

USE OF EVIDENCE FROM PREVIOUS TRIAL

By Tell Stephen and Bottom Line Research & Communications

Rule 263 provides as follows with respect to use of evidence from one trial in another proceeding:

263. An order to read evidence taken in another cause or matter is not necessary; but that evidence may, with all just exceptions, be read

(a) on ex parte applications by leave of the court to be obtained at the time of making the application, and

(b) in any other case, upon the party desiring to use such evidence, giving two days' previous notice to the other parties of his intention to read the evidence.

On a simple reading of the rule, it does appear that evidence from *any* trial may be used by *anyone* in a subsequent proceeding or matter. However, it is clear that evidence adduced or entered in a trial may not be used in another trial unless certain common law requirements are met. Stevenson and Cote in *Alberta Civil Procedure Handbook 2009* [Jurliber] explain as follows:

A quick reading of this Rule might suggest that a transcript of evidence from one lawsuit can be entered as evidence of the truth of its contents in a different lawsuit. However, the common law did not allow it, and this Rule is interpreted not to change that. . . . This Rule only gives the mechanism where such evidence is admissible, i.e. where the parties (or their privies) in the two suits are the same. There are other practical limitations as well, and in all cases, leave of the court is required. . .

Such use of evidence was similarly characterized as contrary to the rules of natural justice in *Tycholis v. Teem Energy Ltd.*, [2007] A.J. No. 961, 2007 ABCA 219, 417 A.R. 135:

20 There is another problem here. The matrimonial judge expressly cited and relied upon "the Tarapaski trial evidence" about qualifications on the expert accounting evidence, and "the salary and bonus pattern of Teem prior to the separation of the parties" (paras. 4 and 13). She did not explain the point about pre-separation patterns.

21 This refers to evidence which the matrimonial judge had heard at the matrimonial trial. (When we heard this appeal, that trial was not yet finished, though all the evidence may have been heard.) Mr. Tycholis was not a party to the matrimonial suit, and did not attend that trial. He did not know that evidence, and had no notice that it would be used, and there was no order to that effect. This is a breach of the rules of natural justice, and of rr. 263(b) and 384(3), (4).

Judge Allan Fradsham explained the purview of Rule 263 in *Alberta Rules of Court Annotated 2009*, Thomson Carswell. There he adopted the decision in *Degenstein v. Riou*, [1981] S.J. No. 1210, (1981), 12 Sask. R. 253 (Q.B.) per Wright J., on the substantially identical Saskatchewan Rule:

Counsel for the defendant applied at the conclusion of his case to read into evidence questions and answers from the examination of David Nowell who was called as a witness for the plaintiff in the criminal proceedings conducted on November 6, 1980. Counsel relied on Queen's Bench rule 285, which states:

An order to read evidence taken in another cause or matter shall not be necessary; but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence, giving two days previous notice to the other parties of his intention to read such evidence.

The application was opposed although neither counsel could cite any authority. I reserved the matter but expressed my grave doubts as to the propriety of the relief sought. Queen's Bench Rule 285 cannot, in my respectful view, be utilized to introduce such evidence. Nowell was not a party to the criminal or civil proceedings involving this plaintiff. He was a witness at the trial of this action and was cross-examined at length as to his evidence at the criminal trial including specific questions and answers taken from the transcript of his evidence. The issues and parties in the criminal proceedings were different than the parties here. The defendant cannot rely on Queen's Bench Rule 285. [pp. 740-1].

Fradsham further highlighted the case of *Ellis-Don Management Services v. Rae Dawn Construction Ltd.*, [1992] A.J. No. 823, 131 A.R. 190, 3 C.L.R. (2d) 190, 10 C.P.C. (3d) 356 (1992), 131 A.R. 190 at pp. 192-3 (Alta. C.A.), in which the Court of Appeal again expressed its concerns that it was not fair to use such evidence:

And we see some grave objections to that. First, the subcontractor who settled with the insurer (long before the motions in question were launched) would not take any part in the insurance suit. It could not object to the admissibility of evidence, nor cross-examine. That violates natural justice. Not would it make sense to make that subcontractor again a party for that purpose, for its quarrel is with its former co-plaintiffs, not with the insurers who are the only defendants. Those insurers strenuously and correctly object to having to fight afresh in any respect with someone whom they have paid to go away and drop his claim.

...

Therefore, the order that the evidence in one trial apply maybe years later in a different trial with somewhat different players, appears to us to be unjust and unworkable. [per Cote J.A.]

Fradsham also referred to *Walt Disney Productions v. Fantasyland Hotel Inc.*, [1993] A.J. No. 597, 19 C.P.C. (3d) 319, 141 A.R. 291 @ 291-2, per Cote J.A.:

This is an appeal from an order by a judge who had been running a series of pre-trial conferences. At one of the later ones he formally ordered that the evidence from a previous trial be put in total (by a transcript) as evidence at this new trial. He also provided that additional evidence could be given, and the opposing party might have the chance to ask for the attendance live of one or more of the witnesses to cross-examine them. An appeal has been taken from that order, and we have come to the conclusion that we should allow the appeal.

The parties are not identical in the two lawsuits, though it is very fairly conceded by the appellant/defendant here that the parties have similar management control and ownership. The plaintiffs are the same, but as I say the defendants are related. There is a considerable overlap in issues between the two lawsuits, but they are not identical and some different considerations will appear. The appellant/defendant (at least) intends to call somewhat different witnesses at the second trial, possibly partly because the appellant/defendant now has different counsel.

We do not base ourselves on any narrow or technical view of the powers of a pretrial judge. While parties can and often should by agreement waive many of the rules of evidence, nevertheless we feel that it is unjust to force upon a defendant a blanket order to put in merely the written transcript of all the evidence given some time ago for somewhat different purposes by witnesses in a different lawsuit. . .

Justice Kenny considered the requirements for using evidence obtained in an earlier trial in *Kroll Associates Inc. v. Calvi*, [1998] A.J. No. 331, 1998 ABQB 164, 225 A.R. 37, (1998), 60 Alta. L.R. (3d) 135 . She held that before evidence from a prior proceeding will be admitted, three criteria must be met:

...These three criteria were discussed and applied by the Supreme Court of Canada in *Walkerton (Town) v. Erdman* (1894), 23 S.C.R. 352 at 365- 367. The evidence of the witness from a prior proceeding is relevant if:

- (1) the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness;
- (2) that the questions in issue were substantially the same in the first as in the second proceeding; and
- (3) that the proceeding, if civil, was between the same parties, or their representatives in interest.

The criteria set out by Justice Kenny in *Kroll* have been cited with approval by the Alberta courts; for example, in *Highland Produce Ltd. v. Canadian Egg Marketing Agency*, [2004] A.J. No. 1461, 2004 ABQB 924, (per Wilson J.), it is clear that absent all three criteria set out in *Kroll*, evidence from prior proceedings cannot be used. Justice Gallant excluded evidence from other proceedings on the grounds that the parties were not the same, following *Kroll*, in *Shinnez-Lee Yellowbird v. Chief and Council of the Sampson Cree Nation*, [2003] A.J. No. 780, 2003 ABQB 535, 36 Alta. L.R. (4th) 107, 349 A.R. 208.

Therefore, unless the issues and parties and circumstances of the previous case and that proposed by a party meet the three requirements enunciated above, the party ought not to be able to import evidence from a previous trial.

END