

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
I. Pearce Farms LTD., Ian Pearce, Michelle)
Pearce) Darwin E. Harasym, for the Plaintiffs
)
Plaintiffs)
)
– and –)
) Larry M. Najjar, for the Defendants
)
T.S. Mullen Farms LTD., Windfall Farms)
Corp., Timothy Scott Mullen, Bernadette)
Marie Elaine Mullen)
)
Defendants)
)
) Samantha Pillon, for a Non-Party
)
)
)
) **HEARD:** May 30, 2025

2025 ONSC 4280 (CanLII)

RULING ON MOTION

HOWIE J.

Nature of Motion

- [1] The plaintiffs and defendants have each brought motions to deal with:
- (i) undertakings/refusals arising from cross examinations; and
 - (ii) the request that Employment and Social Development Canada (ESDC) produce certain files and employees as witnesses.
- [2] The second issue involves the Attorney General of Canada (AGC).
- [3] I am also asked to rule on whether the plaintiffs should be granted leave to file a supplementary affidavit in the context of a summary judgment motion brought by the defendants; in that summary judgment motion, the defendants seeks to dismiss the claims of the plaintiffs.

[4] For the purposes of this motion, I will not differentiate between the various plaintiffs and defendants.

Background

[5] I start by summarizing the plaintiffs' claim.

[6] In 2008, the plaintiffs were in financial difficulties with regard to their farming operations. At the same time, the defendants required assistance to operate their farming operations.

[7] Accordingly, the parties came to an agreement. Certain properties were transferred from the plaintiff to the defendant. This allowed the plaintiff to pay off debt. In turn, the plaintiffs provided farm labour to the defendants, for minimum compensation, for approximately a decade. The plaintiffs expected that after the provision of labour, the plaintiff's would regain title to the properties.

[8] The plaintiffs allege that the defendants failed to return ownership of the properties.

[9] In a very general sense, the defendants state that no such agreement existed. The defendants allege that they purchased land as an ordinary transfer. The defendants allege that the employment relationship with the plaintiffs had nothing to do with the land transfer. In other words, the plaintiffs were ordinary vendors and ordinary employees.

[10] A motion for summary judgment is scheduled for September 2025.

Position of AGC

[11] In summary, the AGC is being asked to produce files and witnesses.

[12] I will turn to the file production issue first.

[13] In April 2024, the plaintiffs completed a request, pursuant to the *Privacy Act*, RSC, 1985 c.P-21, seeking records related to a 2017 investigation into the plaintiffs' claim for employment insurance benefits. In March 2025, the plaintiff was provided with 392 pages of redacted records. Also in March 2025, further redacted records were provided in response to a second request.

[14] The AGC takes the position that the consents of individual plaintiffs and individual defendants are required in order to produce unredacted versions of the information, or in the alternative, a court order. They take no position other than ensuring that the provisions of the *Privacy Act* are met.

[15] Through the previous order of Justice Bezaire, the issue of un-redacting the "main file" and the "Mullen interviews" file has been resolved. The issue that remains before me today is what I called the "mystery file." The AGC has advised the parties that this mystery file is related to the other files. The Employment and Social Development Canada (ESDC) cannot share anything else because of privacy issues.

[16] In support of her position, the AGC relies on s. 40 of the *DESDA*:

[40] Despite any other Act or law, the Minister [of Employment and Social Development], the members of the [Canada Employment Insurance] Commission and public officers shall not be required, in connection with any legal proceeding, to give evidence relating to the information that is privileged under section 32 or to produce a statement or other writing that contains any such privileged information unless the Minister considers that it is appropriate to do so or the legal proceedings directly concerns the administration or enforcement of a program.

[17] In summary, s. 40 does not permit the production of documents unless the Minister “considers it appropriate”.¹ The Minister retains that discretion despite any other legislation or order of this court: *Basyal v. Mac’s Convenience Stores Inc.*, 2022 BCSC 966 at paras. 60 and 63.

[18] When this matter was originally before Justice Bezaire, the Minister was content to comply with her order that provided for the production of unredacted documents.

[19] In relation to the mystery file, the Minister takes the position that it would be more appropriate to follow the usual course under the access to information regime (ATIP).

[20] In terms of the examination of the three employees as witnesses, the AGC submits that ESDC employees cannot be compelled as witnesses for discovery subject to the Minister’s discretion: s. 40, *DESDA*.

[21] The Minister does not believe that it is “appropriate” for the employees to give oral evidence as the documents have, and will, speak for themselves. The Minister points out that these interviews were conducted many years ago.

Leave to file supplemental affidavit

[22] Since April 2024, the plaintiffs have been attempting to obtain the documents, described above, from ESDC. He has wound his way through the privacy legislation and I have described what has been delivered to date.

[23] The motion for summary judgement, dismissing the claim, was launched by the defendants in October 2024. The plaintiffs (responding to the motion) completed their responding materials in January 2025.

¹ The other test, being the administration of a program, does not apply here.

- [24] Over the last several months, the unredacted files of the ESDC were produced, eventually. There is still the issue of that one remaining file that the parties will be attempting to obtain through the access to information process.
- [25] The plaintiffs wish to file a supplementary affidavit describing and attaching the records produced by the ESDC.
- [26] The plaintiffs have conducted a cross-examination of the defendants on the defendants' affidavit(s). Accordingly, r. 39.02(2) of the *Rules of Civil Procedure* is invoked. That rule states that this court shall grant leave, subject to terms, where this court is satisfied that the plaintiff ought to be permitted to respond.
- [27] It is appropriate to grant leave.
- [28] The test is set out in *Nexim Health Consultants Inc. v. Yacoob*, 2018 ONSC 91, at para 9:
- a. Is the evidence relevant? It was not argued that the evidence is not relevant;
 - b. Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time? The answer is yes. A defendant stated in her cross-examination that there was no statement about the alleged agreement, at the heart of this matter, given to interviewers;
 - c. Would non-compensable prejudice result from granting leave? The answer is no. The cross-examination shall be conducted at the cost of the plaintiff. The defendant is granted leave to file any response to the supplemental affidavit;
 - d. Did the plaintiff provide an adequate explanation as to why the affidavit was not included at the outset? In his submissions, counsel for the plaintiff said that the plaintiff recalled the interactions with employees of the ESDC sometime after this matter was commenced. Secondly, while in retrospect perhaps the information could have been requested by counsel for the plaintiff in a more efficient manner, working through the nuances of the privacy legislation created explainable delay.
- [29] To be clear, whichever party is requesting the mystery file, that party shall promptly provide a copy of any answer received from ESDC to the other party.
- [30] Counsel for the defendants urge this court to deny leave to file supplementary affidavit material on the basis that the records that have been produced thus far, at least, are inherently unreliable and, at times, contradictory. He cited two examples. With respect, at this stage, the issue is whether evidence obtained, but not produced in a timely manner, should be filed. Put another way, had the plaintiffs been in possession of the ESDC file at the time that he swore his affidavit in January 2025, he would have been permitted to include that file information in his affidavit. The issue of reliability is best left with the summary judgment motion judge.

[31] I am aware that the witnesses for ESDC are no longer employed by the government. Counsel for the defendants, correctly, noted that the defendants may be in a position in which the plaintiffs puts forward documents, authored by non-parties, without allowing the defendants an opportunity to cross-examine as those employees may not be located. But even if they could be located, the AGC has made it clear that the Minister will not be producing those witnesses for cross-examination in any event. In other words, there is no path to the cross-examination of these witnesses. But again, this is an issue that the summary judgment judge can take into account.

Undertakings/Refusals

[32] I apply the following principles:

1. Undertakings should be produced in a reasonable time. I should be aware that other litigation activity is continuing. There is very little prospect of the summary judgment motion proceeding in September;
2. An undertaking “under advisement” is a refusal;
3. Acceptable reasons to refuse to produce an undertaking include:
 - a. that the request is irrelevant or collateral;
 - b. that the request constitutes a “fishing expedition”;
 - c. that the time and expense involved to produce the undertaking is disproportionate to the claim. (At issue is the ownership of some 220 acres. Using rough math, the amount at stake is about \$4.0 million);
4. I am aware that Mr. Wolfe is a witness, not a party, but has filed an affidavit;
5. The financial books and records of the defendants, including payroll, were maintained by hand. A search for a specific type of entry requires a manual search going back many years;
6. There was a mediation in this matter. Certain documents were exchanged in the mediation process. A document produced in mediation that would be produced in the normal course of litigation does not attract the mediation shield: *Stewart v. Stewart*, 2008 ABQB 348, para 22.

[33] On that basis, I attach as Schedule “A” the completed undertakings/refusals charts supplied by counsel, having completed the “disposition by court” section.

Order

[34] For these reasons:

1. The motion *viz.* ESDC is dismissed.
2. The plaintiffs are granted leave to file a supplemental affidavit on the summary judgment motion subject to the following:
 - a. the defendants shall be permitted to cross-examine the deponent of the supplemental affidavit, at the cost of the plaintiffs;

- b. the defendants shall be permitted to file a responding affidavit to the supplemental affidavit;
 - c. the plaintiffs shall be permitted to cross-examine the deponent of the responding affidavit at his own cost;
3. The parties shall comply with the undertaking/refusals chart set out at Schedule “A”.

Costs

- [35] There are several layers to the cost ruling.
- [36] Firstly, the AGC seeks costs of approximately \$14,000. I am mindful that the AGC appeared at this motion, and the previous attendance before Justice Bezaire. The AGC has also been involved in the steps with regard to the privacy legislation. Counsel for the AGC submitted that the issues raised were as unique to her as the issues were unique to counsel for the parties. Without being critical, however, costs of \$14,000 is somewhat high. I assess the costs in favour of the AGC in the amount of \$10,000 plus disbursements and HST.
- [37] Which party shall pay the costs? Counsel for the defendants argue that he was a mere passenger with regard to the requests against ESDC. Counsel for the plaintiffs argue that the defendant was permitted to “piggyback” his position, to the benefit of the defendants.
- [38] In totality, it appears to me that counsel for the plaintiffs did not proceed in the most efficient manner. It appears that it was the plaintiff that was most concerned about getting the records/witnesses. By the same token, the defendants did not sign a consent and did not agree to the production of unredacted documents.
- [39] I would assess the costs as 66 percent payable by the plaintiffs and 34 percent payable by the defendants.
- [40] I now turn to the costs related to the motion brought by the plaintiff for leave to file his affidavit. The inability of the plaintiff to recognize the importance of these documents and the missteps taken to obtain the documents (without being critical) led to the necessity to bring the motion. By the same token, once the motion was brought, the defendants should have consented to the request.
- [41] This argument took about 25 percent of the total motion time. Accordingly, the defendants shall pay to the plaintiffs the sum of \$1,750.00 plus HST and disbursements with regard to that portion of the motion.
- [42] Turning now to the undertaking/refusals motions brought by both parties, I find:
- a. the plaintiffs had substantial success with regard to the productions of Mr. Wolf;
 - b. the plaintiffs had limited success with regard to the productions of Ms. Mullen;
 - c. the plaintiffs had marginal success with regard to the productions of Mr. Mullen;

d. the defendants had approximately 50 percent success with regard to the productions of Mr. Pearce.

[43] The plaintiffs bill of costs, “all in”, reflects \$9,606.99 on a partial indemnity basis. Admittedly, he underestimated the counsel fee for appearance.

[44] The defendants did not produce a bill of costs.

[45] Given the relative successes of each party as against the other, the costs claims should be set off. Accordingly, there is no further order as to costs as between the parties.

[46] Finally, I am very indebted to counsel for their very helpful factums and oral submissions.

Jason P. Howie
Justice

Released: July 21, 2025

CITATION: I. Pearce Farms LTD. et al. v. T.S. Mullen Farms LTD. et al., 2025 ONSC 4280
COURT FILE NO.: CV-22-31459
DATE: 20250721

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

I. Pearce Farms LTD., Ian Pearce, Michelle Pearce

Plaintiffs

– and –

T.S. Mullen Farms LTD., Windfall Farms Corp.,
Timothy Scott Mullen, Bernadette Marie Elaine Mullen

Defendants

RULING ON MOTION

Howie J.

Released: July 21, 2025