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BY COURIER AND EMAIL

October 19, 2016
File No.: 127353.1010

Board Secretary
Ontario Energy Board
Yonge-Eglinton Centre
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Re: Xoom Energy ONT, ULC Applications for Natural Gas Marketer & Electricity Retailer Licences – OEB File Nos. EB-2016-0226/EB-2016-0227

We are writing to respond to Xoom Energy's counsel's letter dated October 18, 2016 objecting to Planet Energy's reply submissions.

Planet Energy's reply submissions were filed to reply to a matter raised for the first time in Xoom Energy's October 14, 2016 responding submissions. Parties are ordinarily entitled to reply to evidence or submissions that are newly raised and could not reasonably have been anticipated. This is a principle of procedural fairness and it has often been acknowledged as a right.[1]

Xoom Energy raised for the first time in its responding submissions the matter of Planet Energy's, Xoom Energy's and ACN's arrangements in the United States. Xoom Energy did not address this in the evidence it filed in this proceeding, specifically in its interrogatory responses to Board Staff and Planet Energy; nor did it raise this in its earlier August 5, September 26 or 28, 2016 submissions to the Board. Nor could Planet Energy have anticipated that Xoom Energy would raise this matter. In fact, in refusing to answer Planet Energy's interrogatories, Xoom Energy argued that "the relationship between Xoom, its affiliates, ACN or any of ACN's affiliates operating in the United States are not relevant".[2] Having said that, Xoom Energy reversed its position and then addressed in its responding submissions the operations and relationship between Xoom Energy and ACN (and Planet Energy) in the United States. It is Planet Energy's submission that it was improper for Xoom to

[1] The leading SCC authority *Krause v. R.* [1986] 2. S.C.R. 466 (with relevant passage highlighted) is attached; see also attached *Lockridge* v. *Ontario* , 2013 ONSC 6935 (relevant passage highlighted).
[2] See Xoom Energy's September 12, 2016 Interrogatory Responses to Planet Energy, Introduction and Response 1(b).

raise this matter for the first time in its responding submissions (having earlier said it was irrelevant) and without any evidentiary foundation in the record before the Board.

Planet Energy's reply submissions, as stated, were limited solely to replying to the newly raised matters; Planet Energy did not itself raise any new arguments, nor did it reiterate or reargue points already addressed. Planet Energy also properly referenced supporting documentation for its reply submissions

In the circumstances, Planet Energy respectfully submits that it is entitled, as a matter of procedural fairness, to reply to Xoom Energy's newly raised arguments and that its reply should be considered by the Board in making its determination. Alternatively, the Board may disregard entirely the new and unsubstantiated argument made by Xoom Energy in its responding submissions concerning the alleged arrangements between Planet Energy, Xoom Energy and ACN in the United States; in which case, the Board may likewise disregard Planet Energy's reply submissions on this point.

Lastly, Planet Energy takes issue with Xoom Energy's continued refrain that Planet Energy is attempting to prevent or delay Xoom Energy's entry into Ontario. As Planet Energy has consistently stated in its earlier submissions, Planet Energy does not object to Xoom Energy being licensed, subject to satisfying the Board's licensing requirements, and it does not object to Xoom Energy being licensed within the Board's proposed timeline for rendering a decision. Planet Energy simply requesting that appropriate license conditions be imposed to address the specific risk of consumer confusion and harm that may result if Xoom Energy is allowed to market (without appropriate limitations) through ACN representatives.

Yours truly,

Glenn Zacher

/sc
Encl.

cc: Board Staff
Applicant

Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. Vickerson | 2005 CarswellOnt 2812, 199 C.C.C. (3d) 165, [2005] O.J. No. 2798, 66 W.C.B. (2d) 606, 200 O.A.C. 87 | (Ont. C.A., Jul 6, 2005)

1986 CarswellBC 330
Supreme Court of Canada

R. v. Krause

1986 CarswellBC 330, 1986 CarswellBC 761, [1986] 2 S.C.R. 466, [1986] S.C.J. No. 65, [1987] 1 W.W.R. 97, 14 C.P.C. (2d) 156, 1 W.C.B. (2d) 9, 29 C.C.C. (3d) 385, 33 D.L.R. (4th) 267, 54 C.R. (3d) 294, 71 N.R. 61, 7 B.C.L.R. (2d) 273, J.E. 86-1137

KRAUSE v. R.

Dickson C.J.C., Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

Heard: November 20, 1985
Judgment: November 6, 1986
Docket: No. 18726

Counsel: *J. Green*, for appellant.
A. Stewart, for respondent.

Subject: Civil Practice and Procedure; Criminal; Evidence

Headnote
Criminal Law — Evidence — Evidence at trial — Rebuttal evidence — By prosecution

Criminal law — Evidence — Presentation of evidence — Rebuttal — Accused giving evidence of harassment by police and Crown leading rebuttal evidence under s. 11 of Canada Evidence Act — Accused not having made prior inconsistent statement and s. 11 not applicable — Rebuttal evidence not otherwise admissible as accused's evidence not relevant to merits of case and Crown bound by accused's answers on cross-examination.

On a voir dire at the accused's trial on a charge of first degree murder, the answers of the accused to police questions were held to be voluntary and admissible. However, the Crown chose not to lead the answers in evidence-in-chief, but indicated that it would use them in cross-examination if the need arose. The Crown closed its case without leading any police evidence concerning the statements or conversations between the accused and the police. In his testimony, the accused gave evidence concerning his involvement with the police during their investigation. He testified as to harassing and intimidating conduct by the police and the showing to him of a gory photograph of the victim's body. The Crown cross-examined the accused with respect to his statements to the police and at the close of the defence case applied pursuant to s. 11 of the Canada Evidence Act to call rebuttal evidence. The trial judge granted the Crown's motion and allowed the calling of evidence in rebuttal. The Court of Appeal dismissed the accused's appeal from his conviction, and he further appealed.

Held:

Appeal allowed; new trial ordered.

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The trial judge erred in permitting the Crown to call rebuttal evidence pursuant to s. 11 of the Canada Evidence Act, as the accused had made no prior inconsistent statements with regard to his evidence, and the rebuttal evidence could not be admitted on any other ground in law. The Crown in cross-examining an accused is not limited to subjects which are strictly relevant to the issues in a case and if something new emerges in cross-examination which the Crown had no chance to deal with in its case-in-chief and which is concerned with the merits of the case it may call rebuttal evidence. However, if the new matter is merely collateral in the sense that it is not relevant to an issue in the indictment or to matters which must be proven for the determination of the case, no rebuttal evidence may be called in contradiction. Here the evidence of the accused was not relevant to the determination of the principal issue: whether the accused killed the victim. Although the evidence of the accused reflected on the integrity of the police, it did not touch upon the question of guilt or innocence, and although the Crown was entitled to cross-examine the accused, it was bound by his answers and not entitled to call evidence in rebuttal. If the evidence had been relevant, it should have been introduced in the Crown's evidence-in-chief, and to allow it to be introduced by rebuttal evidence would be to allow the Crown to split its case.

Table of Authorities

Cases considered:

Allcock Laight & Westwood Ltd. v. Patten; Patten v. Bernard, [1967] 1 O.R. 18 (C.A.) — *referred to*

A.G. v. Hitchcock (1847), 1 Exch. 91, 154 E.R. 38 — *referred to*

Latour v. R., [1978] 1 S.C.R. 361, 33 C.C.C. (2d) 377, 74 D.L.R. (3d) 12, 14 N.R. 216 [Que.] — *referred to*

R. v. Bruno (1975), 27 C.C.C. (2d) 318 (Ont. C.A.) — *referred to*

R. v. Cargill, [1913] 2 K.B. 271, 8 Cr. App. R. 224 — *referred to*

R. v. Hrechuk (1951), 58 Man. R. 489 (C.A.) — *referred to*

R. v. Perry (1977), 36 C.C.C. (2d) 209 (Ont. C.A.) — *applied*

R. v. Rafael, [1972] 3 O.R. 238, 7 C.C.C. (2d) 325 (C.A.) — *referred to*

Statutes considered:

Canada Evidence Act, R.S.C. 1970, c. E-10, s. 11.

Criminal Code, R.S.C. 1970, c. C-34, s. 618(1)(a) [am. 1974-75-76, c. 105, s. 18].

Appeal by accused from judgment, 12 C.C.C. (3d) 392, dismissing appeal from conviction on charge of first degree murder.

The judgment of the court was delivered by *McIntyre J.*:

1 This appeal deals with the question of when, and in what circumstances, the Crown may be permitted to call evidence in rebuttal of the evidence given by an accused person.

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2 The appellant was charged with first degree murder of one Hutter on or about 13th March 1981. He was convicted of second degree murder on 12th February 1982 after a trial before a judge and jury. His conviction was upheld in the Court of Appeal on 11th April 1984 (Taggart and Craig JJ.A., Anderson J.A. dissenting) [reported at 12 C.C.C. (3d) 392]. His appeal to this court is under the provisions of s. 618(1)(*a*) of the Criminal Code. The formal order of the Court of Appeal, which dismissed the appellant's appeal to that court, recorded the points of law upon which Anderson J.A. based his dissent in these words:

> i) that the learned trial Judge erred in admitting rebuttal evidence on collateral matters directed to the credit of the appellant;
>
> ii) that the learned trial Judge failed to properly instruct the jury that allegations made by Crown Counsel during his cross-examination of the appellant as to character, and in his address to the jury, were of no evidentiary value and that this failure to direct amounted to non-direction in law; and
>
> iii) that it was not possible to say that the verdict of the jury would necessarily have been the same had the errors described in i) and ii) above not been made and therefore, the curative provisions contained in section 613(1)(*b*)(iii) of the Criminal Code of Canada were not applicable.

3 The evidence revealed that the deceased Hutter had been attempting to arrange for the purchase of a pound or more of marijuana with the assistance of the appellant, who testified that he trafficked in narcotics. The deceased was in contact with the appellant on the afternoon of 12th March 1981. He was in possession of a car and some $750 which had been provided by one Brian Hawe, a Crown witness. The deceased had been at the appellant's residence but had been unable to make a drug purchase. He returned to Hawe's residence about 45 minutes after leaving the appellant's home. The appellant advised Hutter that he would try to set up a drug deal for him, and Hutter returned to Duncan, British Columbia, where he lived.

4 On 13th March 1981, the day of the killing, Hutter returned to the Hawe residence about 10:30 a.m. He was there for a short time and then, using Hawe's vehicle, he left for the appellant's house. Before leaving, he was given $400 in cash in four $100 bills by Hawe towards the purchase of the pound of marijuana. Hutter arrived at the appellant's home shortly thereafter. He was there for a short time, then left at about 11:15 a.m., again with Hawe's vehicle.

5 At some time after his departure from the appellant's house and before 10:45 p.m. on 13th March 1981 Hutter was murdered. He was stabbed to death. His body was found partially covered by leaves on 14th March 1981. There was no money found on his body. The vehicle that Hutter had been driving was observed by an independent witness at the University of Victoria on 13th March 1981 at about 4:30 p.m. and was again observed in the same parking spot on 15th March 1981. The parking lot where the vehicle was found is approximately 1.8 kilometres from where the body was found.

6 The Crown case depended largely upon the evidence of one Molema. He gave evidence that he was in custody at the Vancouver Island Regional Correction Centre in Victoria in June 1981. He received a number of visits from the appellant, whom he had known for seven or eight years. Molema's evidence was that during the course of these visits the appellant had told him he had killed Hutter. Molema was unable to recall dates and times and the exact words used in the conversation. He did recall that a knife was involved in "a stabbing sense". He also gave evidence that the encounter between the appellant and Hutter was over a drug deal and that the appellant had taken $400 to $700 from Hutter. Molema also admitted to a long criminal record.

7 The appellant gave evidence on his own behalf. He said that he got up early on 13th March 1981 and he received a telephone call shortly thereafter from Hutter asking if he could come down to see the appellant. The appellant agreed that he could come. The deceased duly arrived shortly after breakfast and asked where he could get any marijuana. There was some discussion about the scarcity of marijuana and the price of drugs. Hutter told the appellant that he had to return the vehicle he was driving to Hawe. The appellant asked Hutter for a ride. He wished to visit some friends who

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lived in the direction he thought Hutter was going. They left the appellant's residence in Hawe's car but, when it became apparent that Hutter was not going in the direction the appellant had hoped, he got out of the car and continued his journey on foot. Hutter, according to the appellant, did not tell him where he was going. The appellant accounted for his whereabouts for the remainder of the day by saying that he reached his friend's apartment, that is, his destination, at about 11:15 or 11:30 a.m. The friend was absent. He then recalled that his appointment had been for 1:00 p.m. He went on foot to his bank where he deposited $100 in his account. The deposit was recorded by the bank's computer at 12:59 p.m. He then went to a nearby shopping centre where he made some purchases, then took a taxi to his friend's house and returned home later in the afternoon.

8 A Crown witness, one Macaulay, who was an admitted supplier of narcotics to the appellant, called at the appellant's residence at 4:30 p.m. on 13th March and the appellant paid him $600 or $700 in large bills. This was money owed on account. Later in the evening Crown witnesses placed the appellant at a local pub with a group of friends and later in a restaurant, where the appellant bought food for his friends and then went home by taxi.

9 I have gone into some detail on the facts above described in order to make clear the background against which the main point at issue, that of rebuttal evidence, arose. The trial lasted for some ten days. The first two days were taken up in a voir dire, which was conducted in order to determine the admissibility of certain statements made by the appellant to police officers in a series of conversations which took place during the investigation. The appellant was interviewed by police officers on 26th March, 31st March, 1st April, 6th April and 23rd April. During these interviews or conversations he was questioned regarding the murder of Hutter and he gave answers which were largely exculpatory. These conversations were the subject of the voir dire. The answers made to the questions by the appellant were all held to be voluntary and were all held to be admissible. The Crown, however, had made it clear to all parties that it did not intend to adduce the questions and answers in evidence-in-chief, but would use them in cross-examination if the need arose. It is the rebuttal evidence led by the Crown to rebut answers given by the accused in such cross-examination and statements made by the accused during his direct examination which raise the principal issue in this case.

10 The appellant, in addition to giving the evidence summarized earlier, also gave evidence of his involvement with the police during the investigation of the murder. The points of significance for our purposes in this case may be summarized, as follows:

11 He swore that:

1. It seemed to be a regular thing for the police to come and "grab" him and take him down to the station.

2. The police had suggested to him that if he did not tell them where he had sent Hutter to look for marijuana, they were going to "kick in the doors" of known drug dealers and tell them that the appellant sent Hutter there looking for marijuana.

3. The police showed him a photograph of the deceased when they first interviewed him on 26th March 1981.

4. He had not told the police officers that he had never dealt with Hutter in a dope deal, but rather that the statement was taken out of context and that he had told them that he had never dealt with Hutter prior to January 1981.

In cross-examination the appellant was questioned extensively regarding his statements to the police. It was put to him that he had told the officers that he had never dealt with Hutter in a dope deal when he had told him where to go.

12 At the close of the defence case the Crown applied to call rebuttal evidence, pursuant to s. 11 of the Canada Evidence Act. The Crown was relying solely on s. 11 for this application and sought to use the rebuttal evidence solely for the purpose of impeaching the credit of the appellant. The trial judge granted the Crown's motion and allowed the calling of evidence in rebuttal in these words [quoted at p. 397]:

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> Thank you, my ruling is that the Crown should have leave to call the rebuttal evidence that has been outlined, dealing with the statement previously made or alleged to have been made by the accused man. In my view the Crown is permitted to lead this evidence under Section 11 of the Canada Evidence Act.

13 In the Court of Appeal the majority were of the opinion that the trial judge had been in error in his application of s. 11 of the Canada Evidence Act, which he relied on in allowing the Crown to call the rebuttal evidence. The four points upon which the rebuttal evidence was permitted have been enumerated above. Of these points, items 1, 2 and 3 did not involve any past inconsistent statements on the part of the appellant. All of the judges of the Court of Appeal were in agreement that s. 11 could not apply to the first three items and that it was an error on the part of the trial judge to permit the calling of rebuttal evidence in respect of them. The majority, however, were of the view that rebuttal on items 1, 2 and 3 was supportable on another ground, that of relevance on the question of guilt or innocence, and that while the trial judge had misapplied s. 11 of the Canada Evidence Act on the question, the rebuttal evidence was nonetheless admissible and no error in law occurred. It was not contended that any error occurred in the application of s. 11 to the fourth item and no issue arises respecting that item. Anderson J.A., in dissent, was of the view that the rebuttal evidence did not go to issues relevant to the guilt or innocence of the appellant, but were merely collateral. Therefore, while cross-examination of the appellant by counsel for the Crown upon those items was proper, the Crown was bound by the answers given and was not entitled to call evidence to rebut the answers given in such cross-examination.

14 The first ground, as set out in the formal order of the Court of Appeal, and by far the most important in this case, alleges error on the part of the trial judge in permitting the Crown to call evidence in rebuttal of the appellant's testimony after the conclusion of the defence case.

15 At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 27 C.C.C. (2d) 318 at 320 (Ont. C.A.), per MacKinnon J.A., and for a civil case see *Allcock Laight & Westwood Ltd. v. Patten; Patten v. Bernard*, [1967] 1 O.R. 18 at 21-22 (C.A.), per Schroeder J.A. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence — as much as it deemed necessary at the outset — then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.

16 The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

17 In the cross-examination of witnesses essentially the same principles apply. Crown counsel, in cross-examining an accused, are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their credibility. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e., it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved

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for the determination of the case, no rebuttal will be allowed. An early expression of this proposition is to be found in *A.G. v. Hitchcock* (1847), 1 Exch. 91, 154 E.R. 38, and examples of the application of the principle may be found in *R. v. Cargill*, [1913] 2 K.B. 271, 8 Cr. App. R. 224 ; *R. v. Hrechuk* (1951), 58 Man. R. 489 (C.A.); *R. v. Rafael*, [1972] 3 O.R. 238, 7 C.C.C. (2d) 325 (C.A.); and *Latour v. R.*, [1978] 1 S.C.R. 361, 33 C.C.C. (2d) 377, 74 D.L.R. (3d) 12, 14 N.R. 216 [Que.]. This is known as the rule against rebuttal on collateral issues. Where it applies, Crown counsel may cross-examine the accused on the matters raised, but the Crown is bound by the answers given. This is not to say that the Crown or the trier of fact is bound to accept the answers as true. The answer is binding or final only in the sense that rebuttal evidence may not be called in contradiction. It follows then that the principal issue which arises on this branch of the case is whether the issues arising out of items 1, 2 and 3 are collateral in the sense described or relevant as going to a determinative issue in the case.

18 The Crown's application to call rebuttal evidence was made under s. 11 of the Canada Evidence Act, which provides:

> 11. Where a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement.

I am in full agreement with the judges of the Court of Appeal that s. 11 could have no application to items 1, 2 and 3, no past inconsistent statement having been made regarding those items by the appellant. As has been noted, there was no error in this respect regarding item 4. We are then only concerned with items 1, 2 and 3. In dealing with these items, the first question is: Did other grounds exist which would justify the admission of the rebuttal evidence? Craig J.A., in the Court of Appeal, considered such other grounds did exist. He was of the view that the issues arising from items 1, 2 and 3 were not collateral issues but were relevant. Therefore, Crown evidence by rebuttal was admissible. He said, in *R. v. Krause*, supra, at p. 405:

> One sometimes reads, or hears, a statement that credibility is a collateral issue. This is misleading. Credibility may be a secondary issue in a particular case, the primary issue being whether the Crown is able to establish the guilt of the accused beyond a reasonable doubt, but it is always an underlying issue. Evidence of the former words and conduct of a witness which is unrelated to the circumstances in issue is inadmissible either because it is immaterial or because it is irrelevant. It is collateral in both senses of the word. To the extent, however, that the former words and conduct of a witness may bear on his credibility in the case before the court, he may be questioned about them, but his answers may not be contradicted because to permit such a contradiction would cause confusion of issues, surprise and unfair prejudice. On the other hand, a person's words and conduct in relation to the case before the court are not collateral. They are very relevant. In this case, the main fact in issue was whether Krause had killed Barry Hutter on or about March 13th. The Crown adduced evidence to prove that he had killed Hutter. Krause denied that he killed Hutter. His words and actions pertaining to the circumstances of this case were relevant to the main fact in issue and, also, to Krause's credibility.

Taggart J.A. was essentially in agreement with Craig J.A. Anderson J.A., dissenting, considered that the issues dealt with in rebuttal were collateral and, accordingly, not the proper subject of rebuttal evidence.

19 It will be seen that there was no disagreement between the majority and the minority in the Court of Appeal with respect to the law which should be applied on this point. The sole point of departure was the differing view on the nature of the issues raised by items 1, 2 and 3. The majority found the issues relevant and material to the determination of the principal issue of guilt or innocence. The dissent found them limited only to the collateral issue of credibility.

20 There was one principal issue raised in this case, that is, did the appellant kill Hutter or did he not? Evidence bearing on that issue would be clearly material and admissible and in no way collateral. The evidence in respect of which rebuttal was allowed dealt in item 1 with the appellant's assertion that the police harassed him before his arrest. He said

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it seemed to be a regular thing for the police to come and "grab" him and take him down to the station. Item 2 dealt with further harassing and intimidating conduct on the part of the police, an alleged threat to put pressure on other drug dealers, telling them that the appellant had sent Hutter to them to get marijuana. Item 3 dealt with an allegation that during the course of the investigation the police had shown the appellant a gory photograph of Hutter's body. Were the points so raised material and relevant in deciding the issue — did the appellant kill Hutter?

21 It should be observed that the Crown chose in this case to proceed without making the accused's out of court statements part of its case. To establish guilt, the Crown relied on the evidence of one Molema and one Macaulay, whose evidence has been referred to above, and on various other witnesses who developed the Crown's case against the appellant. The Crown, in closing its case, was doing so without any police evidence regarding the statements or conversations between the police and the appellant. Although the admissibility of the conversations had been established in the voir dire, they were not read in evidence in the Crown's case. It seems clear that, at least up to the time when the Crown closed its case, it did not consider the evidence relevant to that issue. It may be suggested, however, that the evidence given by the accused at trial made the police version of the conversations relevant. This, however, is a conclusion I cannot reach. The evidence of the appellant reflected on the integrity of the police — though not on that of any police witness who gave evidence as part of the Crown's case-in-chief — but it did not touch upon the question of guilt or innocence. I am unable to say that the rebuttal evidence, which merely answered allegations made by the appellant and did not touch questions relating to his guilt or innocence, was relevant on that issue. The fact that evidence is introduced by the defence-in-chief does not make it a proper subject for rebuttal evidence unless it is otherwise relevant to a matter other than credibility: see *Cargill* and *Hrechuk*, both supra. In my view, in agreement with Anderson J.A. in his dissent, the issues made the subject of rebuttal were collateral, as being neither material nor relevant on the issue of guilt or innocence. The Crown was entitled to cross-examine and did cross-examine the appellant on this matter. The Crown, however, was bound by the answers and was not entitled to call evidence in rebuttal. A somewhat similar case is to be found in the case of *R. v. Perry* (1977), 36 C.C.C. (2d) 209 (Ont. C.A.). I adopt here the approach taken in that case by Dubin J.A. If the evidence of what passed between the police and the appellant during the investigation was relevant and material, it should have been introduced in chief. To allow it to be introduced by rebuttal evidence would be to allow the Crown to split its case. If, on the other hand, it was not relevant and material, and did not become relevant and material to the question of guilt or innocence or to a defence (for example, an alibi arising for the first time during the accused's case-in-chief), no rebuttal evidence should have been permitted. I would therefore resolve this issue against the Crown, holding that it was error on the part of the trial judge to permit the Crown to call evidence in rebuttal under s. 11 of the Canada Evidence Act and that the allowance of rebuttal evidence could not be supported on any other ground in law. I would allow the appeal and direct a new trial. In view of my disposition of this issue, it is unnecessary to deal with the remaining points.

Appeal allowed; new trial ordered.

End of Document

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2013 ONSC 6935
Ontario Superior Court of Justice (Divisional Court)

Lockridge v. Ontario (Director, Ministry of the Environment)

2013 CarswellOnt 15491, 2013 ONSC 6935, 234 A.C.W.S. (3d) 34, 322 O.A.C. 345

ADA Lockridge and Ronald Plain, Applicants and Director, Ministry of the Environment, Her Majesty the Queen in Right of Ontario, as Represented by the Minister of the Environment, the Attorney General of Ontario and Suncor Energy Products Inc., Respondents

Harvison Young J.

Heard: September 9, 2013
Judgment: November 12, 2013
Docket: 528/10

Counsel: Justin Duncan, Lara Tessaro, Margot Venton, for Applicants / Moving Party
Jack Coop, Jennifer Fairfax, Lindsay Rauccio, for Respondent, Suncor Energy Products Inc.
Robin Basu, Matthew Horner, Lise Favreau, Kristin Smith, for Respondent, Director, Ministry of the Environment, Her Majesty the Queen in right of Ontario, as represented by the Minister of the Environment, the Attorney General of Ontario

Subject: Civil Practice and Procedure; Evidence

Headnote

Civil practice and procedure --- Practice on interlocutory motions and applications — Evidence on motions and applications — Use of affidavit evidence — Miscellaneous

Applicants sought leave to file seven reply affidavits — Respondents raised number of objections to all or parts of affidavits — Applicants brought motion for leave — Motion granted in part — There could be little surprise or prejudice to respondents at current stage because parties would have opportunity to conduct cross-examinations — Impugned paragraphs were permitted that were not confirmatory but were clarifying evidence or were directly responsive to questions put in issue in respondents' affidavits — Impugned paragraphs were permitted where issues were central to application — Impugned paragraphs were permitted where they were relevant and it was in interests of justice and fairness and focusing of issues — Impugned paragraphs were not permitted where evidence was not appropriate or relevant or was confirmatory — In certain instances, sur-replies were permitted and they should be filed promptly.

Table of Authorities

Cases considered by *Harvison Young J.*:

Abbott Laboratories v. Canada (Minister of Health) (2003), 2003 CarswellNat 4114, 29 C.P.R. (4th) 450, 2003 CarswellNat 4595, 2003 FC 1512, 2003 CF 1512 (F.C.) — considered

Arfanis v. University of Ottawa (2004), 2004 CarswellOnt 3698, 7 C.P.C. (6th) 371 (Ont. S.C.J.) — referred to

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Burton v. Oakville (Town) (2004), 2004 CarswellOnt 565, 69 O.R. (3d) 771, 2 M.P.L.R. (4th) 200 (Ont. S.C.J.) — considered

Canada (Attorney General) v. United States Steel Corp. (2011), 2011 CF 742, 2011 CarswellNat 2352, 2011 CarswellNat 3278, 2011 FC 742 (F.C.) — referred to

Cannon v. Funds for Canada Foundation (2011), 2011 ONSC 2960, 2011 CarswellOnt 3950 (Ont. S.C.J.) — considered

Eli Lilly Canada Inc. v. Apotex Inc. (2006), 54 C.P.R. (4th) 199, 298 F.T.R. 70 (Eng.), 2007 CF 953, 2006 CarswellNat 2447, 2006 FC 953, 2006 CarswellNat 5841 (F.C.) — distinguished

First Capital Realty Inc. v. Centrecorp Management Services Ltd. (2009), 258 O.A.C. 76, 83 C.P.C. (6th) 310, 2009 CarswellOnt 6914 (Ont. Div. Ct.) — considered

Friends of Lansdowne v. Ottawa (City) (2011), 2011 ONSC 1015, 2011 CarswellOnt 861 (Ont. Master) — considered

Janssen-Ortho Inc. v. Apotex Inc. (2010), 2010 CarswellNat 132, 2010 FC 81 (F.C.) — considered

Lockridge v. Ontario (Director, Ministry of the Environment) (2012), 2012 CarswellOnt 7116, 68 C.E.L.R. (3d) 27, 2012 ONSC 2316, 350 D.L.R. (4th) 720 (Ont. Div. Ct.) — followed

Mead Johnson Canada v. Ontario (Ministry of Health) (1999), (sub nom. *Mead Johnson Canada v. Ontario (Minister of Health)*) 117 O.A.C. 121, 1999 CarswellOnt 104 (Ont. Gen. Div.) — considered

Melrose Homes Ltd. v. Donald Construction Ltd. (2000), 2000 CarswellOnt 5172 (Ont. Master) — considered

Merck-Frosst - Schering Pharma GP v. Canada (Minister of Health) (2009), 2009 CarswellNat 2762, 2009 FC 914, 78 C.P.R. (4th) 100 (F.C.) — followed

Pollack v. Advanced Medical Optics Inc. (2011), 2011 CarswellOnt 653, 2011 ONSC 850, 16 C.P.C. (7th) 316 (Ont. S.C.J.) — considered

R. v. Krause (1986), 1986 CarswellBC 330, 1986 CarswellBC 761, 7 B.C.L.R. (2d) 273, [1987] 1 W.W.R. 97, [1986] 2 S.C.R. 466, 71 N.R. 61, 54 C.R. (3d) 294, 29 C.C.C. (3d) 385, 14 C.P.C. (2d) 156, 33 D.L.R. (4th) 267 (S.C.C.) — considered

1775091 Ontario Inc. (c.o.b. Canadian Best Auto Inc.), Re (May 29, 2012), Flude Chair (Ont. L.A.T.) — referred to

Rules considered:

Federal Courts Rules, SOR/98-106
R. 312(a) — considered

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

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R. 1.04 — referred to

R. 37-39 — referred to

R. 39.02(2) — considered

R. 68 — referred to

MOTION by applicants for leave to file reply affidavits.

Harvison Young J.:

1 The applicants, Ada Lockridge and Ronald Plain, brought a motion seeking an order granting them leave to file seven reply affidavits, which I heard on September 9, 2013.

2 Initially, there appeared to be two issues. The first issue was whether, in light of the litigation schedule in place pursuant to my order dated November 23, 2012, the applicants were entitled to file reply affidavits at all. The second issue was, assuming that the answer to the first issue is "yes", whether the affidavits filed constituted proper reply.

3 With respect to the first issue, the litigation schedule contemplated that cross-examination would be completed by September 30, 2013. In fact, it has not yet begun. In any event, the parties now agree that my order dated November 23, 2012, did not preclude the filing of otherwise proper reply evidence and I find that that order did not do so. Accordingly, the only issue is whether the reply affidavit evidence filed is proper.

4 The respondents Suncor Energy Products Inc. ("Suncor") and The Director, Ministry of the Environment, Her Majesty the Queen in Right of Ontario, as represented by the Minister of the Environment, the Attorney General of Ontario (the "Director") raise a number of objections to all or many paragraphs in each of the seven affidavits that the applicants seek to file. The grounds the respondents raise are set out at para. 1 of Suncor's factum:

> The vast majority of the Applicants' proposed reply evidence is not proper reply and should not be permitted for one or more of the following reasons:
>
> (a) It consists of confirmatory or clarifying evidence which seeks to expand upon (or quote verbatim from) points already made in the Application Record;
>
> (b) It relies upon documents that were already in existence and available to the Applicants prior to tendering their initial evidence in April 2011, and ought to have been submitted then. In fact, the Applicants, themselves, admit that they had some of these documents in their possession as early as February 2010;
>
> (c) It relies upon additional studies and publications, all but one or potentially two of which predate the Applicants' initial expert reports sworn in April 2011;
>
> (d) It is not responsive to the Respondents' evidence (to which it purports to reply), nor is it responsive or relevant to the issues on the application;
>
> (e) It raises new issues, not previously in issue and not raised by the Respondents;
>
> (f) It seeks to re-introduce evidence that was already struck out by this Honourable Court as inadmissible on an earlier preliminary motion;
>
> (g) It contains improper speculation; and,

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(h) The expert reports are longer than, if not the same or similar length as, their original reports. This is a tell-tale sign that something is amiss.

5 This motion is reminiscent of the motion brought by the respondents in 2012 to strike the application or, in the alternative, to strike the affidavits: see *Lockridge v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316, 350 D.L.R. (4th) 720 (Ont. Div. Ct.), in which the respondents took issue with the admissibility of hundreds of paragraphs of affidavit evidence submitted by the applicants. There, as here, I was grateful for the cooperation of counsel in submitting a chart that sets out each paragraph to which the respondents object and indicates the basis of objection. I note that the grounds of objection raised by the respondents were generally consistent as among themselves. I am particularly grateful for the consolidated chart that shows each paragraph with the objections of all respondents on the same chart. The chart submitted is 54 pages in length.

6 At the beginning of the hearing on this motion, I proposed, and counsel agreed, that I would set out the general principles to be applied in considering whether the reply evidence was proper, and then indicate very briefly my ruling on each paragraph objected to on the chart. Accordingly, these reasons will consist of a summary of the principles I apply to the determinations, and the chart containing the rulings with respect to each paragraph will be annexed as Appendix A.

The Parties' Submissions on the Applicable Standard

7 The applicants submit that the court should apply a "liberal and flexible approach", consistent with the rule that any application party can submit affidavits at any time prior to commencing cross-examinations: see *Rules of Civil Procedure*, r. 1.04, 37 to 39, and 68. In support, they cite *Friends of Lansdowne v. Ottawa (City)*, 2011 ONSC 1015 (Ont. Master), and *Melrose Homes Ltd. v. Donald Construction Ltd.*, [2000] O.J. No. 5275 (Ont. Master). *Friends of Lansdowne* involved an application to quash certain by-laws. Master MacLeod noted, at paras. 55 to 56, that "ordinarily either party is at liberty to serve affidavits up until cross-examinations commence," but when a case management order sets out the timing and order for each side's affidavits,

> the parties are intended to proceed in a manner similar to a trial. As such, reply evidence should be limited to proper reply. That is it should respond to evidence raised by the other party and it should not be evidence that ought to have been submitted in the first place. Though that was clearly the intent of the [case management] order [issued there], procedural orders are intended to bring order to the proceedings and ensure fairness. They are not intended to be rigidly applied so as to suppress evidence that may be important. Striking the affidavits is a simplistic response. [Footnotes omitted.]

8 In *Melrose Homes*, the applicant filed a reply affidavit beyond the time permitted in the case management order but before cross-examinations had begun. Master Polika considered only whether the applicant had engaged in improper case-splitting. He declined to exclude the affidavit because, at para. 16, the affidavit responded to new evidence introduced by the respondent's deponent and the respondent had the ability to cross-examine the affiant.

9 The applicants submit that their motion should be allowed because (a) the evidence will assist the court by ensuring a complete record; (b) there can be no prejudice to the respondents because cross-examinations have not yet begun; and (c) the supplementary affidavits constitute true reply, i.e., they introduce no new issues, and respond only to matters raised by the respondents or "to new evidence not previously available to the Applicants".

10 The Director's position as to the applicable standard was not entirely clear. The Director states that the four elements in *Merck-Frosst - Schering Pharma GP v. Canada (Minister of Health)*, 2009 FC 914, 78 C.P.R. (4th) 100 (F.C.), constitute the governing test for determining whether to allow reply evidence. That test looks to whether the reply evidence (a) serves the interests of justice; (b) assists the court in making its determination on the merits; (c) would cause substantial or serious prejudice to the other side; and (d) was available and/or could not have been anticipated as being relevant at an earlier date: *Merck-Frosst*, at para. 10.

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11 The Director continues to state that a stricter standard than the one proposed by the applicants should apply, and that the strict standard should reflect the scope-limiting principles found in my reasons in *Lockridge*, supra. The Director does not explicitly endorse the *Merck-Frosst* test as the stricter standard it seeks, and its analysis does not address all of the components of that test. On the other hand, the applicants' arguments do address each of the test's elements, albeit without stating they are doing so.

12 Suncor proposes the strictest test of the three parties on the grounds that the application is already complex and lengthy, a judicial review application should be dealt with expeditiously and the court has established a timetable and case management order. It submits that the court's sole inquiry should be whether the applicants' evidence is "proper reply" as that term is understood in the context of a trial, emphasizing that proper reply evidence is evidence that is responsive to a *new* issue raised by the respondent that the applicant had no prior opportunity to address and which the applicant could not reasonably have anticipated.

13 To that end, Suncor's submissions focus almost exclusively on what it sees as the improper case-splitting and non-responsive features of the applicants' reply evidence. Suncor does not address the *Merck-Frosst* test from the Director's factum. Likewise, Suncor cites the above-quoted language in *Friends of Lansdowne* but does not reflect Master MacLeod's caution that the goal of applying a stricter standard when there is a case management order is to bring order and ensure fairness, and not "to suppress evidence that may be important."

Principles for Adducing Reply Evidence

Proper reply in the strictest sense, i.e., at trial

14 It may be most helpful to begin with the strictest principles for adducing reply evidence, namely, those that apply during a trial or similar hearing on the merits. The rules are well established: see John Sopinka et al, *The Law of Evidence in Canada*, 3rd ed. (Toronto, ON: LexisNexis, 2009), at pp. 1165-68.

a. *Case splitting*: Under the rule against case splitting, reply evidence cannot simply confirm the evidence presented in the party's case in chief. "It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on *prima facie* proof, and when this has been shaken by his adversary, adducing confirmatory evidence": *Allcock, Laight & Westwood Ltd. v. Patten* (1966), [1967] 1 O.R. 18 (C.A.), at p. 21.

b. *New issues*: The reply evidence cannot introduce any new issues; it must respond only to those matters raised by the defendant: [1] see *R. v. Krause*, [1986] 2 S.C.R. 466 (S.C.C.), at p. 474.

c. *Unanticipated need*: The replying party can only offer evidence that it could not have anticipated as being relevant when it presented its case in chief: *Krause*, at p. 474; and *Halford v. Seed Hawk Inc.*, 2003 FCT 141, 24 C.P.R. (4th) 220 (Fed. T.D.), at paras. 15-16 (reserving discretion to admit it anyway).

d. *New evidence not previously available*: On occasion, a party wishes, after the close of its case at trial, to introduce new evidence that was not previously available. This is not strictly reply evidence, but rather newly-discovered evidence. Sopinka, at p. 1170, states that in civil cases the court's discretion to permit this

> should be exercised in light of the broad principles which are the basis for the restriction on reply evidence. These principles are designed to ensure that the defendant knows the case to be met and that the plaintiff is not permitted to split his or her case. The rationale for the latter principle is that trials should not be unduly prolonged by creating a need for surrebuttal. Within these broad parameters, the trial judge has discretion to permit reply evidence when it is the reasonable and proper course to follow.

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15 As indicated by Sopinka, these rules are designed to prevent prejudice and unfair surprise to either side and to avoid confusion and unnecessary delay in the presentation of the evidence within the strictures of trial: *R. v. Krause* [1986 CarswellBC 330 (S.C.C.)], at pp. 473-74. When adhering to the above-stated principles, rebuttal "will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other": *Krause*, at p. 474.

Adducing reply evidence on an application prior to trial or a hearing on the merits

16 There is less chance of prejudice, unfair surprise, confusion, and undue delay when reply evidence is offered on an application prior to the hearing on the merits than when the parties have already put their case in chief before the decisionmaker. Indeed, each party's ability to make full submissions and defence at the determination stage depends on each party receiving a fair (and properly scoped) opportunity to develop the record in advance. Thus, as demonstrated below, the standard for permissible reply evidence is less strict when the evidence is introduced well in advance of a hearing on the merits, particularly when cross-examinations have not yet begun.

17 For example, in *Mead Johnson Canada v. Ontario (Ministry of Health)* (1999), 117 O.A.C. 121 (Ont. Gen. Div.), Sharpe J. considered supplemental affidavits filed by the applicant on an application for judicial review before cross-examinations had begun. Sharpe J. stated, at para. 7:

> I would also reject the argument that the impugned material should be struck on the basis that the applicant has improperly split its case. The impugned material is filed in response to material filed by Abbott which was not named in the initial application but rather, was added as a party respondent on its own motion. There has been no cross-examination to date and I fail to see how there is any unfairness or prejudice in permitting the applicant to file this material by way of reply. The situation is plainly distinguishable from that which exists at trial where prejudice may well occur if a party does not put its entire case forward in chief; compare *Allcock Laight and Westwood Ltd. v. Patten, Bernard and [Dynamic] Displays Ltd.*, [1967] 1 O.R. 18 (C.A).
>
> [Emphasis added.]

Accord *Melrose Homes*, at para. 16.

18 In *Abbott Laboratories v. Canada (Minister of Health)*, 2003 FC 1512 (F.C.), at paras. 19 and 21, Heneghan J. expressed a similar view:

> In my opinion, the strict test characterizing reply evidence in a trial does not necessarily apply in respect of proceedings taken ... by way of application....
>
> Abbott here is attempting to impose a technical, legalistic meaning on the words 'proper proceeding reply evidence' which is unwarranted. This is an application for judicial review, it is not a trial and the general rules concerning admissibility of evidence do not apply.

19 Even when the proceeding is an action and not an application, some courts have applied a lower threshold for adducing reply evidence before trial. In *Cannon v. Funds for Canada Foundation*, 2011 ONSC 2960 (Ont. S.C.J.) (CanLII), Strathy J. (as he then was) allowed the plaintiffs to file an affidavit as a supplement to their motion record on a motion for class certification, and he gave leave to the defendants to file sur-reply. The plaintiffs had asked the court to apply a more lenient test for reply evidence on a motion than that which exists at trial. Strathy J. stated, at paras. 16 to 18:

> The point is a fair one. The rule against case-splitting, in the trial context, is designed to prevent unfairness to the opposite party who has no chance to reply to the "surprise" evidence. In the motions context, the unfairness can be mitigated by giving the disadvantaged party an opportunity to respond, possibly with appropriate time extensions or costs consequences.

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> That being said, class proceedings are case managed and important motions like certification or summary judgment are invariably subject to a timetable that requires each party to think carefully about the evidence it will produce. It can be unfair, inefficient and expensive for one party — whether through inadvertence, lack of foresight or deliberate tactics — to introduce new and unanticipated evidence at a late stage in the proceedings.
>
> Ultimately, it is a balancing exercise, with the goal of ensuring that each party has a fair opportunity to present its case and to respond to the case put forward by the other party.

Compare *Pollack v. Advanced Medical Optics Inc.*, 2011 ONSC 850, 16 C.P.C. (7th) 316 (Ont. S.C.J.), in which Strathy J. declined to permit reply evidence on a motion for class certification. In *Pollack*, when the plaintiffs submitted the challenged affidavit, the parties were one week away from the certification hearing, had long ago agreed not to conduct cross-examinations and had exchanged evidence only on a limited issue, and the plaintiffs had already submitted reply evidence once before: *Pollack*, at paras. 6-8, 13. The challenged affidavit raised a new issue, was hearsay and improper opinion evidence and was not, by the plaintiffs' own admission, "reply evidence": *Pollack*, at paras. 13, 30-31, 38, 51. Strathy J. ultimately struck the affidavit "without prejudice to the entitlement of the plaintiffs to move, after certification, to amend the common issues, on a proper evidentiary basis" to include the new issue raised in the struck affidavit: *Pollack*, at para. 54.

20 As a general rule, the parties to an application may exchange affidavits in any order until cross-examinations begin: see Rule 39.02(2); *Friends of Lansdowne*, at para. 55.

21 A case management order may restrain this liberty. Because the case management order is meant to ensure order and fairness to both sides in an otherwise costly and complex matter, the parties subject to such an order "are intended to proceed in a manner similar to a trial.... That is it [the reply evidence] should respond to evidence raised by the other party and it should not be evidence that ought to have been submitted in the first place": *Friends of Lansdowne*, at para. 56. The court may engage in a balancing test to determine whether the reply evidence should be adduced, weighing the need for the orderly exchange of evidence and fairness to the opposing party against the need not to apply the rules so rigidly as to exclude important evidence: *Friends of Lansdowne*, at para. 56. *C.f. Cannon*, at paras. 16-18. But see *Burton v. Oakville (Town)* (2004), 69 O.R. (3d) 771 (Ont. S.C.J.), at para. 23 (striking a late-filed reply affidavit in a case-managed application to quash election results because the affidavit raised a new issue, contained inadmissible evidence, was not helpful to the court, and given the special need in election result cases to proceed expeditiously and orderly).

22 However, the present case is not one in which it may fairly be claimed that the filing of the reply evidence flies in the face of the case management order. As noted above, my order of November 23, 2012, did not preclude the filing of otherwise proper reply evidence and was silent on the schedule for doing so.

23 Once cross-examinations begin, the standard for reply evidence is higher but still not the same as at trial. Rule 39.02(2) of the *Rules of Civil Procedure* requires that, once a party has begun to cross-examine the opposing party's affiants, that party must obtain leave of the court or consent before adducing any additional affidavits. This rule applies to applications for judicial review as well as standard applications: see *Arfanis v. University of Ottawa* (2004), 7 C.P.C. (6th) 371 (Ont. S.C.J.).

24 When deciding whether to grant leave under Rule 39.02(2), the court must ask the following:

> 1) Is the evidence relevant?
>
> 2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
>
> 3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

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4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

First Capital Realty Inc. v. Centrecorp Management Services Ltd. (2009), 258 O.A.C. 76 (Ont. Div. Ct.), at para. 13. "A flexible, contextual approach is to be taken ..., having regard to the overriding principle outlined in Rule 1.04 of the *Rules of Civil Procedure* that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute": *ibid.*, at para. 14.

25 Here, of course, cross-examinations have not yet begun.

26 In the Federal Court, an applicant must seek leave of the court to file a reply or supplemental affidavit in every application: *Federal Court Rules*, r. 312(a). This is a stricter rule than the rule in Ontario because it applies without regard to whether cross-examinations have begun. However, the Federal Court's test for granting leave reflects principles similar to those found in the Ontario jurisprudence.

27 Although *Merck-Frosst*, which the Director cited, applied a four-factor test, the Federal Court has since added undue delay as a fifth consideration: *Janssen-Ortho Inc. v. Apotex Inc.*, 2010 FC 81 (F.C.), at para. 33. Therefore, when evaluating an applicant's request to file reply or supplemental affidavits, the Federal Court judge asks whether the reply evidence

(i) serves the interests of justice;

(ii) assists the court in making its determination on the merits;

(iii) will cause substantial or serious prejudice to the other side;

(iv) was available and/or could not be anticipated as being relevant at an earlier date; and

(v) would cause an undue delay in the proceeding.

Janssen-Ortho, at para. 33. These factors afford the judge "'vast discretion'" that "'is incompatible with a mechanical application of any set test or formula'" (citation omitted): *Canada (Attorney General) v. United States Steel Corp.*, 2011 FC 742 (F.C.), at para. 27. "'The factors mentioned above are not exhaustive and the jurisprudence does not prescribe how they are to be weighed by the judge or the prothonotary. Further, because each decision is discretionary and will be fact-specific, there may be other factors in any given case'" (citation omitted): *ibid.*

28 With respect to the fourth element, the court in *Merck-Frosst*, at paras. 23 to 25, identified a two-step approach to evaluate whether the evidence should have been introduced earlier:

The first step is to ask whether the proposed evidence is properly responsive to the other party's evidence. It is responsive if it is not a mere statement of counter-opinion but provides evidence that critiques, rebuts, challenges, refutes, or disproves the opposite party's evidence. It is not responsive if it merely repeats or reinforces evidence that the party initially filed.

. . .

If the proposed evidence is found to be responsive, one must then ask whether it could have been anticipated as being relevant at an earlier date. If it could have been anticipated earlier to be relevant, then it is being offered in an attempt to strengthen one's position by introducing new evidence that could and should have been included in the initial affidavit. Such evidence is not proper reply evidence as the party proposing to file it is splitting his case. A party must put his best case forward for the other to meet, he cannot lie in the weed and after the party opposite has

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responded file additional evidence to bolster his case in light of the defence that has been mounted. It is improper because it could have been filed in the initial instance and the other party now has no opportunity to respond to it.

29 In other words, according to *Merck-Frosst*, concerns about unfairness, inefficiency, and confusion that can result from non-proper reply evidence do not fall away. Purely confirmatory evidence is barred and the evidence must be responsive to the respondent's case for leave to be granted under rule 312(a) of the *Federal Court Rules*.

30 No court in Ontario has applied the Federal Court's test, though one Ontario tribunal has: *1775091 Ontario Inc. (c.o.b. Canadian Best Auto Inc.), Re*, [2012] O.L.A.T.D. No. 173 (Ont. L.A.T.), at para. 10 (concerning reply evidence introduced during a hearing before the Registrar of Motor Vehicles).

The principles to be applied

31 On the basis of the foregoing, the following principles will be applied to the present motion and the respondents' objections. The court will consider the potential prejudice and unfair surprise to the respondents; whether the evidence is responsive to the respondents' case or is merely confirmatory; whether the evidence will assist the court in making its determination on the merits; whether the evidence was available and/or could not have been anticipated as being relevant at the time the application was filed; and the applicants' reasons for their delay in adducing the evidence. To the extent the respondents object on the grounds that the reply affidavits contain irrelevant, speculative, or argumentative evidence, I have applied the principles stated in my judgment on the respondents' earlier motion to strike: see *Lockridge*, supra. The goal will be to ensure that each party has a fair opportunity to prepare its case and its response to the other side's evidence.

32 I decline the respondents' invitation to apply the strict test for reply evidence adduced at trial or (in an application) after cross-examinations are complete. Such a standard is not justified in the present circumstances. There can be little prejudice or unfair surprise to the respondents at this stage of the case, especially because the parties will have the opportunity to conduct cross-examinations. With respect to cross-examination, note that any reference in my dispositions in Appendix A to the parties' ability to cross-examine an affiant on a particular point should not be interpreted as expanding or restricting the scope of otherwise-permissible cross-examination.

33 Suncor has requested leave to file sur-reply to certain paragraphs of the applicants' reply affidavits. I have noted the disposition of these requests in the chart annexed as Appendix A. When sur-reply is permitted, it should be filed promptly. The parties are expected to confer with each other to establish a specific deadline for filing the sur-reply. In the absence of an agreement on the timeline, the parties may make brief submissions to me in writing or arrange a conference call with me, which might also address other scheduling issues arising in light of the changed timetable.

34 If the parties are unable to agree as to the costs of this motion, they may make brief submissions to me on a timetable to be agreed upon among themselves.

Motion granted in part.

Appendix A

CONSOLIDATED CHART OF THE OBJECTIONS TO THE APPLICANTS' PROPOSED REPLY EVIDENCE OF THE RESPONDENTS, HMQO and SUNCOR

A. Affidavit of Dr. Manuel Reimer

Parties Objecting	*Paragraphs of Affidavit or Question in Reply Report (with reference to pages in Applicants' motion record)*		*HMQO's Objection*	*Suncor's Objection*	*Disposition*
Suncor Energy Products Inc. ("Suncor")	Entire affidavit and	*Question posed: Throughout the expert reports filed by the Respondent Suncor, it is asserted*		*Entire affidavit and report—* Confirmatory	*Permitted.*

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report, p. 33	*that you and other experts retained by the Applicants were working from an improper assumption that the Decision resulted in an increase in refinery production, and ergo an increase in pollution from the entire refinery. This allegation that you misunderstood what the actual Decision related to is repeated at numerous other places in Suncor's expert reports and affidavits. Can you confirm your understanding of the Decision at issue in this case?*	evidence and/ or case splitting is not proper reply: *Allcock, Laight & Westwood Ltd. v. Patten* [1967] 1 O.R. 18.	
			This is not confirmatory but addresses a question regarding Dr. Reimer's premises, which was directly put in issue by the Lynch affidavit.
	Response: While your wording in the court document could have been interpreted to imply that you were referring to general production at Suncor's refinery plant, it was very clear through direct communication with you as well as the applicants and my personal visit to Sarnia that the director's decision was about allowing a 25% increase of production for a specific stack at the sulphur recovery unit at Suncor's refinery in Sarnia. Thus, my opinion was based on that knowledge and understanding.	Unresponsive — responding to unspecified evidence: *Eli Lilly Canada Inc. v. Apotex Inc.* 2006 FC 953, 2006 CarswellNat 2447. *Cross-references to Suncor's factum:* Paras. 24-25, 35, and 49(a)	

B. Affidavit of William Auberle

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