CITATION: Voegelin v. Wade and Company, 2025 ONSC 5988
COURT FILE NO.: CV-20-00642451-0000
DATE: 2025-10-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: VOEGELIN v. WADE AND COMPANY INC.

BEFORE: ASSOCIATE JUSTICE D. MICHAEL BROWN

HEARD: May 28, 2025

COUNSEL: Madelena Viksne for the moving party (plaintiff)

Julien Bonniere for the responding party (defendant)

REASONS FOR DECISION

[1] The plaintiff, Michelle Voegelin, brings this motion seeking to strike out the statement of defence of the defendant, Wade and Company Inc., for its failure to attend examinations for discovery and mediation. In the alternative, the plaintiff seeks an order to compel the defendant to produce Marc Wade as its representative for examinations for discovery. The plaintiff further seeks a status hearing, an extension of the deadline for setting the action down for trial and the imposition of a litigation timetable. The defendant opposes the motion to strike and the order compelling it to produce Mr. Wade as its discovery representative. The defendant does not oppose the status hearing or the extension of the set-down deadline. The parties have agreed to a litigation timetable to be followed if the defence is not struck and the status hearing is granted such that the action is allowed to proceed.

[2] For the reasons that follow, the motion to compel the defendant to produce Marc Wade as discovery witness is granted as is the motion for a status hearing and the extension of the set-down deadline. The motion to strike the statement of defence is dismissed. As the motion to strike the statement of defence is based, in large part, on the defendant's failure to produce Marc Wade as its representative for discovery, I will deal first with the alternative relief seeking to compel the defendant to produce Mr. Wade.

Marc Wade is an appropriate discovery representative for the defendant

[3] The plaintiff's action is for wrongful dismissal, breach of contract and breach of the Ontario *Human Rights Code*. The plaintiff alleges she was wrongfully terminated from her employment with the defendant as Marc Wade's executive assistant on April 16, 2020 while she was on maternity leave. She seeks damages totaling more than $600,000, including for unpaid salary, damages in lieu of reasonable notice, moral damages, damages for breach of the *Human Rights Code* and punitive and aggravated damages. The defendant denies that the plaintiff was ever a salaried employee of the defendant and pleads that the plaintiff was at all material times an

independent contractor. The defendant further pleads that the plaintiff, and not the defendant, terminated the relationship between the parties at the time her child was born.

[4] According to the plaintiff's evidence, the plaintiff was hired by Marc Wade as his personal executive assistant and that he was the plaintiff's direct report through the course of her employment with the defendant. The plaintiff alleges that her employment contract was an oral agreement she negotiated with Marc Wade acting on behalf of the defendant. The plaintiff's evidence is that Marc Wade always held himself out as the controlling mind of the defendant having the authority to bind the company in her dealings with it. The plaintiff chose Marc Wade as the representative of the defendant for examinations for discovery and served a notice of examination on the defendant on November 2, 2022, for an examination to be conducted on November 28, 2022. Mr. Wade failed to attend.

[5] The defendant has refused to produce Mr. Wade as its discovery representative on the basis that he was not an officer, director or employee of the company during the plaintiff's time with the company. The defendant instead proposes to produce Laurence Ezer as its representative. Mr. Ezer's evidence is that he was the sole registered director and officer of the company during the period of the plaintiff's alleged employment with the defendant, but that he ceased being an officer and director of the defendant in April 2023. He has never been an employee of the defendant and is currently a "consultant" for the defendant.

[6] Per Rule 31.03(2), where a corporation is to be examined for discovery, the examining party may examine any officer, director or employee of the corporation on behalf of the corporation, but the court may order the examining party to examine another officer, director or employee of the corporation. This court has held that the reference to officer, director or officer in Rule 31.03(2) means a current director officer or employee of the company at the time of the examination for discovery.[1] The rationale for this requirement is that answers given by the representative on the examination for discovery must bind the corporation at the time of the examination.[2] Contrary to the defendant's position on this motion, it is not a requirement under Rule 31.03(2) that the representative was an officer, director or employee of the corporate party at the time of the events relevant to the plaintiff's claim.

[7] Notwithstanding Rule 31.03(2), the parties are free to agree on a discovery representative that is not a current, director, officer or employee of the corporate party, including a former director, officer or employee of the corporation.[3] It is an implied term of such an agreement that the answers given by the corporate representative on discovery will bind the corporate party.

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[1] *Creative Kitchen Gallery Inc. v. YRCC No. 715*, 2020 ONSC 1260 (CanLII) (Master) at paras 34-36, citing *Scott Transport Ltd. v. Bondy*, [1973] O.J. No. 1884,
[2] *Creative Kitchen Gallery, supra,* at para 51
[3] *Thorne v. AXA Canada Inc.*, 2012 ONSC 2409 (CanLII) (Div. Ct.), at paras 10-18, Corbett J. speaking for the majority.

[8] According to the defendant's evidence, neither Marc Wade nor Laurence Ezer is a current officer, director or employee of the defendant, Wade and Company Inc. Marc Wade was registered as the sole director and officer of the defendant at the time of its incorporation in June 2014. He was replaced as registered officer and director by Mr. Ezer in December 2017. Mr. Ezer held those positions until April 2023. According to the defendants' evidence, neither Mr. Ezer nor Mr. Wade has ever been an employee of the defendant. The defendant's evidence is that Wade and Company Inc. has no employees, only consultants and independent contractors.

[9] The defendant's affidavits filed on this motion do not include any information regarding the current officers and directors of the company. The most recent corporate profile report appended to the defendant's affidavits was generated in December 2022. Mr. Ezer testified on cross-examination on his affidavit that the only current officer and director of the company is Eric Strachan, a resident of the Bahamas. Eric Strachan was apparently appointed to these positions in April 2023 to replace Mr. Ezer. However, when plaintiff's counsel asked for corporate documents demonstrating that Eric Strachan is now the only registered officer and director of the defendant, the defendant took the question under advisement and has never produced the documents. Defence counsel agreed in his submissions that Eric Strachan was too far removed from the dispute to be an appropriate discovery representative. On the defendant's evidence there is no current director, officer or employee of the defendant who would be an appropriate discovery representative.

[10] The court on this motion is being asked to choose between two discovery representatives, neither of whom is purported to be a current director, officer or employee of the defendant. The parties agree that a former registered director or officer may be a discovery representative for the defendant, but they disagree on which former director and officer should be examined. The defendant argues that that Mr. Ezer is the more appropriate witness of these two because he was a director and officer during the plaintiff's tenure with the company. I disagree.

[11] In my view, the fact that Mr. Ezer was a registered officer and director at the time of the plaintiff's tenure at the company is not relevant. What is relevant is Mr. Ezer's level of knowledge and involvement with respect to the facts relevant to the plaintiff's claim during this time. Mr. Ezer had little or no involvement in the key events that underlying the statement of claim. He has no direct knowledge of the agreement with the plaintiff negotiated by Mr. Wade and was not involved with the plaintiff's day to day work with the company. It is clear that Marc Wade, who hired the plaintiff and was the plaintiff's direct report during her tenure at Wade & Co. has far greater knowledge and involvement than Mr. Ezer with respect to the facts and events relevant to the plaintiff's claim and the defendant's defence. If the court is to choose between these two former registered directors and officers, the clearly more appropriate discovery representative is Marc Wade. I would allow the plaintiff's motion to compel the defendant to produce Mr. Wade for discovery on this basis alone.

[12] I would also order the defendant to produce Marc Wade for discovery on the basis that he was at all material times, and remains currently, a *de facto* officer and employee of the defendant. The plaintiff's evidence is that Marc Wade is the controlling mind of Wade & Company Inc. The defendant has filed no evidence to contradict that statement. It is clear from the correspondence in

the record that Marc Wade is the senior decision maker at the defendant. The evidence shows that during the plaintiff's tenure with the defendant, Marc Wade signed correspondence with a signature line that identified him as the "Chairman" of the defendant. Mr. Ezer admitted on cross-examination that all payments made by the defendant to the plaintiff during the course of her engagement with the defendant were made at the direction of Marc Wade. The defendant's statement of defence describes Mr. Wade currently as "principal" of the defendant.

[13] The defendant has chosen to structure itself in such a way that it purportedly operates without any employees on the payroll,[4] only with independent consultants who report to Marc Wade, a direct or indirect owner of the company, who is not himself a registered officer or director but who nevertheless appears to control the day-to-day operation of the business. While such a structure might serve a legitimate business purpose, it would be manifestly unfair and contrary to the purposive interpretation of the Rules mandated by Rule 1.04 to allow such a structure to insulate the defendant from meaningful examination for discovery.

[14] In my view, a purposive interpretation of the terms "officer" and "employee" as used in Rule 31.03(2) would include a person such as Mr. Wade, who is the controlling mind of the company. Mr. Wade's decisions bind the company in its day-to-day operations. His answers on examinations for discovery should similarly bind the defendant. I find that Marc Wade is a current "officer" and "employee" of the defendant for the purpose Rule 31.03(2). His selection by the plaintiff as the defendant's discovery representative was therefore in compliance with Rule 31.03(2).

[15] A party has a *prima facie* right to select the representative of the opposing corporate party to be examined for discovery. The court will not lightly interfere with the selection and the onus is on the corporation to show that the person selected is inappropriate.[5] The defendant has failed to meet its onus in this case. The defendant's sole objection to the selection of Marc Wade is that he was not a director, officer or employee of the defendant during the relevant period, an objection that I have now ruled against. As noted above, Marc Wade has sufficient knowledge of the facts and issues relating to the plaintiff's claim having negotiated the agreement with the plaintiff and having been the plaintiff's direct report throughout her time with the defendant. There is no evidence that the examination of Marc Wade would be prejudicial or oppressive to the defendant or to Mr. Wade.

[16] The plaintiff's motion as it relates to the alternative relief is granted. The defendant shall produce Marc Wade as its representative for examination for discovery.

The statement of defence should not be struck

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[4] The question of whether the persons working for the defendant (including the plaintiff) are employees or independent contractors for employment law purposes was not before me on this motion and I should not be taken to have decided that issue.

[5] *Ciardullo v. Premetalco Inc.*, 2009 CanLII 45445 at para. 9

[17] Rule 34.15(1)(b) provides as follows:

> 34.15 (1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under rule 34.14, the court may,
> …
> (b) where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;

[18] An order striking a defence under Rule 34.15(b) is discretionary.[6] In *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*[7], the Court of Appeal considered an appeal by defendants whose pleading had been struck pursuant to Rule 30.08(2) for failing to comply with their documentary production obligations. The Court of Appeal listed a number of common sense factors a court should consider when deciding whether to strike out a pleading for a party's failure to comply with its discovery obligations:

> (i) whether the party's failure is deliberate or inadvertent;
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> (ii) whether the failure is clear and unequivocal;
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> (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly;
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> (iv) whether the substance of the default is material or minimal;
>
> (v) the extent to which the party remains in default at the time of the request to strike out its pleading; and
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> (vi) the impact of the default on the ability of the court to do justice in the particular case.[8]

[19] The court of appeal in *Falcon* further directed the court to consider whether the striking of the pleading is a proportional remedy.[9] In *Hordo v. State Farm Mutual Automobile Insurance Company*, Justice Vermette noted that the discretion to strike a pleading for failure to attend

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[6] *Ferguson v. Yorkwest Plumbing Supply Inc.*, 2022 ONSC 4792 (CanLII) (Assoc. Judge) at para. 19
[7] *Falcon Lumber Limited v. 2480375 Ontario Inc. (GN Mouldings and Doors)*, 2020 ONCA 310
[8] *Ibid.* at para 51; although *Falcon* deals with striking a defence under Rule 30.08(2), it has been applied in cases involving the application of Rule 34.15(b), for example see *Namena Corp. v Ameri-Can Pharma Inc.*, 2024 ONSC 306 (Assoc. Judge) and *Elkin Injury Law v. Smith*, 2025 ONSC 1384 (CanLII)
[9] Falco, *supra* at para.

discoveries should be exercised as a last resort where warranted in order to protect the integrity of the justice system from abuse by a recalcitrant litigant.[10]

[20] In this case, the defendant failed to produce Marc Wade for examination for discovery on November 28, 2022. This was the first and only time a notice of examination was served for the examination of Mr. Wade. There were no subsequent notices of examination served and there have been no court orders compelling Mr. Wade's attendance. The defendant objected to producing Mr. Wade for examination for discovery within a week of being served with the notice of examination. The defendant proposed instead that Mr. Ezer be produced on the basis that he was a registered officer and director of the defendant at the time of the events described in the statement of claim. Although I have now found that the defendant's position on the appropriate discovery representative was wrong in law, the defendant's belief in that position appears to have been *bona fide*. This not a case where the defendant was intentionally flouting its discovery obligations. In my view, the defendant has reasonably explained the failure to produce Marc Wade for discovery.

[21] The plaintiff also moves to strike the defence under Rule 24.1.13(2)(b) for the defendant's failure to attend mandatory mediation. Rule 24.1.13(2)(b) provides for an order to be made at a case conference by an associate judge following a referral of the matter to the associate judge by the mediation co-ordinator. There has been no such referral in this case and no case conference. I have been provided no authority for the plaintiff's ability to seek this relief on her own motion. Even if there is such authority, I find that the defendant has explained its failure to attend mediation.

[22] On July 18, 2022, the defendant's former lawyer served a notice of motion for a motion seeking to be removed as lawyer of record, returnable September 7, 2022. While that motion was pending, following a request by the plaintiff to the mandatory mediation coordinator for a roster mediator to be assigned, the mandatory mediation was unilaterally scheduled by the assigned roster mediator on August 25, 2022 to take place on September 15, 2022.

[23] The defendant's current lawyer of record was appointed by the defendant on September 8, 2022, a week before the scheduled mediation and after the deadline for the service of mediation briefs. Defence counsel wrote to the mediation coordinator and plaintiff's counsel the same day advising they would not be attending the mediation on September 15, 2022. Defence counsel objected to the appointment of the mediator and requested that a new roster mediator be selected and that the mediation be rescheduled to a date available to all parties. Defence counsel took the position that the mediation should be conducted after examinations for discovery have been completed. The plaintiff objected to the selection of a new roster mediator and to the rescheduling of the mediation.

[24] The plaintiff and the mediator attended the scheduled mediation session on September 15, 2022. The defendant did not. In an affidavit filed on this motion, counsel for the defendant explains

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[10] *Hordo v. State Farm Mutual Automobile Insurance Company*, 2022 ONSC 3678 at para 74, citing *Starland Contracting Inc. v. 1581518 Ontario Ltd*., 2009 CanLII 30449 at para. 27 (Ont. Div. Ct.)

that attending the mediation on such short notice without sufficient time to prepare would have been prejudicial to their client and would have resulted in an unproductive mediation for all parties. While this does not excuse the defendant's non-attendance, it reasonably explains it.

[25] The defendant has reasonably explained its failure to produce Mr. Wade for discovery and its failure to attend mediation. Although this conduct has delayed this proceeding, I am satisfied that the defendant did not engage in this conduct for the purpose of delay. The plaintiff also bears responsibility for at least some of the resulting delay having waited almost two years from the defendant's failed attendance at mediation and discoveries before taking any steps to bring this motion.

[26] The delay in examinations for discovery has not impacted the court's ability to do justice in this case. There is no evidence before me that evidence has been lost or that discovery witness' memories of events have faded significantly. The delay in the mandatory mediation will not prejudice the parties. The parties have now agreed in the proposed litigation timetable on the motion for a status hearing that the mandatory mediation be conducted after examinations for discoveries as the defendant originally proposed.

[27] An order striking the statement of defence is not a proportionate remedy in the circumstances. Both the interests of the plaintiff and the integrity of the justice system are sufficiently protected by an order compelling the defendant to produce Marc Wade for examination for discovery coupled with a court ordered litigation timetable for the remaining steps in the action. The plaintiff's motion to strike the statement of defence is dismissed.

Status hearing and litigation timetable

[28] The defendant does not oppose the status hearing or the extension of the set-down deadline and has agreed to a litigation timetable to be followed if its defence is not struck. This litigation has been stalled largely due to the parties' dispute over the defendant's discovery representative. Absent that dispute, the action would have been set down for trial in advance of the deadline under Rule 48.14, or the parties would have agreed to a litigation timetable in advance of the set-down deadline, obviating the need for a status hearing. Now that the dispute over the discovery representative has been resolved, I am satisfied that the action should be allowed to proceed.

[29] The timetable agreed to by the parties is reasonable. However, the timetable assumed the motion would be decided on the day it was argued. One of the dates in the proposed timetable has now passed. I have therefore adjusted the litigation timetable in my disposition below to account for the period of time my decision was under reserve. The timetable maybe amended on consent of the parties, except for the deadline for setting the action down for trial which may only be amended by court order.

Costs

[30] In their oral submissions on costs the parties agreed that the costs of the motion should be fixed at $14,000 if awarded on the partial indemnity scale or fixed at $21,000 if costs were awarded

on the substantial indemnity scale. Each party submitted that they should receive substantial indemnity costs if they are successful on the motion but should pay only partial indemnity costs if they are unsuccessful.

[31] The plaintiff was largely successful on the motion. I found in the plaintiff's favour on central issue of dispute regarding the defendant's discovery representative and awarded the alternative relief sought based on that finding. Although the defendant was the unsuccessful party, they took a principled position in opposition to the motion. As noted above the defendant has reasonably explained its failure to attend discovery and mediation. There has been no egregious conduct by the defendant that would justify an enhanced award of costs. The plaintiff shall have her costs of the motion on the partial indemnity scale, fixed at $14,000.

Disposition

[32] **ORDER TO GO AS FOLLOWS:**

1) The defendant, Wade and Company Inc., shall produce Marc Wade as its representative for examinations for discovery.

2) The parties shall adhere to the following litigation timetable for the next steps in the proceeding:

   a) The parties shall answer any remaining undertakings from the cross-examinations on affidavits on this motion by November 30, 2025.

   b) The parties shall serve any updated affidavits of documents by November 30, 2025.

   c) Examinations for discovery shall be completed by February 15, 2026.

   d) All answers to undertakings given on examinations for discovery shall be provided by April 1, 2026.

   e) Any party bringing a motion on refusals and undertakings shall obtain a date for the motion from the court office by May 15, 2026.

   f) The parties shall conduct a mediation in the action by October 30, 2026

   g) The action shall be set down for trial on or before January 14, 2027, failing which it shall be administratively dismissed by the Registrar.

3) This timetable may be amended on consent of all parties, except for the deadline for setting the action down for trial which may only be amended by further order of the court.

4) The defendant shall pay to the plaintiff costs of this motion fixed at $14,000 and payable within 30 days.

5) This order is effective immediately, without further formality

D. Michael Brown, Associate Judge

DATE: October 16, 2025