Toronto Law Journal

Who is the Right Witness at Examinations for Discovery?

Comparing the Federal Court, Tax Court, Alberta, British Columbia, New Brunswick and Ontario

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Introduction

Examination for discovery is a key turning point in a case. Choosing the right witness/representative/nominee enhances your chances of success at trial and in settlement discussions and minimizes the risk, expense, and delay of motions to substitute the nominee. This article explores what makes a good nominee, how you select a nominee, and how you challenge the opposing party's choice of nominee, based on the rules of several different courts.

What Makes a Good Nominee for Discovery?

Good nominees have two characteristics: (1) they can speak to the substance of the dispute, and (2) they understand their role as witness, not advocate.

We all know that pleadings determine what questions are relevant on an examination for discovery.[1] When choosing a nominee, focus on what issue(s) will decide the case. The more the nominee can speak to issues that matter, the better they are for examination. Such a nominee eliminates the need for multiple nominees and makes the examination process less unwieldy.

But nominees do not need to have personal knowledge[2] of all relevant facts.[3] Across Canada, the applicable rules require nominees to inform themselves about the relevant facts before the examination.[4] Hearsay is permitted, even expected, in examinations for discovery. When

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1 See, for example, *Tor Can Waste Management Inc. v The Queen*, 2015 TCC 157; *Canadian Imperial Bank of Commerce v The Queen*, 2015 TCC 280 at para. 16.

2 In Alberta, the Rules of Court recognize that the corporate representative appointed under rule 5.4 is not expected to have personal knowledge of all the information available to the corporation. The representative will have to make inquiries of other officers and employees, particularly in the case of large organizations: *CNOOC Petroleum North America ULC v 801 Seventh In*, 2023 ABCA 97, at para. 29.

3 A question is relevant when "there is a reasonable likelihood that it might elicit information which may directly or indirectly enable the questioning party to advance its case or damage the opponent's case, or which fairly might lead to a train of inquiry which may have either of those consequences": *Allergan, Inc. v Juno Pharmaceuticals Corp.*, 2023 CanLII 56759 (FC), at para. 17, referring to *Canada v Lehigh Cement Limited*, 2011 FCA 120, at para. 34; *Madison Pacific Properties Inc. v Canada*, 2019 FCA 19, at para. 23; *Canada v Thompson*, 2022 FCA 119, at para. 30; *Carroll v ATCO Electric Ltd*, 2014 ABQB 378, at para. 33, aff'd on appeal (2014 ABCA 364).

4 *Federal Courts Rules*, SOR/98-106, rules 240-244; *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, rule 95; Ontario, *Rules of Civil Procedure*, R.S.O. 1990, c. C.43, rule 31.06(1) (see *Euclide Cormier Plumbing and Heating Inc. et al. v Canada Post Corporation et al.*, 2008 NBCA 54, at para. 51); British Columbia, *Supreme*

choosing the nominee, the question is who will be the best nominee *after* taking steps to inform themselves.

As a result, the jurisprudence on good nominees focuses on the nominee's preparation and knowledge during the examination. Courts in Ontario have emphasized that the test is not which witness has "the most knowledge" or which witness would "objectively be the best choice" but whether the proposed witness is "sufficiently knowledgeable."[5] In *Nicolardi v Canadian Tire Corporation*, the Ontario Superior Court found that the proposed alternative nominee did "not have sufficient knowledge of, or any direct involvement in, the matters in issue." The Court thus rejected her nomination, noting that it would be "unduly onerous" to examine her for discovery.[6]

Similarly, in *Choptiany v The King*, the Tax Court observed:

> The Respondent has repeatedly failed to have its nominees at any of the three oral examinations be knowledgeable and prepared, including failing to inform themselves on matters that clearly were relevant on discovery and could have been expected to be the subject of questioning. The Respondent's nominee at the Second Discovery and the Third Discovery was also uncooperative, obstructive, obfuscatory and evasive. He provided incorrect answers to relevant questions asked and these have not been fully or properly corrected. Other answers were glib and cavalier. Others appear to be attempts to run out the clock.[7]

Courts sometimes look at the number of undertakings given by counsel because the nominee did not know the answer. In *Benisti Import-Export Inc. v Modes TXT Carbon Inc.*, counsel gave 37 undertakings to seek answers that the nominee did not know but another employee did. It was clear to the Federal Court that the other employee would be a better nominee because she would be able to answer questions that the nominee was unable to answer.[8] One strategy

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Court Civil Rules, B.C. Reg. 168/2009, rule 7-2(18-24); *Alberta Rules of Court*, Alta Reg 124/2010, rule 5.23-5.30; New Brunswick, *Rules of Court*, NB Reg 82-73, rule 32.06-32.09.

5 *Mohotoo v Humber River Hospital*, 2021 ONSC 4894, at para. 22. See also *Nezhat-Mahal v Cosmetica Laboratories Inc.*, 2022 ONSC 2458, at para. 24, citing *Creative Kitchen Gallery Inc. v YRCC No. 715*, 2020 ONSC 1260, at paras. 28-30.

6 *Nicolardi v Canadian Tire Corporation*, 2018 ONSC 2861, at paras. 14-19.

7 *Choptiany v The King*, 2022 TCC 112, at para. 89. Emphases added. See also *Backman v Her Majesty the Queen*, 97 DTC 550, referred to in *General Motors Acceptance Corp. of Canada Ltd. v The Queen*, 1999 CanLII 527 (TCC), at para. 16, in which the Tax Court noted that the nominee was "unprepared, or ignorant" and in either case, "he and Respondent's counsel had every reason to have him fully prepared. They should have been fully prepared and they weren't."

8 *Benisti Import-Export Inc. v Modes TXT Carbon Inc.*, 2004 FC 539, at paras. 5-8. See also *Nicolardi v Canadian Tire Corporation*, 2018 ONSC 2861, at para. 18, where the Court noted that the suggested nominee would have to "provide an excessive number of undertakings."

in selecting a nominee, therefore, is explaining to your client how much time the nominee must invest in preparing for the examination to be able to answer the opposing party's questions.

The second characteristic to consider is how the nominee will perform as a witness. Will the person take the time required to prepare? Will the person answer the questions succinctly and clearly? Will the person try to argue the case or otherwise be "uncooperative, obstructive, obfuscatory and evasive" to use the Tax Court's phrase? Sometimes, even the most knowledgeable person, before preparation, is not the best nominee. Thus, holding practice sessions as part of preparation is critical so that the nominee can become more comfortable answering the key questions.

Other practical factors to consider include the nominee's work schedule or seniority, whether they might be called as a witness at trial, and whether the nominee is aligned with the corporation they represent. Notably, availability can be a determining factor. For instance, in Ontario, while top officers of corporations are not immune to discovery,[9] it is *prima facie* oppressive to require the president of a large company to attend at an examination for discovery where the case is not a "landmark case".[10]

These practical, but secondary, factors will be disregarded to achieve the purpose of discovery, i.e., having a knowledgeable nominee. Where a particular person is the most knowledgeable on relevant issues, the court might disregard other factors and allow the examination to proceed.[11]

Who Chooses the Corporate Nominee and How?

A nominee's answers in the examination for discovery bind the corporation under examination. The rules on which party gets to choose the corporate nominee vary by jurisdiction:

- In the Federal Court, Tax Court, and British Columbia, the corporate party being examined chooses its nominee.[12]
- Ontario and New Brunswick take the opposite approach: the examining party selects the nominee.[13]

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9 *Nezhat-Mahal v Cosmetica Laboratories Inc.*, 2022 ONSC 2458, at. para. 25.

10 *Shokar v Windsor Casino Limited*, 2018 ONSC 7644, at para. 15; *Great Lakes Copper Inc. v 1623242 Ontario Inc.*, 2013 ONSC 2600, at paras. 24-28, referring to *Roe v Dominion Stores Ltd.*, [1984] O.J. No. 2226 and *Canadian Imperial Bank of Commerce v Cigam Entertainment Inc.*, [1999] O.J. No. 2011, at para. 23.

11 In *Ciardullo v Premetalco Inc.*, 2009 CanLII 45445 (ON SC), paras. 22-24, the Court allowed a nominee to be examined for discovery despite concerns regarding the "potential embarrassment and distress of the nominee" and the fact that she might be called as a witness. See also *Mohotoo v Humber River Hospital*, 2021 ONSC 4894, at para. 29 and *Carroll v ATCO Electric Ltd*, 2014 ABQB 378, at paras. 41-42.

12 *Federal Courts Rules,* rule 237(1-2); *Tax Court of Canada Rules (General Procedure)*, rule 93(2-3); British Columbia, *Supreme Court Civil Rules*, rule 7-2(5)(b).

13 Ontario, *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, rule 31.03(2); New Brunswick, *Rules of Court*, rule 32.02 (2).

- Alberta uses both approaches: the corporation selects its nominee for questioning (corporate representative) and the examining party may question both the corporate representative and one or more officers or former officers of the corporation.[14]

The jurisdictions that permit the corporation to select their own nominee point to two rationales. First, "the selected person is to be examined 'on behalf of the corporation' and, as a result, his or her answers are sought with a view to binding the corporation."[15] Second, the opposing party may not know enough to choose the appropriate nominee.[16]

On the other hand, Ontario, a jurisdiction that permits the examining party to select the nominee, explains that the examining party has a right "to explore the pleaded issues most important to its case" and should therefore choose the person to be examined.[17]

The jurisdictions that permit the corporation to select their own nominee allow the corporation to choose from a broader pool of potential nominees. The Federal Court has the broadest rule: At the Federal Court, the nominee may be an employee of the affiliate, a former employee or even have no relationship with the corporation.[18] The Tax Court requires a relationship with the corporation, requiring the nominee to be a current or former officer of the corporation or the Crown.[19]

A stricter approach is seen in jurisdictions that permit the opposing party to choose the corporation's nominee (*i.e.*, Ontario and New Brunswick). The pool of potential nominees is limited to current officers, directors, or employees of the corporation.[20]

Regardless of who picks the nominee and from which pool of candidates, the jurisprudence on what makes a good nominee, described above, is remarkably consistent across Canada. Selecting your nominee with these considerations in mind and well in advance of any examinations (to allow for proper preparation) is critical.

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14 Alberta, *Rules of Court*, Alta Reg 124/2010 rules 5.4 and 5.17(1)(b).

15 *The Beaverbrook Art Gallery v Beaverbrook Canadian Foundation*, 2013 NBCA 17, at para. 3. In British Columbia, however, the corporation's choice is "just a suggestion" and "does not allow the party receiving an appointment to discovery to have a veto on selecting an alternative representative unless the court otherwise orders": *Jazette Enterprises Ltd. v Amit*, 2023 BCSC 226, at para. 31. See British Columbia, *Supreme Court Civil Rules*, rule 7-2(5(c).

16 *Jazette Enterprises Ltd. v Amit*, 2023 BCSC 226, at para. 31.

17 *Nezhat-Mahal v Cosmetica Laboratories Inc.*, 2022 ONSC 2458, at. para. 22.

18 *McCain Foods Limited v J.R. Simplot Company*, 2021 FC 890, at para. 22.

19 *Tax Court of Canada Rules (General Procedure)*, rule 93(2-3).

20 Ontario *Rules of Civil Procedure*, rule 31.03(2); New Brunswick, *Rules of Court*, rule 32.02 (2). In Ontario, see *Nezhat-Mahal v Cosmetica Laboratories Inc.*, 2022 ONSC 2458, at. para. 22.

What is the Test for Substituting a Nominee?

In most cases, parties do not dispute the choice of nominee.[21] However, all rules anticipate that the party who did not pick the nominee may seek substitution of the nominee.[22] The onus is generally on the party seeking substitution to demonstrate that the initial selection was inappropriate.[23]

When a motion to substitute a nominee is brought, the court considers the request through the lens of the qualities of a good nominee, such as:[24]

a) Is the nominee knowledgeable and can they give broad discovery?
b) To what degree has the nominee taken pains to inform herself or himself?
c) What is the nature and materiality of the evidence sought to be canvassed with the second nominee?
d) What is the expense, convenience, or prejudice of obtaining a different nominee?
e) Would it be oppressive to require the nominee to be examined, for example, by being required to give an inordinate number of undertakings or unnecessarily being taken away from onerous management responsibilities?[25]

Other factors are whether in examining the nominee, counsel was proactive in asking for the necessary information[26] (including asking for undertakings), and whether the party under examination has given satisfactory answers to undertakings.[27]

In Ontario, courts have been consistent that they will not "lightly interfere" with a party's selection unless the other party demonstrates that the selected nominee is inappropriate.[28]

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21 *Thorne v AXA Canada Inc.*, 2012 ONSC 2409, at para. 10.

22 See *Federal Courts Rules*, rule 237(3); *Tax Court of Canada Rules (General Procedure)*, rule 93(2-3); British Columbia, *Supreme Court Civil Rules*, rule 7-2(5(c)(ii)); Ontario *Rules of Civil Procedure*, rule (r. 31.03(2)(a)); New Brunswick, *Rules of Court*, rule 32.02(2).

23 *Ciardullo v Premetalco Inc.*, 2009 CanLII 45445 (ON SC), at para. 9; *Great Lakes Copper Inc. v 1623242 Ontario Inc*, 2013 ONSC 2600, para. 17; *Shokar v Windsor Casino Limited*, 2018 ONSC 7644, para. 4.

24 *Benisti Import-Export Inc v Modes TXT Carbon Inc*, 2004 FC 539, at para. 3, referring to *Liebmann v Canada (Minister of National Defence)*, (1996), 110 F.T.R. 284, pp. 291-292. At the Tax Court: *Choptiany v The King*, 2022 TCC 112, at para. 89; *Teranet Inc. v The Queen*, 2016 TCC 42, at para. 30; *Backman v Her Majesty the Queen*, 97 DTC 550, referred to in *General Motors Acceptance Corp. of Canada Ltd. v The Queen*, 1999 CanLII 527 (TCC), at paras. 13 and 16.

25 *Great Lakes Copper Inc. v 1623242 Ontario Inc.*, 2013 ONSC 2600, at para. 20; *Jeffrey v Open Storage*, 2024 ONSC 634, at para. 46; *Farris v Staubach*, [2004] O.J. No. 3961, at paras. 3-12.

26 *Dilalla v The Queen*, 2018 TCC 178, at para. 20.

27 *Blue Wave Seafoods Incorporated v The Queen*, 2003 CanLII 690 (TCC), at paras. 9-10, citing *General Motors Acceptance Corp. of Canada v Canada*, [1999] T.C.J. No. 11, at para. 9.

28 *Jeffrey v Open Storage*, 2024 ONSC 634, at para. 44, citing *Ciardullo v Premetalco Inc.*, 2009 CanLII 45445 (ON SC), para. 9; *Farris v Staubach*, 2004 CanLII 31800 (ON SC), at para. 2; *Nemni v BCE Inc.*, 2011 ONSC 6196.

Conclusion

Selecting your nominee for examinations for discovery is a critical strategic choice. How the nominee performs during the examination can give you leverage in settlement discussions, increase your chances of success at trial, and help you avoid expensive motions on nominee substitution. Across Canada, courts say that a good nominee is informed, prepared, and answers to the best of their knowledge, information and belief, any proper relevant question. As counsel, you can help the client invest the time to choose the right nominee and properly prepare them.

Toronto Law Journal

Forced Labour and Child Labour in Global Supply Chains

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Introduction

Canada has recently joined several jurisdictions[1] in enacting legislation to address forced labour and child labour in global supply chains. On January 1, 2024, the *Fighting Against Forced Labour and Child Labour in Supply Chains Act*, S.C. 2023, c. 9 (the "**Act**") entered into force, requiring subject companies to publish annual, board-approved reports by May 31st[2] detailing their efforts to prevent and mitigate illegal labour in their supply chains. Failure to submit a report or including false or misleading information in a report can incur penalties for companies, directors, and officers[3]. This article will detail the legislative background behind the new law and summarise the new reporting requirements that companies (and the lawyers who advise them) should be aware of.

Background

Forced labour and child labour in global supply chains have been widely identified as a crisis of the modern era. A 2019 International Labour Organisation report[4] found that, around the globe, nearly 25 million people are trapped in forced labour and almost 152 million children are subject to child labour. During the COVID-19 pandemic, public attention was drawn to poor working conditions within supply chains, particularly in industries involving metals, seafood, cotton, cocoa, and coffee[5].

There have been different legislative approaches by which countries have sought to discourage the use of illegal labour. For Canada, the Act falls within a category of legislation identified as "transparency legislation," as it requires corporations to disclose the actions they have undertaken to combat the collective problem of illegal labour in supply chains, rather than actually mandating certain commercial practices that would have that effect. While this method has been criticized by academics as being unlikely to meaningfully influence corporate

[1] Early examples of comparable legislation include California's *Transparency in Supply Chains Act* (2010) and the UK's *Modern Slavery Act* (2015).
[2] Since businesses incorporated under the *Canada Business Corporations Act* or any other Act of Parliament are also required to provide a report to each shareholder with their annual financial statements (per Section 13 of the Act), this may affect the deadline for preparing reports.
[3] Under the Act, every business that fails to file a report, knowingly makes false or misleading information, or otherwise fails to comply with the Act will be liable for a fine of up to $250,000. Furthermore, any director or officer who directed or participated in the commission of this offence is party to and guilty of the offence.
[4] International Labour Organization, Organisation for Economic Co-operation and Development, International Organization for Migration, and United Nations Children's Fund, "*Ending child labour, forced labour and human trafficking in global supply chains*" (2019) at 1, online: <https://mneguidelines.oecd.org/Ending-child-labour-forced-labour-and-human-trafficking-in-global-supply-chains.pdf>
[5] Above Ground. "*Creating Consequences: Canada's moment to act on slavery in global supply chains*" (June 2021) at 5, online: <https://aboveground.ngo/wp-content/uploads/2021/06/Above-Ground-forced-labour-report-June-2021.pdf>

behaviour and disrupt exploitative supply chains[6], the actual impact of the Act, including that of the disclosure that will emerge from its reporting obligations, remains to be seen.

The New Reporting Obligations

Beginning on May 31, 2024, and on each May 31 thereafter, businesses with reporting obligations are required to submit to Public Safety Canada:

- an online questionnaire (available on the website) that covers much of the required report contents;
- a completed report; and
- an attestation from the business' governing authority concerning the accuracy of the report.

Which entities are subject to the reporting obligations?

The legislation applies to businesses (corporations, trusts, partnerships, and unincorporated organisations) which produce, sell, or distribute goods in Canada or elsewhere, import goods into Canada from elsewhere, or directly or indirectly control a business that is engaged in either activity, provided that the business:

1) is listed on a stock exchange in Canada; or
2) has a business presence in Canada[7] and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years:
    a) has at least $20 million in assets;
    b) has generated at least $40 million in revenue; and
    c) employs an average of at least 250 employees.

When considering those financial thresholds, a business should include the activities of its subsidiaries. If those subsidiaries are independently subject to reporting obligations, a "joint report" may be filed concerning the information that is common between the parent and its subsidiaries.

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[6] Re:Structure Lab. *Forced Labour Evidence Brief: Due Diligence and Transparency Legislation* (Sheffield: Sheffield, Stanford, and Yale Universities, 2021) at 5, online: <https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/60660e41b634ac7381898670/1617301058609/ReStructureLab_DueDiligenceAndTransparencyLegislation_April2021.pdf>

[7] Defined as a business that "has a place of business in Canada, does business in Canada, or has assets in Canada".

What should be included in a report?

Each report must detail the steps that the business has taken during the previous financial year to prevent or reduce the risk that illegal labour is used in the production of the goods that it deals in, including activities in the supply chain that occur outside of Canada. Additionally, the report should include supplemental information regarding the business' approach to combating illegal labour, including descriptions of:

- its structure, activities, and supply chains;
- its policies, employee training, due diligence processes, and remediation measures related to forced labour and child labour;
- an analysis of which parts of its supply chains carry a risk of illegal labour being used, as well as the steps taken to assess and manage that risk; and
- the methods by which it assesses its effectiveness in ensuring that illegal labour is not being used in its business and supply chains[8].

As "transparency legislation," the Act does not penalize businesses for failing to adopt the due diligence activities described above but rather for failing to submit and publish a report or for including false or misleading information. Describing an absence of policies concerning illegal labour would still technically be compliant with the Act. With that said, the fact that the report is publicly available provides companies with an incentive to be seen as taking active steps to address the issue.

Where will the report be displayed?

After May 31, the Department of Public Safety and Emergency Preparedness will publish the submitted reports in a searchable public registry, and businesses are required to publish their reports in a "prominent place" on their website so that they may be visible and readily accessible to members of the public.

Recommended Actions

Reporting businesses wishing to present a robust strategy for preventing or mitigating illegal labour within their supply chains should consider taking the actions outlined in the Ministry's questionnaire[9], including:

- Conducting assessments of the risks of illegal labour in their supply chains;
- Developing and implementing action plans for addressing illegal labour;

[8] For a full list of the required criteria, see Section 11 of the Act.
[9] For a full list of the Ministry's suggested steps, see the online questionnaire on the Public Safety website.

- Researching key problem areas to help prioritise due diligence efforts;
- Conducting due diligence risk assessments of suppliers and intermediaries, including subsequent auditing and monitoring;
- Engaging with civil society groups and experts on the issue of illegal labour;
- Engaging directly with workers and families potentially affected by illegal labour;
- Creating investigation and remediation procedures for addressing illegal labour; and
- Providing specialised training and awareness materials to employees.

Conclusion

As the first set of reports are being submitted and published by compliant entities, uncertainties remain concerning best practices for reporting businesses. Beyond mere "cosmetic compliance," it also remains to be seen what broader effect these reports will have on promoting responsible corporate policies and preventing illegal labour in supply chains. Lawyers advising business clients should take care to remain informed of all new developments and guidance concerning the Act, as well as other legislative efforts that may arise in the coming years to deal with the serious issue of forced and child labour abroad.

Toronto Law Journal

Federal Court Updates its Guidance on the Use of AI-Generated Content

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As 2023 was coming to a close, the Federal Court issued a Notice to the Parties and the Profession on the use of artificial intelligence in court proceedings. Consistent with several other provincial courts, the Notice required parties to inform the Court, and the other parties, if they have used artificial intelligence to create or generate new content in preparing a document that is filed with the Court. If any such content has been included in a filed document, the Notice provided that the first paragraph of the text in that document must disclose that AI had been used to create or generate that content.

The Notice also advised that counsel and the parties are to verify any AI-related content – that there was a "human in the loop" – and set out principles to guide the use of AI in court documents, including the exercise of caution and the use of only well-recognized and reliable sources when referring to legal authority or analysis.

On May 7, 2024, the Federal Court issued an updated Notice, addressing issues raised in the Court's Artificial Intelligence Working Group. The Court recognized that significant concerns continue to be raised regarding the use of AI in Court proceedings, including the possibility of "hallucinations" and "deepfakes", and the potential fabrication of legal authorities through AI. The issues raised included:

"Where does the Court draw the line between uses of AI that must be declared and those that do not need to be declared?"

On this issue, the Court noted that the "Notice does not apply to AI that lacks the creative ability to generate new content. For example, [it]does not apply to AI that only follows pre-set instructions, including programs such as system automation, voice recognition, or document editing."

The Court indicated that "a Declaration is required if content … was directly provided by AI, whether or not it was inserted from an external source like a web-based generative AI." A Declaration is not, however, required "if AI was used to merely suggest changes, provide recommendations, or critique content already created by a human". A useful formulation of when a Declaration is required is that one is required "when the role AI plays in the preparation of materials for the purpose of litigation resembles that of a co-author."

"Will the Court treat documents containing a Declaration on the use of AI differently than those that do not? More particularly, would a member of the Court use the inclusion of a Declaration to make a negative inference on the contents of the document?"

On this issue, the Court confirmed that the inclusion of a Declaration will not in and of itself attract an adverse inference, rather, it simply notifies the Court and the other parties that AI has been used in the generation of its content.

"What is the onus on counsel, when taking over a matter from either a self-represented litigant or previous counsel, to verify whether documents that were previously filed with the Court contain content that should have been declared?"

On this issue, the Court advised that when counsel takes over from a previous lawyer or self-represented party – while it may be difficult to ascertain whether materials previously filed contain content created or generated by AI – it is reasonable to expect counsel to use best efforts to provide a Declaration in respect of any materials they have reason to believe may include AI generated content.

As new concerns on the use of generative AI are encountered, we are likely to see further updates from not only the Federal Court, but from other provincial courts.

Toronto Law Journal

Moffatt v. Air Canada: A Misrepresentation by an [AI] Chatbot[1]

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The recent decision in *Moffatt v. Air Canada*[2] represents a milestone in the expanding field of digital interactions and accountability. The case grapples with whether a company can be held liable for misleading information provided by an automated chatbot on its website. The decision held that a company can be liable for negligent misrepresentations made by a chatbot on a publicly available commercial website. The decision represents an incremental development of the law which previously focused on the liability of persons for their pre-programmed automated tools.

Summary of the decision

Jake Moffatt sought a refund from Air Canada, claiming he relied on incorrect advice from the airline's chatbot regarding bereavement fares. The chatbot suggested that Mr. Moffatt could retroactively apply for bereavement fares, a statement later contradicted by another page on Air Canada's website. Mr. Moffatt sought compensation for the difference between the regular and bereavement fares.

To prove the tort of negligent misrepresentation, Mr. Moffatt had to show that Air Canada owed him a duty of care; Air Canada's representation was untrue, inaccurate, or misleading; it made the representation negligently; Mr. Moffatt reasonably relied on it; and Mr. Moffatt's reliance resulted in damages.

Air Canada argued that it could not be held responsible for the chatbot's misleading information and claimed that Mr. Moffatt did not follow the proper procedure for bereavement fare requests. It asserted that the chatbot, despite being part of the Air Canada website, should be considered a separate entity and, thus, absolved it of any liability for its inaccuracies.

The tribunal held that "given their commercial relationship as a service provider and consumer" "Air Canada owed Mr. Moffatt a duty of care." It also found that the Chatbot gave Mr. Moffatt inaccurate information.

The tribunal held that Air Canada was liable for the misleading information provided by the chatbot. According to the tribunal generally "the applicable standard of care requires a company to take reasonable care to ensure their representations are accurate and not misleading." It made a finding that Air Canada breached this duty "as Air Canada had failed to exercise reasonable care to ensure the information's accuracy".

[1] This article was originally published on barrysookman.com, the author's blog, and is reprinted herein with the permission of the author.

[2] 2024 BCCRT 149.

> I find Air Canada did not take reasonable care to ensure its chatbot was accurate. While Air Canada argues Mr. Moffatt could find the correct information on another part of its website, it does not explain why the webpage titled "Bereavement travel" was inherently more trustworthy than its chatbot. It also does not explain why customers should have to double-check information found in one part of its website on another part of its website.

The tribunal further found that Mr. Moffatt was reasonable to rely on the chatbot's information, that he would not have flown last-minute had he known he would need to pay the full fare, and that he suffered damages as a result of the inaccurate information.

The tribunal rejected Air Canada's argument that the chatbot was a separate entity, stating that as a part of Air Canada's website, the airline was responsible for all information provided, including that from the chatbot.

> Air Canada argues it cannot be held liable for information provided by one of its agents, servants, or representatives – including a chatbot. It does not explain why it believes that is the case. In effect, Air Canada suggests the chatbot is a separate legal entity that is responsible for its own actions. This is a remarkable submission. While a chatbot has an interactive component, it is still just a part of Air Canada's website. It should be obvious to Air Canada that it is responsible for all the information on its website. It makes no difference whether the information comes from a static page or a chatbot.

Comments on the decision

This decision is important as it reaffirms the well-established principle that generally organizations are responsible for the acts or omissions of the computer systems they use and for misrepresentations they make to the public, irrespective of whether it comes from a human representative or an automated chatbot.

The Air Canada case may be the first case to affirm this principle in the context of information provided by chatbots, but there is significant caselaw dealing with programmed computers to the same effect. For example, a Hong Kong court which relied on a decision of a British Columbia decision, which in turn relied on my book, *Sookman Computer Internet and e-Commerce Law*, summarized the law on this point this way:

> This brings the arguments back to a more fundamental question (when shed of the modernity and complexity of the internet): as a matter of general tort principle, should or should not a person/entity remain responsible in law for acts done by his/her tool, and what are the limits of such liability (if any)?. . .
>
> In a lengthy judgment, Punnett J said [in Century 21 Canada Limited Partnership v Rogers Communications Inc and anor doing business as Zoocassa Inc]:
>
> A machine or a computer and the software that runs it has at some point been constructed and programmed by an individual. As noted by Sookman at 10.5:

> . . . an electronic agent, such as a computer program or other automated means employed by a person, is a tool of that person. Ordinarily, the employer of a tool is responsible for the results obtained by the use of the tool since the tool has not independent volition of its own. When computers are involved, the requisite intention flows from the programming and use of the computer.
>
> I agree with this statement. Liability is not avoided by automating the actions in question.[3]

A similar holding was arrived at in the United States case, *State Form Mutual Automobile Ins. Co. v. Bockhorst*,[4] a case in which an insurance company was held to be bound by a contract to renew an insurance policy formed by its pre-programmed computer. The court had little trouble in attributing the action of its computer to the business:

> Holding a company responsible for the actions of its computer does not exhibit a distaste for modern business practices…. A computer operates only in accordance with the information and direction supplied by its human programmers. If the computer does not think like a man, it is man's fault.

What is unfortunate about the Air Canada case is the lack of information about why the tribunal found Air Canada to be negligent. The decision noted that "Air Canada did not provide any information about the nature of its chatbot". It stated only that "generally speaking, a chatbot is an automated system that provides information to a person using a website in response to that person's prompts and input." Air Canada might have tried to defend the case by explaining how the chatbot was trained and tested to argue that while the message provided was inaccurate, it was not negligent. I suspect that future cases will focus carefully on this. Future cases involving AI systems will also need to canvass who is responsible for outputs of AI systems including generative AI systems from among the numerous possible AI actors and users.

Air Canada also did not appear to rely on any website terms and conditions that may have attempted to disclaim liability. It is well known that chatbots and AI systems including generative AI systems sometimes give inaccurate information. These "hallucinations" and the liability therefore are commonly disclaimed in terms of service.

Despite the questions about whether Air Canada was indeed negligent, the decision underscores the importance of ensuring the accuracy of information across all customer interfaces and highlights the potential legal liabilities arising from negligent misrepresentation in the use of chatbots and AI systems more generally.

The decision also represents an incremental development of the law which previously focused on the liability of persons for their pre-programmed automated tools.

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[3] Quoted in Sookman, Computer, Internet, and eCommerce Law at 11.3(a).

[4] 453 F.2d 533 (10th Cir. 1972).

Update

According to an article published by the CBA, National – Proving AI's misrepresentations (nationalmagazine.ca), the Air Canada Chatbot was not developed using AI. Therefore, assuming its accuracy, the tribunal's decision is an affirmation of the longstanding law regarding a person's liability for delicts caused by programmed computers. But it offers no insights into how the law will develop to deal with liability for misrepresentations by AI-powered chatbots.