

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
CASSIE FALARDEAU)	Patrick Poupore / Alexandra McCallum, for
)	the Plaintiff
– and –)	
)	
HIS MAJESTY THE KING IN RIGHT OF)	Sam Sandhu, for the Defendants
ONTARIO, REPRESENTED BY THE)	
MINISTER OF TRANSPORTATION AND)	
GREEN INFRASTRUCTURE PARTNERS)	
INC.)	
)	
Defendants)	
)	HEARD: July 24, 2025

REASONS FOR DECISION ON MOTION

CULLIN J.

Overview

[1] This matter appeared before me in Motions Court to address two motions by the plaintiff: (1) a motion to add LEA Consulting Ltd. as a defendant to this action; and (2) a motion to require the defendant, His Majesty the King in Right of Ontario, represented by the Minister of Transportation (“HMTK”) to answer undertakings and to re-attend at their own expense for a continuation of their oral examination for discovery.

[2] The motion to add LEA Consulting Ltd. proceeded with the consent of the defendants and was unopposed by the proposed defendant.

[3] The motion to answer undertakings was unopposed by HMTK. The motion to compel HMTK to re-attend for discovery was opposed by HMTK.

[4] For the reasons that follow, the plaintiff’s motion to compel HMTK to re-attend for a continuation of their oral examination for discovery, at their own expense, is granted.

Summary of the Facts

[5] The plaintiff was involved in a single-vehicle motor vehicle accident on September 9, 2023. She has commenced this action alleging that the accident was caused or contributed to by the

negligence of the defendants. She alleges that there was a hazardous gravel patch in an unmarked construction zone on the roadway.

[6] The defendants served a boilerplate Statement of Defence denying the plaintiff's allegations. The defence disclosed no facts indicating the involvement of any other party in the maintenance or management of the roadway or its construction zones.

[7] On January 21, 2025, HMTK attended for an oral examination for discovery ("the discovery"). Shortly after the discovery commenced, HMTK advised of the involvement of LEA Consulting Ltd. ("LEA"), an onsite contract administrator for the roadway construction project. The plaintiff did not receive documents relevant to the involvement of LEA prior to the discovery; they did not receive a copy of LEA's contract with HMTK or any of the records that LEA prepared in discharging their role.

[8] Counsel for the plaintiff conducted some questioning but then concluded the discovery with the following statement:

MR. POUPORE: Okay. Well, I'm going to -- I'm going to adjourn my exam until I get the records, (a) from LEA Consulting, and then (b) all of the journals and inspections from -- you know. I don't see any real benefit to continuing this without those records. So I'll let my friends go ahead, but I can tell you that I'm going to wait for those records and then decide whether or not I have any more questions...

The Law

[9] The procedure for conducting oral examinations for discovery is provided in Rule 34 of the *Rules of Civil Procedure*. For the purpose of this motion, the relevant rules are as follows:

Adjournment to Seek Directions

34.14 (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,

...

(d) there has been a neglect or improper refusal to produce a relevant document on the examination. [emphasis added]

Sanctions for Improper Conduct or Adjournment

(2) Where the court finds that,

(a) a person's improper conduct necessitated a motion under subrule (1); or

(b) a person improperly adjourned an examination under subrule (1),

the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the court may fix the costs and make such other order as is just.

[10] In *Kingsberg Developments Ltd v. Maclean*, [1985] OJ No 1650, at para. 8, the Court noted that, “Rule 34.14 is designed to permit the Court to make such orders as may be just and necessary when the conduct of one counsel or another is such that a proper examination cannot be held.” It described the conduct giving rise to intervention under the Rule as, “a type of misconduct such as to render the examination futile without the intervention of the Court.”

Analysis

[11] The involvement of LEA in the management of the road construction site where the accident occurred was significant information which the defendant HMTK elected not to disclose in advance of the discovery. It is difficult to understand why they elected to withhold this information, which was clearly relevant to the issues raised in the Statement of Claim.

[12] At the discovery, the plaintiff learned that LEA oversaw the construction contract on HMTK’s behalf, administered the “day-to-day business” onsite, and prepared records regarding activities undertaken on the site including “sign diaries” and “compaction audits”. HMTK’s role was not, “on the ground” but rather was to oversee the activities of LEA.

[13] During the discovery, counsel for HMTK acknowledged that there were relevant documents missing from the disclosure provided to the plaintiff and that it was possible that a further attendance may be necessary. At Question 38 of the discovery, the following exchange took place:

38 Q. Okay. Have you seen any of these inspections?

A. No. We have them, I'm not -- I'm not aware of -- I didn't read them or go through them, no.

MR. POUPORE: Do we have them, Counsel?

MR. SANDHU: I don't think so.

MR. POUPORE: Well, we're going to need those, please.

MR. SANDHU: Yes. Okay. Just let me know exactly what you want as the undertaking.

MR. POUPORE: Well, I think you're obliged to go through your records. And I think that your witness is obliged to go through the records and provide anything that's considered relevant. And so I don't know that I need to give you any kind of a timeframe.

MR. SANDHU: Yeah. I mean, certainly --

MR. POUPORE: I mean, we should have those, frankly, but we don't.

MR. SANDHU: Yeah. Yeah. I mean, you can leave it with me to get anything relevant that I haven't got already, which would certainly include those records and produce them. And yeah, I'll comply with the general obligation to produce everything relevant for sure.

MR. POUPORE: Okay. I'd like that. And then once I have them, we'll decide whether or not we need to come back.

MR. SANDHU: Sure.

MR. POUPORE: Thank you.

[14] Both the plaintiff and HMTK's witness were deprived of the opportunity to prepare for the discovery due to HMTK's failure to disclose relevant documents. There were multiple questions that the representative of HMTK was unable to answer in the absence of LEA's records. The plaintiff was unable to probe further as they had no knowledge of the contents of those records. I find that the failure of HMTK to disclose the involvement of LEA and documents relevant to their role as the contract administrator in advance of the discovery undermined the purpose and utility of the discovery.

[15] In the circumstances, I find that it is just, appropriate, and necessary to require HMTK to re-attend for a continuation of their oral examination for discovery. As this situation was due to the failure of HMTK to disclose relevant information and documents, and therefore was completely avoidable, I find that HMTK should be required to attend at their own expense.

Costs

[16] The Court's ability to award costs is conferred upon it pursuant to s.131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Although awarding costs is discretionary, in civil actions the Court is guided in its exercise of discretion by the *Rules of Civil Procedure*.

[17] With respect to motions, pursuant to Rule 57.03, the successful party is entitled to an award of costs, payable forthwith, absent circumstances that would support a finding that another order would be more just. Other factors to be considered by the Court include: (i) the amount claimed and recovered in the proceeding; (ii) the complexity of the proceeding; (iii) the importance of the issues; (iv) the conduct of the parties; and (v) whether any step was improper, vexatious or unnecessary.

[18] An award of costs must reflect an amount that is fair and reasonable having regard to the individual circumstances of a case: *Boucher v. Public Accountants Council (Ontario)*, 2004 CanLII 4579. Costs are intended to indemnify a successful party for the expense of being compelled to seek the assistance of the Court to resolve a dispute: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, paras. 19-21.

[19] The plaintiff seeks costs against HMTK with respect to the motion for undertakings and to compel HMTK's re-attendance for oral examination for discovery. A Costs Outline has been submitted seeking partial indemnity costs in the amount of \$4,243.15. Had HMTK been successful, they were seeking partial indemnity costs in the amount of \$1,186.50; I note, however, that HMTK filed no materials on the motion except for their Costs Outline.

[20] I find that the plaintiff ought not to have been required to bring this motion and, once it was brought, ought not to have been required to argue it. HMTK's position on the motion was unreasonable and wholly failed to acknowledge their role in causing the circumstances that required the motion. While I agree with the submission of HMTK's counsel that the threat of a motion for undertakings could have been better documented prior to initiation, the focal point of the motion was the discovery issue which could not have been resolved absent a motion.

[21] I find that the costs requested by the plaintiff are reasonable in the circumstances and they will be so ordered.

Disposition

[22] In summary, the plaintiff's motions shall be and are hereby disposed of as follows:

1. The plaintiff's motion to compel the defendant, His Majesty the King in Right of Ontario, represented by the Minister of Transportation, to fulfill their outstanding undertakings and to re-attend for a continuation of their oral examination for discovery at their own expense, is granted. The defendant, His Majesty the King in Right of Ontario, represented by the Minister of Transportation, shall forthwith pay the plaintiff's costs of the motion, fixed in the amount of \$4,243.15. The plaintiff's counsel has submitted a draft Order which I have signed, subject to amendments to accurately reflect these reasons.
2. The plaintiff's motion to amend their Statement of Claim is granted. No costs shall be payable with respect to that motion. The plaintiff's counsel has submitted a draft Order which I have signed, subject to non-substantive amendments to its form.

CITATION: Falardeau v. Ontario (Transportation), 2025 ONSC 4388
COURT FILE NO.: CV-24-0058
DATE: 2025-07-28

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CASSIE FALARDEAU

Plaintiff

– and –

HIS MAJESTY THE KING IN RIGHT OF ONTARIO,
REPRESENTED BY THE MINISTER OF
TRANSPORTATION and GREEN
INFRASTRUCTURE PARTNERS INC.

Defendants

REASONS FOR DECISION ON MOTION

Cullin J.

Released: July 28, 2025