CITATION: Foto v. City of London, 2025 ONSC 7276
COURT FILE NO.: CV-24-00003594-0000
DATE: 2025-12-31

2025 ONSC 7276 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Patricia Foto	)	J. Bonniere, Counsel for the Plaintiff/Respondent
Plaintiff	)	
– and –	)	
THE CORPORATION OF THE CITY OF LONDON	)	S. Greenlaw, Counsel for the Defendant/Appellant
Defendant/Appellant	)	
	)	**HEARD:** December 15, 2025

REASONS FOR DECISION

TEN CATE J.

Overview

[1] This is an appeal from the interlocutory order of Associate Justice McGraw granting the Plaintiff leave, under Rule 31.03(2)(b) of the *Rules of Civil Procedure*, to conduct a limited, continued examination for discovery of a second, corporate representative of the City of London, namely Ms. Lynne Livingstone, for one hour, together with a hybrid process permitting up to two pages of written questions.

[2] The City argues the Associate Justice made palpable and overriding errors of fact and law, and errors of law, principally by: (a) relying on an alleged agreement between the parties respecting a hybrid examination when none existed and no transcript was before the court, and (b) misapplying the strict test under Rule 31.03(2)(b) and related authorities. The Plaintiff responds that the order was proportionate, firmly grounded in the record, and reflected a careful application of the governing principles, particularly given Ms. Livingstone's long tenure and direct managerial involvement, and Mr. Goldrup's limited overlap with the Plaintiff.

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[3] For reasons that follow, the appeal is dismissed. The order permitting a time-limited further examination, and written questions is a measured remedy tailored to cure discovery incompleteness. No reversible errors are shown warranting appellate intervention.

Background

[4] The underlying action is a wrongful dismissal claim with allegations of discrimination and harassment. The Plaintiff worked in HR/Talent Management for 21 years with the City of London, with a managerial role for 10 years. At the time of the Plaintiff's termination from employment, Ms. Livingstone was the City Manager.

[5] Although the Plaintiff initially requested an examination of Ms. Livingstone, the City produced Mr. Michael Goldrup, Director of People Services, for discovery. He was involved with the Plaintiff for approximately two months leading up to her termination and reported to Ms. Livingstone, who managed the Plaintiff's employment, and retired in March 2024.

[6] Mr. Goldrup was examined over multiple sittings for a total of 6.5 hours. There were approximately 30 undertakings, and he provided a "will say" statement indicating his responsibility for the termination. The discovery process experienced multiple cancellations and adjournments, attributed variously to scheduling and late service issues, culminating in a motion for leave to examine Ms. Livingstone.

[7] On November 16, 2023, a Case Conference was conducted before Wilson, J.. In her endorsement, she indicated that Ms. Livingstone has evidence that is relevant to the action, may be called as a witness at trial, and that her relevant information "ought to be imparted to the Plaintiff". Wilson J. also indicated that Mr. Goldrup "has an obligation to inform himself of what her evidence would be at trial, since he was not employed with the company at the time of certain events giving rise to this claim".

[8] On August 13, 2024, Associate Justice McGraw granted leave to conduct a one-hour discovery of Ms. Livingstone and permitted a hybrid approach with two pages of written questions, expressly to address incompleteness and proportionality concerns.

Issues

[9] This appeal raises two principal issues:

1. Whether the Associate Justice misapplied Rule 31.03(2)(b) and the principles governing leave to examine a second corporate representative resulting in a palpable and overriding error or error of law; and

2. Whether any reliance by the Associate Justice on an alleged agreement respecting written questions to be given to Ms. Livingstone resulted in a palpable and overriding error.

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Analysis

[10] The parties agree the standard of review of an error of fact is palpable and overriding error and that on an error of law, the standard is correctness. In *Housen v. Nikolaisen*, 2002 SCC 33 (para. 36) the Supreme Court clarified that on a question of mixed fact and law the standard of review is a continuum between correctness and palpable and overriding error.

[11] In *Longo v. MacLaren Art Centre*, 2014 ONCA 526 (para. 39) the Court of Appeal stated that a palpable and overriding error is an obvious error that is sufficiently significant to vitiate the challenged finding. The appellant bears the onus of showing that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of the error.

[12] In *Fischer v. IG Investment Management Ltd.*, 2016 ONSC 4405 (paras. 39) Perrel J. quoting *Baylis Estate v. Canada (Attorney General)*, [2000] O.J. No. 2531 (S.C.J.), leave to appeal refused [2000] O.J. No. 4931 (Div. Ct.) outlined the guiding principles on a motion to examine a second corporate representative. The moving party must demonstrate: (a) that it cannot otherwise obtain the discovery to which it is entitled from the examined party's witness; and (b) there are other special circumstances related to whether the initial representative was uninformed about the material issues.

[13] In my view, McGraw A.J. properly applied the test in *Fischer* to the facts on the motion because he found: (1) Mr. Goldrup's tenure with the Defendant was limited while the Plaintiff was still actively employed; and (2) there was significantly more overlap between the Plaintiff and Ms. Livingston during her employment, which would reasonably warrant examination of her.

[14] From his reasons, it is clear the Associate Justice was satisfied that the Plaintiff's examination of the Defendant was incomplete, and that the Plaintiff cannot otherwise obtain the information to which she was entitled from Mr. Goldrup. He based this conclusion on a specific meeting between the Plaintiff and Ms. Livingstone involving a previous workplace complaint. Although he did not explicitly find Mr. Goldrup to be uninformed, evasive or unwilling to inform himself, implicit in his reasons was his finding that Mr. Goldrup was unable to inform himself of some of the issues in the action because of his short tenure while the Plaintiff was employed, and because he was not involved in the meeting with Ms. Livingstone. Overall, he was satisfied that both branches of the *Fischer* test were met.

[15] The City submits that the Associate Justice's statement in his reasons: "the parties have agreed that the Plaintiff will deliver, and Ms. Livingston will answer some questions in

writing" lead to reversible error because no such agreement was communicated by counsel during the hearing. Although the City asserts that no transcript was available from the motion hearing, it admits it made no inquiries of the court reporting office. Because the appellant bears the burden of proof on the appeal, and no transcripts were provided to me, there is no evidence to contradict this sentence. Even if such an agreement was not reached, the Associate Justice applied the correct test in *Fischer* and tailored his order to the facts of this case. I therefore find no reversible error.

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[16] Additionally, I find the Associate Justice applied the principle of proportionality -- he was careful to limit the duration and format of the discovery given that Ms. Livingston had retired, and there had already been a lengthy discovery of Mr. Goldrup.

[17] Lastly, I find the Associate Justice's decision to order the use of a hybrid process was appropriate. The City argues that *City of Hamilton v. Attorney General et al.*, 2015 ONSC 1046 in which a hybrid discovery process was ordered is distinguishable because it dealt with multiple government entities. In my view, Hambly J.'s order in *Hamilton* sought to achieve the same broad policy objectives as in this case -- shortening the time required for discovery; reducing the costs to the public; expediting the completion of discovery; and simplifying/expediting the presentation of the case at trial. Again, I find no reversible error.

Conclusion

[18] The Associate Justice applied the correct legal principles under Rule 31.03(2)(b), made findings available on the record, and fashioned a proportionate remedy responsive to incompleteness and efficiency concerns. The City has not demonstrated a palpable and overriding error, an error of law, or an unreasonable exercise of discretion.

Costs

[19] If the parties cannot agree on costs, written submissions, limited to four pages exclusive of bills of costs, shall be exchanged and delivered as follows: Plaintiff's costs submissions within 15 days of release of these reasons; and the City's responding submissions within 15 days thereafter. There shall be no reply without leave of the court.

Order

[20] The appeal is dismissed. The Order of Associate Justice McGraw, dated August 13, 2024, permitting a one-hour examination of Ms. Livingstone and up to two pages of written questions, is confirmed.

Next Steps

[21] At the request of counsel, court staff were instructed by me to follow up on the transfer of the court file from Toronto to London as *per* the Order of Thomas, R.S.J. dated August 14, 2024.

[22] I echo the comments of Wilson J. in her 2023 endorsement: “In my view, counsel should focus on completing the discoveries and proceeding to a mediation in an attempt to resolve the action. If that is unsuccessful, the action should be set down for a trial and a trial date selected”.

[23] To that end, the parties are encouraged to consent to a new timetable, given that over five years have elapsed since the issuance of the claim. If they are unable to agree, counsel may request judicial assistance *via* Case Conference through the Civil Trial Co-ordinator, at Rebecca.Nagy@ontario.ca. I am not seized.

“Justice E. ten Cate”

Justice E. ten Cate

Released: December 31, 2025

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