limiting oral response is all the more appropriate where, as here, the proceeding in issue is not a determination of the merits of the action, but rather a procedural issue albeit an important one.

[60] I am satisfied that the Master did not err. As noted above, the appeal is from the order of the Master dated April 8, 2003. I have some sympathy for the position argued by Mr. Hart, that it was not clear to him until the decision of April 8 that the result of the original process might be a limitation on his right to cross-examine on follow-up questions. However, when one reads the original decision of the Master in October 2002, and more particularly his decision of January 17, it should in hindsight have been apparent that that is the direction it was going, namely, that unlimited follow-up questions would not be permitted. Strictly speaking, the appeal before me should have been from the order of October 12-15, 2002. In effect, I have dealt with the issue as if the October orders had been appealed.

[61] In my view, the further opportunity granted to the Plaintiffs to question Dr. Faber along with the further written responses in respect of other witnesses as ordered by the Master will allow the Plaintiff appropriate scope to make submissions on the motion for certification.

Summary

[62] In summary, I am satisfied that the appropriate test in this case is to give deference to the decision of the Master, even though that decision involves to some extent issues of law. I am also satisfied that the decision of the Master meets the standard of correctness test.

[63] Since the cross-examination is sought to be extended in connection with a procedural order, namely certification, I am satisfied that any potential risk to the position of the Plaintiff

coming from limitation on cross-examination can be dealt with on the return of that motion before the presiding judge. The appeal is therefore dismissed.

[64] If it is necessary to deal with the issue of costs from this appeal, the parties may make written submissions to be received by me within the next two weeks.

_____

C. CAMPBELL J.

Released:

COURT FILE NO.: 95-CU-82186CA
DATE: 20030604

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DAVID CAPUTO, LUNA ROTH, LORI CAWARDINE and RUSSEL HYDUK

Plaintiffs

and –

IMPERIAL TOBACCO LIMITED, ROTHMANS, BENSON & HEDGES INC., RJR-MACDONALD INC.

Defendants

REASONS FOR JUDGMENT

C. CAMPBELL J.

Released: June 4, 2003