

CANADA / JUDGMENT

Sidhu v. Hiebert

2020 BCSC 336

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Supreme Court of British Columbia

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2020 BCSC 336 Sidhu v. Hiebert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Hiebert,

2020 BCSC 336

Date: 20200302

Docket: M082472

Registry: Vancouver

Between:

Arshdeep Singh Sidhu

Plaintiff

And

Jan Abram Hiebert, Balwinder Kaur Sidhu, Rajvinder Singh Sidhu,

Surinder Singh Rattan, Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc., Abbotsford Nissan Ltd.

Defendants

And

Insurance Corporation of British Columbia, Jan Abram Hiebert,

Balwinder Kaur Sidhu, Rajvinder Singh Sidhu, Surinder Singh Rattan,

Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc. and Abbotsford Nissan Ltd.

Third Parties

Before: The Honourable Madam Justice Forth

Oral Reasons for Judgment

Re Seeking a Pre-Trial Examination of John Hall

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No appearance

Counsel for the Defendant and Third Party, Surinder Singh Rattan:

No appearance

Counsel for the Third Party, Insurance Corporation of British Columbia:

No appearance

Place and Dates of Hearing:

Vancouver, B.C.

February 24 and 25, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 2, 2020

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Introduction

- [1] The defendants, Nissan Canada Inc., Nissan Motor Co., Ltd., Nissan North America, Inc., and Abbotsford Nissan Ltd., (collectively, "Nissan" or the "Nissan defendants") seek an order to conduct a pre-trial examination of James Edward Hall, one of the plaintiff's experts, pursuant to R. 7-5(1) and (2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [2] Nissan brings this application in the context of a claim brought by the plaintiff for damages sustained in a motor vehicle accident on March 30, 2008, and a second accident on April 15, 2011 (the "Actions"). The Actions involve the following claims:
- a. a motor vehicle tort claim against the defendants Jan Abram Hiebert, Balwinder Kaur Sidhu, and Rajvinder Singh Sidhu relating to a motor vehicle accident on March 30, 2008 (the "Collision");
 - b. a product liability claim against the Nissan defendants relating to alleged negligence in the design, manufacture, distribution, and sale of the 2006 Nissan Pathfinder vehicle (the "Pathfinder") involved in the Collision;
 - c. a social host tort claim against the defendant Surinder Singh Rattan relating to the alleged negligence of Mr. Rattan as social host of the defendant Hiebert prior to the Collision; and
 - d. a motor vehicle accident tort claim against the defendants Robert Vivier, Williams Roofing & Drainage Ltd., Rajvinder Singh Sidhu, and Balwinder Kaur Sidhu, in a second motor vehicle accident on April 15, 2011.
- [3] I have been the judicial management judge and trial judge assigned to the Actions since June 2017.
- [4] Nissan argues that a pre-trial examination of Mr. Hall is needed since Mr. Hall is a former member and former Chair of the National Transportation Safety Board in the United States ("NTSB"). As such, he is a fact witness with direct contemporaneous fact evidence for the period from approximately 1994 to 2001 on a number of relevant issues. Mr. Hall resides in the United States.

- [5] The plaintiff opposes the pre-trial examination on the basis that Nissan has failed to show that the fact evidence cannot be obtained by other means, and Mr. Hall has provided responsive answers to questions put to him by the Nissan defendants.
- [6] The trial in this matter is set to commence on March 23, 2020 for 72 days by judge alone.

Background Facts and Issues

- [7] In the Collision, the plaintiff was seated in the rear, driver-side seat of the Pathfinder owned by his father, Rajvinder Singh Sidhu, and driven by his mother, Balwinder Kaur Sidhu. The Pathfinder was struck by a vehicle driven by the defendant Hiebert, who had been drinking alcohol at a party hosted by the defendant Rattan prior to the Collision.
- [8] The plaintiff is a ventilator-dependent quadriplegic as a result of the injuries he sustained in the Collision.
- [9] The plaintiff concedes that he was not wearing his seatbelt properly at the time of the Collision. He alleges that he had his lap belt buckled and he was wearing the shoulder belt over his right shoulder instead of his left, as it was designed to be worn.
- [10] The plaintiff alleges that his injuries were caused by a defect in the Pathfinder's rear seatbelt system (the "Seatbelt"). He alleges that the Pathfinder and the Seatbelt were defective and unsafe and that Nissan knew that the Seatbelt did not fit children of a certain weight and size, like the plaintiff.
- [11] The plaintiff claims that Nissan negligently failed to warn purchasers and users of the Pathfinder of the dangers with respect to the Seatbelt defect.
- [12] On October 31, 2019, the plaintiff served an expert report authored by Mr. Hall dated October 29, 2019 (the "Report"). Mr. Hall was asked for the following opinion, as he describes in the Report:

You have asked for my opinion whether standard three-point seat belts in the rear seats of the 2006 Nissan Pathfinder are designed to fit children like the Plaintiff as he was in March 2008 and if not, whether there were reasonable alternative designs available to automobile manufacturers to reduce the risk of injury to children like the Plaintiff in the event of a collision.

- [13] In providing his opinion, Mr. Hall states in his Report at p. 12:

The opinions that I offer to the questions that I have been asked in this case are based on my experience as Chairman of the NTSB from 1993 to 2001 which included the direction and supervision of accident investigations, the conduct of safety research and studies, and the development of safety recommendations to government agencies, vehicle manufacturers, commercial transportation entities and the driving public.

- [14] On November 6, 2019, the Nissan defendants wrote to the plaintiff requesting portions of Mr. Hall's file falling within the scope of R.11-6(8)(a), being:

- a. any written statement or statements of facts on which the expert's opinion is based;
- b. a record of any independent observations made by the expert in relation to the report;
- c. any data compiled by the expert in relation to the report;
- d. the results of any tests conducted by or for the expert, or of any inspections conducted by the expert, if the expert has relied on that test or inspection in forming his or her opinion.

[15] That letter requested Mr. Hall's attendance at trial for cross-examination.

[16] On November 18, 2019, the plaintiff wrote to the Nissan defendants advising that Mr. Hall did not have any undisclosed documents in his file falling into the categories listed in R. 11-6(8)(a).

[17] On November 28, 2019, the Nissan defendants wrote a letter to the plaintiff outlining a number of objections to the Report, requesting a number of documents referenced in the Report (the "Unlisted Documents"), and putting the plaintiff on notice of its intention to seek an interview, pre-trial examination or deposition of Mr. Hall with respect to his relevant fact evidence.

[18] On December 23, 2019, the Nissan defendants wrote a letter requesting that the plaintiff make Mr. Hall available for a voluntary interview, or alternatively, that he provide written responses to written questions. The written questions were set out in Schedule "A" to the letter. Schedule "A" consists of 25 questions.

[19] On January 13, 2020, the plaintiff advised that Mr. Hall would provide responses in the near future.

[20] On January 14, 2020, the plaintiff provided a letter responding to the November 23, 2019 demand for the Unlisted Documents and included copies of documents. The plaintiff asserts that some of the documents are publicly available.

[21] On January 15, 2020, the plaintiff filed a trial brief listing Mr. Hall as an expert witness.

[22] On January 20, 2020, the plaintiff sent a letter enclosing Mr. Hall's responses to the 25 questions. The parties disagree about whether all the answers were responsive. I will canvas the issue of the responsiveness of the answers below.

[23] The plaintiff asserts that the Nissan defendants did not follow up with any further questions.

[24] The Nissan defendants, in oral reply submissions, referred to a letter dated January 29, 2020, in which they noted problems they had with the written answers. In the letter, they say that the answers provided by Mr. Hall were:

not sufficiently or completely responsive due to the documents disclosed after the question was posed and raise additional issues of fact which cannot reasonably or practically be addressed through written questions and answers.

[25] The letter goes on to say:

Please advise by February 4 whether the plaintiff will voluntarily make Mr. Hall available for an in-person interview or pre-trial examination under Rule 7-5. We are prepared to conduct the interview or examination of Mr. Hall in Washington, D.C., Tennessee, or other location convenient to Mr. Hall. We would like to conduct the interview or examination by March 6, 2020 at the latest.

[26] The letter confirmed that if the plaintiff was not prepared to make Mr. Hall available, the Nissan defendants would bring this application. Attached to the letter was a draft notice of application seeking to compel a pre-trial examination of Mr. Hall. The Nissan defendants say that no response was made by the plaintiff, so the notice of application was finalized, filed, and served.

[27] Mr. Hall has confirmed that he will attend for an examination to be questioned by the Nissan defendants if the Court so orders.

General Principles - Pre-Trial Examination of an Expert

[28] Rule 7-5(1) provides the general rule on an application for a pre-trial examination of a witness. It reads:

- (1) If a person who is not a party of record to an action may have material evidence relating to a matter in question in the action, the court may
 - (a) order that the person be examined on oath on the matters in question in the action, and
 - (b) either before or after the examination, order that the examining party pay reasonable lawyer's costs of the person relating to the application and the examination.

[29] Rule 7-5(2) provides the jurisdiction of the court to order a pre-trial examination of a party's expert. It reads:

- (2) An expert retained or specially employed by another party in anticipation of litigation or preparation for trial may not be examined under this rule unless the party seeking the examination is unable to obtain facts and opinions on the same subject by other means.

[30] Rule 7-5(3) requires the party seeking a pre-trial examination to provide an affidavit in support of the application:

- (3) An application for an order under subrule (1) must be supported by affidavit setting out
 - (a) the matter in question in the action to which the applicant believes that the evidence of the proposed witness may be material,
 - (b) if the proposed witness is an expert retained or specially employed by another party in anticipation of litigation or preparation for trial, that the applicant is unable to obtain facts and opinions on the same subject by other means, and

- (c) that the proposed witness
 - (i) has refused or neglected on request by the applicant to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question, or
 - (ii) has given conflicting statements.
- [31] The B.C. Court of Appeal, in interpreting the former R. 28, noted that subrule (2) (the wording of which has remained the same) acts as a limitation on the general rule under subrule (1) that applies in respect of experts retained by a party: *Christensen v. Sinclair*, 2002 BCCA 65 at paras. 34-35. The exception is overcome by demonstrating that the expert witness has observed or learned of facts which are no longer discoverable by the opposing party through independent means: *Ochoa v. Canadian Mountain Holidays Inc.*, 1995 CanLII 1360 (B.C.S.C.) [Ochoa] at para. 15; *Azuma Foods (Canada) Ltd. v. Versacold Canada Corporation*, 2008 BCSC 643 [Azuma] at para. 138. In other words, the witness must possess "specialized knowledge of the events in question which could only have been obtained by being present at the relevant time": *Peaston v. College of Physicians and Surgeons of British Columbia*, 2013 BCSC 2254 [Peaston] at para. 28.
- [32] The courts have described the discretion to allow pre-trial examination of other party's experts as one that should be cautiously exercised, and recourse to such a pre-trial examination of an expert is rare: *Azuma* at para. 140; *Peaston* at para. 26.
- [33] An example of when such a pre-trial examination met the test was in *United Services Funds v. Richardson Greenshields of Canada Ltd.* (1988), 24 B.C.L.R. (2d) 41 (S.C.) [United Services Funds]. In that case, the court permitted the examination of a former Superintendent of Brokers on the basis that he may have "unique information, facts and opinions in that he was the Superintendent of Brokers during the material period who was directly involved in some of the activities which are the subject matter of this litigation": *United Services Funds* cited in *Li (Guardian ad litem of) v. Sandhu*, 2006 BCCA 79 at para. 14.
- [34] The purpose, policy, and scope of the pre-trial examination of witnesses rule was described by Justice Pearlman in *Gardner v. Viridis Energy Inc.*, 2014 BCSC 232, adopting the analysis of Justice Dillon in *Sinclair v. March*, 2001 BCSC 102:
- [10] As discussed by Madam Justice Dillon in *Sinclair v. March*, 2001 BCSC 102, aff'd, 97 B.C.L.R. (3d) 17 (C.A.), the purposes, policy and scope of the Rule for pre-trial examination of witnesses are as follows:
- (a) The purpose of the rule is to provide an investigative technique to facilitate full disclosure of the facts before trial, thus avoiding a party being taken by surprise and ensuring that all relevant evidence is brought before the court (at para. 10);
 - (b) The policy of the Rule is to permit examination of an uncooperative witness (at para. 10);

- (c) The purpose of the Rule is to provide information, not to record evidence or provide admissions. The scope of the inquiry is broader under Rule 7-5 than in the examination for discovery of a party because it is not limited to matters at issue between the parties as defined in the pleadings but includes all that is generally relevant between all parties (at para. 13);
 - (d) The Rule is to be interpreted liberally so as to eliminate the element of surprise at trial (at para. 14).
- [35] The fact that a witness is willing to proceed by written questions and answers is not determinative of whether a pre-trial examination should be ordered: *Coates v. Triance*, 2010 BCSC 294 [Coates] at para. 7. In that case, the witness was given 200 questions and the Court found that the answers provided were not sufficient. If the answers to the questions posed are incomplete or unresponsive, a witness can be ordered to attend an examination: *Continental Securities v. McLeod* (1994), 94 B.C.L.R. (2d) 375 (S.C.) at para. 19.
- [36] In *Semkiw v. Wilkosz*, 2009 BCSC 1068 [Semkiw] at paras. 14-16, the Court was satisfied that pre-trial examination was not necessary on the basis that the written questions were answered responsively and the witness' report contained a comprehensive review of all the information he had collected with respect to the incident. In that case, the expert had prepared an Incident Investigation Report in respect of the accident in which Mr. Semkiw was killed.
- [37] Of significance is whether written answers would be unworkable, unpractical and interminable in the circumstances. As Justice Grauer noted in *Gestion Soprema Canada Inc., v. Nanji*, 2017 BCSC 1227 [Gestion] at para. 25:
- [25] It is my view that in the particular circumstances of this case, and taking into account the overall object of the Rules, an offer to provide written answers through counsel to written questions effectively constitutes a refusal to provide a responsive statement. This is because such a process would be unworkable, unpractical and interminable. As was anticipated in both *Delgamuukw v British Columbia* (1988), 26 BCLR (2d) 317 (SC) and in *Ochoa*, the answer to one question will lead to several more, and references to various documents will lead to other references to other documents. The quality of responsiveness would disappear in any practical sense. Given the extent and duration of Mr. Law's involvement, and the number of documents produced, the expense and time involved would be insupportable. That is not to say that an oral examination would not also be expensive and time-consuming, but I am satisfied that in addition to eliciting truly responsive evidence, it would be far more manageable and productive, and far more likely to achieve the object of the Rules.

Does Mr. Hall have "facts and opinions" that cannot be discovered by other means?

Nissan's Position

[38] Nissan submits that it is necessary to examine Mr. Hall because:

- (a) the Hall Evidence is material to the matters in issue in the litigation, particularly:

- (i) The 1996 NTSB Safety Study respecting the performance and use of child restraint systems, seatbelts and airbags for children in passenger vehicles;
- (ii) the Recommendations of the NTSB to motor vehicle manufacturers to install [adjustable upper anchorages (AUAs)] (and not comfort guides) in rear outboard seatbelts; and
- (iii) the standard of practice in the North American motor vehicle industry with respect to the use of AUAs and other seatbelt adjustment devices;
- (b) the Hall Evidence is specifically known to Mr. Hall, particularly:
 - (i) the studies performed and considered by the NTSB with respect to child safety, child restraints, seatbelt adjustment devices and misuse of seatbelts and restraints by children, including the 1996 NTSB Safety Study;
 - (ii) the internal analyses and deliberations of the NTSB with respect to the Safety Study and the Recommendations;
 - (iii) the communications between the NTSB and North American motor vehicle manufacturers other than Nissan with respect to the Recommendations; and
 - (iv) the communications between the NTSB and [National Highway Traffic Safety Administration] with respect to guidelines and regulations for AUAs;
- [39] Nissan claims that the Report raises the factual background, surrounding considerations, and steps taken by the NTSB in making its recommendations. In addition, Mr. Hall has knowledge respecting the steps taken and communication made by other North American auto manufacturers in responding to the recommendations made. He also has knowledge, during his leadership of the NTSB, on the regulatory dialogue between NTSB and the National Highway Traffic Safety Administration ("NHTSA") on the inclusion of seatbelt positioners and the NTSB recommendations. This information is not possessed by Nissan and cannot be obtained by other sources unless documented.
- [40] Nissan submits that Mr. Hall has contemporaneous factual knowledge on the following relevant issues:
 - (a) The investigations, studies, state of knowledge, positions, communications, recommendations and steps taken by the NTSB with respect to child restraints and child safety in passenger vehicles for the period 1993 to 2006, including the 1996 NTSB safety study respecting the performance and use of child restraint systems, seatbelts and airbags for children in passenger vehicles (the "1996 NTSB Safety Study");
 - (b) The reasoning, creation, implementation, deliberations, communications, recommendations and steps taken by the NTSB with respect to Blue Ribbon Panels I and II;

- (c) The reasoning, creation, implementation, issuance, communications, follow-up and steps taken by the NTSB relating to the NTSB safety recommendations referenced in the Hall Report, including recommendations H-96-29 through H-96-33 (collectively the "Recommendations");
 - (d) The steps taken by the NTSB with respect to the implementation of the Recommendations including, but not limited to, communications with North American motor vehicle manufacturers;
 - (e) The communications between Mr. Hall and other employees at the NTSB and employees of North American motor vehicle manufacturers with respect to the Recommendations and other matters relating to seat restraint and child safety;
 - (f) The responses provided, and positions taken, by North American motor vehicle manufacturers with respect to the NTSB's recommendations relating to [AUAs] and other seatbelt adjustment devices; and
 - (g) The communications between and amongst, the NTSB, the [NHTSA] and the United States Congress with respect to the drafting, proposal and implementation of guidelines, rules, standards, regulations and laws arising from or relating to the Recommendations including the NHTSA Notice of Rule Making dated August 13, 1999 referenced in the Hall Report.
- [41] Nissan claims that without a pre-trial examination, they are likely going to be caught by surprise at the trial when Mr. Hall is cross-examined since he will be able to access the "giant warehouse of facts" he possesses. Nissan will have no ability to properly prepare for trial and therefore will not be able to effectively cross-examine Mr. Hall on those facts.

Plaintiff's position

- [42] The plaintiff disputes that Mr. Hall is the exclusive source of information in the areas about which Nissan wants information. He points out that the NTSB is an organization stretching over many years and it maintains a public database. That public database is accessible to anyone.
- [43] The plaintiff further submits that former Nissan employees, who can be readily located, can provide information on their interactions with the NTSB. The plaintiff distinguishes this case from Ochoa, where the mountain guides who had examined the snowpack and who were later retained as experts in an avalanche case were the only people with knowledge of the relevant snowpack conditions given the subsequent change in snow conditions by the time of the litigation.

- [44] The plaintiff submits that Nissan has not discharged its onus of showing that the facts and opinions they seek are not otherwise available to them. Nissan has failed to set out the efforts made to access publicly-available archives and databases. They have also failed to set out their efforts to obtain information from former employees of Nissan who had dealings with the NTSB.

Analysis

- [45] This is a case that is highly complex and challenging for all parties. The degree of complexity is reflected in my reasons, indexed at 2020 BCSC 183, in which I struck the jury notice.
- [46] In my view, the evidence establishes that Mr. Hall has relevant fact evidence in his role as the former member and Chair of the NTSB from 1993 to 2001. In that capacity, Mr. Hall was one of the authors of a safety study titled *The Performance and Use of Child Restraint Systems, Seatbelts, and Air Bags for Children in Passenger Vehicles*, dated September 1996 (the "Safety Study"). The evidence before me supports that Mr. Hall was involved in making recommendations, in particular, recommendations H-96-29 through H-96-33, and while he acted as Chair, there were communications between NTSB and other North American motor vehicle manufacturers, and the NHTSA with respect to the recommendations.
- [47] There does exist a public website setting out the history of correspondence between the NTSB and various domestic and international automotive manufacturers. In my view, the existence of those documents does not address Mr. Hall's knowledge of other communications that may have occurred which may not have been recorded in publicly accessible documents or documented at all.
- [48] I agree with Nissan's submissions that former Nissan employees would not possess knowledge of the interactions between Mr. Hall and other North American automotive manufacturers and the NHTSA. The past Nissan employees would only have knowledge of the communications they had with Mr. Hall, the NTSB, and the NHTSA.
- [49] Mr. Hall relies on the knowledge he obtained as chair of the NTSB in providing his opinions in his Report.
- [50] I would distinguish this case from the Semkiw case, which involved a WorkSafe investigator who performed an investigation of the accident in which Mr. Semkiw was killed. The witness prepared an investigation report that was available to the defendants. Mr. Hall's involvement is not as an expert who was retained to investigate the circumstances, as were many of the other experts in this case, of this specific Collision. I agree with the submissions of plaintiff's counsel that allowing pre-trial examinations of those types of experts could open the "floodgates" by counsel wishing to pose questions of experts, which could then be used to their advantage to set up the cross-examination at trial. This practice must be discouraged by the courts.

[51] I do not see that Mr. Hall falls into the same category as those other accident reconstruction or biomechanical injury analysis experts who opined on the Collision at issue in this action.

[52] I am convinced that Mr. Hall does have fact evidence that Nissan cannot obtain by accessing documents on a website or from past Nissan employees. I find that the evidence is not otherwise available to Nissan.

Were responsive answers provided?

Nissan's position

[53] Nissan submits that Mr. Hall did not provide adequately responsive answers to the questions posed. The following examples were given (among others):

- a. Question 3: Why did the NTSB make recommendations with respect to the AUAs in NTSB H-96-32?

Answer 3: Recommendation H-96-32 to the domestic and international automotive manufacturers focused on the fit of lap/shoulder belts for children who had outgrown child restraints or booster seats, but who were too small in stature for the restraints designed for adults.

Nissan's position: The answer does not answer "why" the NTSB made the recommendation as it relates to AUAs.

- b. Question 4: Did the NTSB ever make any recommendations respecting warnings relating to AUAs or seatbelt positioners, including warnings that AUAs were not suitable for children under a certain age or a certain height or weight? If so, please identify such recommendations. If not, why not?

Answer 4: H-96-32 was focused on ensuring proper fit of lap/shoulder restraints for children who had outgrown child restraints or booster seats. See my letter of January 16, 1999 to Nissan Group of North America.

Nissan's position: Answer 4 is almost a cut and paste of Answer 3, which asks an entirely different question. Mr. Hall's answer directs Nissan to a letter he wrote more than 20 years ago rather than specifically answering whether NTSB made any recommendations regarding AUAs or seatbelt positioners, including warnings and providing an explanation why a recommendation was not made, if in fact it was not made.

- c. Question 8: Did Mr. Hall or anyone else at the NTSB ever communicate or recommend to any auto manufacturer, including Nissan, that comfort guides were preferred to and/or safer than AUAs? If not, why not?

Answer 8: Recommendation H-96-32 focused on ensuring the fit of lap/shoulder belts for children who had outgrown booster seats and asked manufacturers to determine the safest solution whether or not that included AUAs.

Nissan's position: Mr. Hall did not answer whether or why the NTSB did or did not communicate or recommend that comfort guides were preferred to and/or safer than AUAs.

[54] Nissan submits that some of the non-responsive or not fully responsive questions require follow-up questions. The nature of the issues are nuanced and complex such that follow-up questions cannot be efficiently or conveniently made through written questions and answers. That task would be "impracticable, unworkable, and interminable", using the language in Gestion.

Plaintiff's position

[55] The plaintiff's position is that Mr. Hall answered each of the questions posed. In some of the answers, he provided his own insights and directed the Nissan defendants to the relevant NTSB correspondence and literature. The answers may not have been to the satisfaction of the Nissan defendants, but they were all responsive to the questions asked.

[56] The plaintiff submits that there was no attempt made by the Nissan defendants to seek further clarification or additional responses from Mr. Hall. They simply brought this application seeking a pre-trial examination.

[57] If Mr. Hall has additional knowledge, the Nissan defendants can elicit that information during his cross-examination.

Analysis

[58] The Nissan defendants gave an option to Mr. Hall to attend an interview or to answer written questions. The Nissan defendants are obliged to give this option to a witness as required by R.7-5(3)(c)(i). Mr. Hall chose to answer the written questions. As a witness, he had a right to do so.

[59] Nissan submits that it drafted the questions prior to receiving the Unlisted Documents it had requested. In my view, nothing turns on this since Nissan had the choice of when it prepared the questions for Mr. Hall. The choice was made to draft those questions prior to the receipt of the Unlisted Documents.

[60] In my mind, there are two considerations: the first being whether the answers provided by Mr. Hall to the questions are responsive, and the second being whether follow-up questions should be permitted and, if so, in what manner.

[61] I have reviewed each of the questions and answers provided and taken into consideration the factual knowledge that Mr. Hall would have over his approximately seven years as the Chair of the NTSB and one of the authors of the Safety Study. Although many of his answers are responsive, in some of the responses, he does not provide the answer to the "why" question posed. As such, I make the finding that Mr. Hall's answers were not responsive to all of the questions posed. In doing so, I do not in any way attribute any criticism to Mr. Hall. This is not a case in which a witness deliberately tried to give non-answers or tried to be

unhelpful. In my view, trying to craft answers to "why" questions are difficult and more capable of being answered orally.

- [62] I also make no finding that the answers "creat[ed] an artificiality in the evidence because of the lawyer's influence over the answers", using Justice Griffin's words in *Coates* at para. 17.
- [63] I have considered whether follow-up questions would sufficiently address the concern expressed by Nissan that Mr. Hall is a fact witness with an extensive warehouse of factual evidence that they are entitled to explore prior to trial so as to avoid surprise at the trial.
- [64] I accept that Nissan, upon receipt of the written answers, provided notice to plaintiff's counsel by letter dated January 29, 2020 that the answers were insufficient and that they would be seeking an interview, or if not agreed to, a court ordered pre - trial examination.
- [65] When taking into account the nature of this action, the wealth of information that Mr. Hall has about the role of the NTSB, the Safety Study, the recommendations made, and the importance of his evidence to the issues in this litigation, I am of the view that a limited pre-trial examination is appropriate.
- [66] I do not see that further written questions and answers will provide the opportunity to clarify the answers and follow-up on the answers given. A flexibility exists in an oral examination that cannot be captured through pen and paper questions. I adopt the words of Justice Grauer in *Gestion* that in this unique and complex case, it is far more manageable and productive for the questions to be posed in an oral examination. At that oral examination, the appropriate follow-up questions can be asked as needed.
- [67] To be fair to Mr. Hall, since he is commenting on events that took place as far back as 1994, the Nissan defendants will provide written notice of the areas they plan to canvas. They are not required to provide the specific questions they wish to ask. The written notice should be provided as soon as possible.
- [68] Any questions must avoid delving into the opinion Mr. Hall has provided in his Report. In essence, this is not a first run of the cross-examination of Mr. Hall on his Report. It is a fact-finding investigation only to provide the Nissan defendants with the opportunity to find out facts in advance of the trial so to ensure that a fair trial takes place.
- [69] There were no submissions made on the appropriate length of this pre-trial examination. I note in the letter from Nissan's counsel dated December 23, 2019, that a three-hour interview was anticipated. R. 7-5(9) provides that the examination of a person under this rule must not exceed three hours in duration, unless otherwise ordered. There was no request made to extend that duration.

[70] I order that James Edward Hall attend at a pre-trial examination on oath conducted by counsel for the Nissan defendants at a date, time, and location agreed to by the parties to take place on or before March 16, 2020. The pre-trial examination must not exceed three hours in duration. There will be written notice of the areas to be canvassed at the pre-trial examination provided to Mr. Hall as soon as possible.

[71] Costs of this application are to the Nissan defendants in the cause.

"Forth J."

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