SUPREME COURT OF YUKON

Citation: *Ross River Dena Council* v. *Attorney General of Canada,* 2011 YKSC 88

Date: 20111121
Docket S.C. No.: 05-A0043
06-A0092
Registry: Whitehorse

BETWEEN:

ROSS RIVER DENA COUNCIL

Plaintiff

AND:

THE ATTORNEY GENERAL OF CANADA

Defendant

AND:

BETWEEN:

ROSS RIVER DENA COUNCIL

Plaintiff

AND:

THE ATTORNEY GENERAL OF CANADA
on behalf of and as the representative for
Her Majesty the Queen in right of Canada

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
Stephen Walsh — Counsel for the Plaintiff
Suzanne Duncan and Maegan Hough — Counsel for the Defendant

RULING ON OBJECTION
DELIVERED FROM THE BENCH
(Ruling on Expert's Oral Testimony)

GOWER J. (Oral): I gave Mr. Walsh's potential objection some thought over the lunch hour. I acknowledge that the case of *Lotocky* v. *Markle,* 2005 BCSC 1609, was provided to me, I think last week before we broke, but I do not think at that stage that the expert report had been admitted, so it was not a live issue then.

[1] What I take that case to mean is that there is some type of a distinction between notice of a party's intention to use an expert's written report [our Rule 34(2)], and notice of a party's intention to have the expert testify orally [our Rule 34(4)]. In British Columbia, it is Rule 40A, which is essentially identical to our Rule 34.

[2] In *Lotocky*, Mr. Arvay, for the plaintiffs, wanted to call an expert in addition to tendering the written report and relied upon some authority in *The Conduct of Civil Litigation in British Columbia* by Fraser and Horn, asserting a broad right to call evidence to explain or elaborate upon the opinions expressed in the report. Fraser and Horne in turn cites a British Columbia Court of Appeal decision, *Pedersen* v. *Degelder,* [1985] B.C.J. No. 2694, which held that when the report of an expert is tendered in evidence, the examination-in-chief must be confined to questions which explain the terms used in the report or which are intended to clarify ambiguities. Macaulay J. in *Lotocky* held that *Pedersen* was still good law, and he denied the plaintiffs the opportunity to have the expert testify in person. In his reasoning, Macaulay J., at para. 6, talked about one of the rationales for the rule as avoiding the delay associated with opposing parties being "surprised" by expert evidence on which no notice is given. At para. 8, he noted that the plaintiffs had not given "any notice" of their intention to call oral evidence.

[3] I have to say that I was somewhat surprised by the *Lotocky* decision and I was not previously aware of it. When Mr. Walsh raised this point last week, I had a further look at our Rule 34. I even had a look at the British Columbia Rule 40A in the text, *British Columbia Supreme Court Rules Annotated 2008*, by A.P. Seckel, Q.C. and J.C. MacInnis (Thomas Carswell: 2007) and it is not immediately apparent from the annotations to Rule 40A that different forms of notice are required for the written report and for oral evidence. In fact, at p. 444 of that text the authors simply state:

> "…[W]here a party intends to call an expert witness to give testimony at trial, R. 40A(3) requires that party to provide to all other parties of record a written statement setting out the opinion of the expert. The statement itself is also admissible at trial."

[4] In this case, there is no dispute that Dr. McHugh's written report, which is now an exhibit in the trial, was provided to the plaintiff's counsel prior to trial within the time limit specified by the Rule. So, there is no question that he has notice of the general topic area of which the witness is about to testify. Furthermore, Canada's counsel reminded me this morning that this issue was raised in at least one, if not two, case management conferences before trial where she indicated (and I take her at her word, although I have not yet had an opportunity to specifically check my notes of those conferences) her intention to have Dr. McHugh available to testify in person. This is distinguishable from the situation in *Lotocky* where there was no notice, and I cannot see how Mr. Walsh could be taken to be surprised by the expert evidence which Crown wishes to adduce from this witness.

[5] Lastly, the area which Canada wants to go to now is the structure and various

parts of the *1870 Order*, which I agree on its face is a somewhat complex document to digest. That area is sufficiently part of and connected to what Dr. McHugh has already opined about in his written report, that there would be insufficient prejudice to the plaintiff to allow Canada to pursue that line of questioning.

[6] I am going to allow the questions.

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GOWER J.