

CITATION: 2414840 Ontario Inc. (Cottage Country Family Diner) v. Echelon Insurance, 2025
ONSC 3493
COURT FILE NO.: CV-18-07617
DATE: 2025-06-11

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
2414840 Ontario Inc. c.o.b. Cottage Country) Michael Gauthier, for the Plaintiff
Family Diner)
Plaintiff)
– and –)
)
Echelon Insurance a.k.a. EGI Financial) Deema Elshourfa, for the Defendant
Holdings Inc. a.k.a. Echelon Financial)
Holdings Inc.)
Defendant)
) **HEARD:** April 3, 2025

DECISION ON MOTION FOR ANSWERS TO UNDERTAKINGS AND REFUSALS

S.K. STOTHART J.

Overview

[1] The defendant has brought a motion seeking an order compelling the plaintiff to provide answers to outstanding undertakings given and to questions that it says were improperly refused at the examination for discovery of Jamie Fitchett, who appeared for examination on behalf of the corporate plaintiff. The defendant also seeks an order compelling Jamie Fitchett to re-attend at an examination for discovery at his own expense to answer questions arising from his answers to the outstanding undertakings and questions improperly refused. This motion is brought pursuant to Rule 34.15 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Background

[2] On June 17, 2017, the Cottage Country Family Diner, which was a restaurant/variety store located at 12 Front Street in Mactier, Ontario, was damaged by a fire that was intentionally set. The fire was investigated by the Chief Fire Marshall’s office and the Ontario Provincial Police. No criminal charges have been laid.

[3] The Cottage Country Family Diner was purchased by the plaintiff corporation in May 2015. Jamie Fitchett and Tanya Fitchett are the President and Vice-president and sole shareholders of the corporation.

[4] Following the fire the plaintiff made a claim under its insurance policy held with the defendant for the loss of the building, its contents and business interruption. The claim was denied.

[5] On June 13, 2018, the plaintiff commenced this action seeking damages for breach of contract and breach of the defendant's duty of good faith.

[6] On April 23, 2019, the defendant served its statement of defence which pleads civil arson and that the plaintiff, or its beneficial owners (the "Fitchetts"), intentionally set fire to the property. The defendant has pled that the plaintiff and the beneficial owners had motive to commit arson because they were in poor financial condition. The defendant has further pled that the Fitchetts had exclusive and sole opportunity to ignite the fire because the fire occurred at or immediately following the time they had locked and departed the premises. The defendant has retained a forensic accounting firm to assess the plaintiff's financial circumstances and to provide an expert opinion relevant to this action.

[7] On December 1, 2022, Jamie Fitchett attended as the plaintiff's representative for examination for discovery in this action. During examination for discovery, he was asked a number of questions about he and his wife's personal finances, and he was asked to produce some of their personal financial records. He was also asked to provide the entire copy of the plaintiff's accountant's file from the date of inception up until the fire, which is about a two-year period.

[8] The plaintiff has refused to produce the requested personal financial records of the Fitchetts and the entire accountant's file. It takes the position that it is not required to provide the personal financial information of a non-party and that the request for the accountant's entire file is overbroad and amounts to a fishing expedition.

The remaining refusals and undertakings

[9] In support of this motion, I received a joint refusals and undertakings chart for Jamie Fitchett. Prior to the hearing, the parties were able to resolve some of the issues and agree that the following refusals remaining outstanding:

- a. To provide Jamie and Tanya Fitchetts' personal income tax information for the two years up until the date of the fire;
- b. To provide Jamie and Tanya Fitchett's personal bank accounts for two years up until the date of the fire;
- c. To provide copies of any personal credit card statements of Jamie and Tanya for two years up until the date of the fire;
- d. To provide the Royal Bank file regarding the mortgage and approval process and the increasing of the mortgage line for the Fitchetts' personal home up until the date of the fire;
- e. To provide a copy of Jamie Fitchett's lease statements and what amounts were owing on his personal pick-up truck, around the time of the fire; and

- f. To provide a copy of the accountant's file regarding the corporation's finances from the date of inception up until the fire, which is a two-year period.

Legal principles to be applied

[10] Pursuant to r. 31.06 of the *Rule of Civil Procedure*, a person examined for discovery shall answer, to the best of their knowledge, information and belief, any proper question relevant to any matter in issue in the action.

[11] The purposes of production and discovery in a civil action are: (1) to enable the examining party to the examination know the case he or she has to meet; (2) to enable the examining party to obtain admissions that will dispense with formal proof of his or her case; (3) to obtain admissions that will undermine the opponent's case; (4) to facilitate settlement, pre-trial procedure, and trials; (5) to eliminate or narrow issues; and (6) to avoid surprise at trial: *Ontario Bean Producers Marketing Bd. v. W.G. Thompson & Sons* (1982), 35 O.R. (2d) 711 (Div.Ct.); *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 at para. 120.

[12] In *Ontario v. Rothmans Inc.*, Perell J. summarized the following five key principles that apply to examinations for discovery:

- a. Discovery questions must be relevant to any matter in issue, as defined by the pleadings. Overbroad or speculative discovery, otherwise known as a "fishing expedition" is not permitted;
- b. An examining party must not go beyond the pleadings to find a claim or defence that has not been pleaded;
- c. The extent of discovery is not unlimited, with the court having an obligation to keep it within reasonable and efficient bounds to avoid it becoming oppressive and uncontrollable;
- d. A witness may be questioned for hearsay evidence because they are required at discovery to give not only his or her knowledge but his or her information and belief about the matters in issue; and
- e. A witness may be questioned about the party's position on questions of law.

[13] Rule 34.15 provides that where a person refuses to answer any proper question or fails to produce a document or thing that he or she is required to produce, the court may, amongst other things, require the person to re-attend at their own expense to answer the question or require the document or thing to be produced if it is just to do so.

[14] In a motion under r. 34.15, the court is required to consider the principle of proportionality. This involves a consideration of the time and expense required to answer the question or produce the document sought, whether requiring the party or other person to answer the question or produce the document would cause them undue prejudice, whether it would unduly interfere with the orderly progress of the action, whether the information or document sought is readily available to the person requesting it from another source, or whether such an order would result in an excessive volume of documents require to be produced by the party or other person: *Rule of Civil Procedure*, r. 29.2.03

[15] Pursuant to r. 31.03, where a party to an action is a corporation, the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee. On discovery, a representative of the corporation is required to answer not only “on their own knowledge” but also on information and belief: *Harris v. Leikin Group Inc.* 2011 ONSC 166 at para. 21.

Analysis

[16] The disputed refusals in this motion fall into two categories: (1) a request for a copy of the accountant’s entire file regarding the corporation’s finances from the date of inception up until the date of the fire, which is about a two-year period; and (2) a request for information related to the personal finances of Jamie and Tanya Fitchett.

[17] The defendant takes the position that financial information about the corporation and its beneficial owners is relevant to this case because it is relevant to the issue of motive. If the corporation and/or its beneficial owners were in poor financial health, they would have had a motive to set the fire and make an insurance claim to recover money.

[18] The plaintiff takes the position that the request for the entire accountant’s file is overly broad and amounts to a fishing expedition. The plaintiff further submits that it cannot be compelled to produce the personal financial records of Jamie and Tanya Fitchett, who are not parties to the litigation. The plaintiff submits that if the defendant wishes to seek this information, they must bring a motion under r. 30.10 for an order for production from non-parties, with leave.

Is the material sought relevant?

[19] Relevance has been described as something that is “logically connected and tending to prove or disprove a matter in issue; having appreciable probative value – that is rationally tending to persuade people of the probability or possibility of some alleged fact”: *Black’s Law Dictionary* (5th edition).

[20] The motive of a party, or someone on their behalf, to intentionally set fire to a property is relevant in an action involving civil arson. The defendant has provided a number of authorities that support this assertion: *Azami v. TFD Home and Auto Insurance*, 2018 ONSC 1697; *Rizzo v. Hanover Insurance Co.* [1990] O.J. No. 475 (H.C.J.) aff’d 1993 CanLII 8561 (ONCA), leave to appeal to SCC refused, [1994] 1 S.C.R. x; *Tait v. Royal Insurance Co. of Canada*, 1997 CanLII 4546 (N.S.S.C.), *Rathell v. Zenith Insurance Co.*, 2003 CanLII 39801 (ONSC); *Lancer Enterprises Ltd. v. Saskatchewan Government Insurance*, 2011 SKCA 28; *Sholdidis v. Economical Mutual*

Insurance Co., 2003 CanLII 3265 (ONSC); *Bidart v. The Portage La Prairie Mutual Insurance Company*, 2017 NSCC 126; *Westcan Horticultural Ltd. v. Royal Insurance Co. of Canada*, 1998 ABQB 743.

[21] Courts recognize that as “a matter of common sense and everyday experience”, a motive to commit an act, renders it more likely that a person who has a motive committed it than a person who lacked that motive. Evidence of motive is relevant to and admissible with respect to whether a person committed a certain act: *R. v. Skeete*, 2017 ONCA 926 at para. 78

[22] In the circumstances of this case, the defendant has pled that the fire and destruction of the property was intentional and committed by the plaintiff’s beneficial owners so that they would receive the insurance proceeds. In this context, I am satisfied that the financial health of the plaintiff corporation and its beneficial owners at the time of the fire, or shortly before, is relevant to these proceedings as it provides a possible motive to intentionally set fire to the property and then make an insurance claim to receive funds which could then be used to address any financial difficulties they were having.

Should the entire accountant’s file be produced?

[23] This request must be assessed within the context of what has already been provided. The plaintiff has already provided extensive disclosure with respect to its financial health leading up to and at the time of the fire. The plaintiff has already disclosed:

- a. Business Income Loss Analysis prepared by Muir Lake Services. Included in this report are: the sales analysis for the diner for the years 2015 to 2018; the plaintiff’s profit and loss as recorded for the years 2015 to June 16, 2017 (the day before the fire loss); transaction details by account for the same time period; the CRA GST printouts for the same time period; GST/HST return report for the same time period, the plaintiff’s tax return summary for the year ending April 30, 2017; the T2 Corporate Tax return for the plaintiff for May 1, 2016 to April 20, 2017; General Index of Financial Information for 2016 and 2017; Extra Expense analysis for expenses for bookkeeping and the interest charges for the Royal Bank Visa, Capital one, and Costco Mastercard; copies of certain invoicing for bookkeeping expenses; summaries of costs from May 2016 to January 2018 for the Fitchett’s personal Royal Bank Visa card, Summaries of Costs for the Fitchett’s personal Capital One Costco Mastercard; copies of the Fitchett’s Royal Bank Visa statements for May 19, 2016 to February 19, 2018; and copies of their personal Capital One Mastercard statements for September 26, 2016 and January 25, 2018;
- b. An affidavit of documents which includes an Equifax Business Credit Report dated June 29, 2017 which shows that the plaintiff had no delinquencies, no collections, no judgements, no returned cheques, no liens, no payments beyond payment terms between A3 2015 and A1 2017;

- c. A transcribed interview of Jamie Fitchett to Echelon Insurance on June 17, 2017; and
- d. Answers provided during the examination of discovery of Jamie Fitchett.

[24] The defendant seeks, in addition to the materials listed above, a copy of the plaintiff's "entire accountant's file" for the corporation from time it was incorporated in 2015 until the fire in 2017. This is a period of about two years.

[25] I am satisfied that *portions* of the accountant's file would be likely relevant to these proceedings if those portions relate to the financial health of the corporation in the time leading up to the fire.

[26] The difficulty I have is assessing what exactly the defendant seeks from the accountant's file. As noted above, a significant amount of disclosure has already been provided with respect to the plaintiff's financial health. If there are other specific pieces or categories of information that would be expected to be in an accountant's file, beyond those that have already been disclosed, that are relevant to the financial health of a corporation, the defendant should be able to set those out with some specificity or description.

[27] The question asked during the examination was for "a complete copy of their file regarding the corporation's finances and file from the date of inception up until the time of the fire, which is a two-year period". This was later clarified to be "Anything they have. It may not be—it may be producible. I don't know how much documentation we're talking about. If it's a lot, I may be able to send an accountant up to review it. But at the present time that's the undertaking I'm asking for because I don't know at this time".

[28] Where a request for documents to be produced is overly broad, a court can infer that the purpose behind the request amounts to a "fishing expedition": *The Bank of Nova Scotia v. Grillon*, 2022 ONSC 4492, at para. 24.

[29] The wording of the question during the examination demonstrates that the defendant was not able, at that time, to articulate what portions of the accountant's file it was seeking. The use of the term "anything they have" is demonstrative of an overbroad request. In my view, given the disclosure provided, the defendant should be able to describe, by category or description, what they seek from the accountant's file that would be relevant to the corporation's financial health. I am not satisfied that the defendant has established that "everything" in the accountant's file could be relevant to this issue.

[30] In the circumstances of this case, I find the defendant's request for the "entire file", without more specificity or description, to be an overly broad request and amounts to "fishing expedition".

Is the plaintiff required to provide the personal financial documents of its officers?

[31] The defendant relies on the cases cited above in support of its position that the financial health of the beneficial owners of the corporation is relevant where the issue is civil fraud in the context of an insurance claim. I agree that this information is relevant. However, the cases provided

do not assist me with whether a corporate plaintiff is required to provide the personal financial information of its officers where those officers are not parties to the action. In all of the cases cited by the defendant, the corporation and the owners were parties to the action. In this case, the Fitchetts are not parties to the action, either as plaintiffs or defendants.

[32] A corporation is a distinct legal entity, separate from its owners. It can own property, enter into contracts, sue and be sued, just like a natural person: *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22, 45 W.R. 193, [1895-99] All E.R. Rep. 33, 66 L.J. Ch. 35, 13 T.L.R. 46, [1896] UKHL 1 (U.K. H.L.); *BCE Inc., Re.*, 2008 SCC 69, at para. 34.

[33] Courts have recognized a distinction between the questions to be asked of a representative of the corporation who attends to be examined, who is the “mouthpiece” of the corporation, and the officer of a corporation who is called as a witness at trial: *Fisher v. Pain*, (1938), [1938] O.W.N. 74, 1938 CarswellOnt 132, [1938] 2 D.L.R. 753 (note) (Ont.H.C.); and *R. v. Ontario (General Sessions of the Peace)* (1970), [1971] 2 O.R. 3 (Ont.C.A.), aff’ing [1970] 3 O.R. 398 (Ont.H.C.) leave to appeal to S.C.C. refused, [1971] 2 O.R. 11n (S.C.C.), at p. 7; *R. v. N.M. Paterson & Sons Ltd.*, [1980] 2 S.C.R. 679 (S.C.C.) at pp. 691-92.

[34] In *R. v. Ontario (General Sessions of the Peace)*, Arnup J.A. commented on the difference in the scope of evidence to be given on an examination for discovery by an officer appearing on behalf of the corporation, and the scope of evidence to be given by an officer of the same corporation at trial. On examination for discovery, the officer speaks for the corporation and may be examined about their knowledge, or knowledge obtained from others employed by the corporation or its records. They may not be examined with respect to knowledge acquired otherwise than as an officer. At a trial, the scope of examination is much broader because the officer is a witness and is required to testify as to all relevant and admissible facts within their knowledge however obtained: *R. v. Ontario (General Sessions of the Peace)*, at p. 7.

[35] In *Cimtel Inc. v. TSV Holdings Ltd.*, 2018 ONSC 894, R. Ryan Bell J., addressed the question of whether a corporate representative should be required to answer as to their personal knowledge regardless of the capacity in which that knowledge was acquired. In that case, the plaintiffs took the position that the corporate representative was required to answer any relevant question within his personal knowledge, regardless of how he acquired such knowledge.

[36] In *Cimtel Inc. v. TSV Holdings Ltd.*, R. Ryan Bell J. concluded at para. 33:

...Where the corporate representative has not been named personally as a defendant, or where the corporate representative's knowledge was gained while he or she was associated with another corporation not named as a corporate defendant in the litigation, in my view, the corporate representative must only answer relevant questions with knowledge gained in his or her capacity as an officer or employee, or inform him or herself from other employees of the corporation or from corporate records. To permit otherwise would result in the adverse party being able to obtain on discovery the knowledge of a non-party without leave, contrary to Rule 31.10 of the Rules of Civil Procedure.

[37] I find the reasoning in *Cimtel Inc. v. TSV Holdings Ltd* to be persuasive and applicable to this case. In this case, Jamie Fitchett was examined as a representative of the plaintiff corporation. I find that he was required to answer questions as part of that examination related to his knowledge of the corporation and its financial health. He was not required, as part of the examination, to answer personal questions about his finances or those of his spouse, because they are non-parties to this action. If this matter proceeds to trial, the scope of questioning available to the defendant would be much broader because Jamie Fitchett would be a witness.

[38] The defence points out that Fitchett agreed in his examination that he would use his personal credit card to purchase items for the corporation and that he would take money from the corporation to pay his personal credit card for purchases made for stock used at the restaurant. The defence submits that given the beneficial owners did not divide their personal finances from the corporation's finances, it is improper to now refuse to disclose their relevant personal income and tax records.

[39] This appears to be an attempt by the defendant to "pierce the corporate veil". On the materials before me, I do not find a basis to support such a request. There is no evidence that the owners, directors, or officers were using the corporation for a fraudulent or improper purpose, or that it was used as a "mere instrument" for their own actions. The corporation owned and ran a business for two years. I have limited information about the extent to which there was comingling of funds. At its highest, there appear to be times when the Fitchetts purchased stock for the corporation using their credit cards and then were reimbursed. The balance owing on those credit cards during the period of 2016-2018 has already been provided by the plaintiff. I fail to see how details about the specific purchases made on those credit cards is relevant to the financial health of the plaintiff corporation.

[40] I am not satisfied that the occasional use of personal credit cards to purchase stock for the restaurant, which was reimbursed by the plaintiff, opens the door for the production of all of the Fitchett's personal financial information as non-parties to this litigation.

Conclusion

[41] I am not satisfied that the corporate plaintiff, through its representative Jamie Fitchett, should be required to produce its entire accounting file for the entire time it existed. I find this to be an overly broad request.

[42] I am also not satisfied that the corporate plaintiff should be required to produce the personal financial records of its beneficial owners, the Fitchetts, as part of examination for discovery. If the defendant seeks production of these materials, it must bring a motion under r. 30.10 for an order for production from non-parties, with leave.

[43] For these reasons, the motion is dismissed.

Costs

[44] If the parties cannot agree on the issue of costs related to this motion, they may provide written submissions to the court on this issue. The plaintiff shall provide its written submissions, of no more than 2 pages, within 15 days of the release of this decision. The defendant shall provide

its written submissions, of no more than 2 pages, 15 days following receipt of the plaintiff's submissions.

Released: June 11, 2025

The Honourable Madam Justice S.K. Stothart

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