IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Sturzenegger v. Peters,* 2003 YKSC 72

Date: 20031211
Docket : S.C. 01-A0222
Registry: Whitehorse

Between:

PETER STURZENEGGER
doing business as ZURICH TRUCKING

Plaintiff

And:

K. PETERS INDUSTRIES NORTHERN LTD. and
KERRY PETERS doing business as KPI NORTHERN

Defendants

Before: Mr. Justice L. Gower

Appearances:
Keith Parkkari — For the Plaintiff
Kerry Peters — On his own behalf

MEMORANDUM OF RULING
ON *VOIR DIRE*
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is a ruling on a *voir dire* which came about because Mr. Peters attempted to cross-examine the witness, Gordon Holland, on a document which is similar but not identical to a document that is already in evidence.

[2] Can counsel help me out as to where that original document was; it is invoice

number 074147.

[3] MR. PARKKARI: Part 1, tab 2, page 6.

[4] THE COURT: The document in question is another version of a document already in evidence in the Book of Documents under Part 1, tab 2, page 6, although it has some additional changes to it. The document is clearly relevant, but that is not where the issue ends.

[5] I also, at the time that Mr. Peters attempted to cross-examine the witness on this affidavit, entered into this *voir dire* because this document is representative of what I understand to be a number of other documents which have come to Mr. Peters' attention lately and which he says will resolve the issues of this trial. Mr. Peters wants to rely upon these documents either directly or in cross-examination.

[6] The rule in question is Rule 26(14), and I will read it:

> Unless the court otherwise orders, where a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the proceeding or use it for the purpose of examination or cross-examination.

[7] The history of this litigation involves some orders that were previously made. The first order of consequence is that of Mr. Justice Wong on September 24, 2002. At that time, the defendants were ordered to make discovery of all documents by delivering to the plaintiff a list of documents by October 15, 2002. That was followed by the order of Mr. Justice Veale made on July 15, 2003. At that time, Mr. Justice Veale ordered that the defendants supply and serve the plaintiff with a list of

documents and an affidavit verifying the list of documents by July 31, 2003. Most recently, there is a second order by Mr. Justice Veale, October 21, 2003, which requires the defendants to provide the plaintiff with replies to his requests made at the examination for discovery of the defendants, which was held August 27, 2003.

[8] I mention these orders because it is clear from the history of the litigation that the issue of documentation and the supplying of documentation by both sides and, particularly, by the defendants, is one that is has been a live issue for several months. The defendants must have known that it was incumbent upon them to make reasonable efforts to find all the documentation and provide it to the plaintiff in a reasonable time in order to comply with the requirements of Rule 26.

[9] The case law that I have provided to counsel starts with the case of *Ball v. Gap (Canada) Inc.,* [2001] B.C.J. 1178. It is a decision of the British Columbia Supreme Court, June 5, 2001. Paragraph 7 of that case says:

> The party seeking to tender the undisclosed document bears the burden of persuasion….

And then the case of *Carol v. Gabriel* (1997), 14 C.P.C. (4th) 376 (S.C.), is cited. The quote continues:

> Part of this burden is to establish, to the court's satisfaction, a reasonable explanation for the failure to disclose.

And then *Carol v. Gabriel*, *supra,* is quoted:

> ...Even in cases where no prejudice will ensue from the admission in evidence of the document, it will be excluded unless there is a reasonable justification for the earlier failure to disclose it. To hold otherwise would be to dilute the disclosure obligation and tempt counsel to refrain from disclosing in situations where they do not expect

> prejudice to result.

[10] That case in turn cited a case, *Blake v. Gill* (1996), 4 C.P.C. (4th) 158 (S.C.) another decision of the British Columbia Supreme Court from 1996. That case was on a slightly different issue, which is whether in certain circumstances it might be justifiable to hold a document back for the purpose of more effective cross-examination. In that case, at page 20, there was reference to the phrase that I talked about earlier, during submissions, and that is "trial by ambush". At paragraph 21, the Court says:

> It is unarguable that the thrust of contemporary civil procedure is towards disclosure.

Then at paragraph 22 it continues:

> I conclude that it sometimes it may be, and in this case was, reasonable for counsel to withhold disclosure of a document in order to make better use of it for cross-examination purposes.

[11] That is not the case here. Mr. Peters has said that he is not tendering these documents late for tactical reasons. He does not want a trial by ambush, and, in any event, it would only be the exception to the rule when that would justify late disclosure.

[12] Another decision of the British Columbia Supreme Court is *Jones Gable and Company Ltd v. Price* (1977), 5 B.C.L.R. 103 (S.C.), which was decided in 1997. Although that was shortly after Rule 26(14) was in effect, the court noted the following, which is relevant to the case before me:

> In my view, "possession or control" of documents by counsel is "possession or control" by the client. No authorities have been cited on this point and, therefore, it seems to me that the rules of law applicable to the

relationship of principal and agent should govern.

[13] I mention that because much has been said by Mr. Peters about documents being in the possession and control of others and not directly by him. However, I have not heard anything with the exception today of the reference to the seizure of some documents by the R.C.M.P. Just putting that to one side for the moment, I have not heard anything that indicates that the parties that had possession of these documents were not parties that you could direct to provide them to you, whether it be your mother, whether it be Mr. Rick Garry and so on. These were all people -- and you have explicitly referred to Mr. Garry as your agent -- which you, as principal, have the authority to direct, Mr. Garry or your mother or these others, to supply you with these documents, and it is their responsibility to follow those instructions as your agent.

[14] At the examination for discovery, which took place on August 27, 2003, there is an extract attached to Mr. Parkkari's affidavit, filed October 16, 2003, as Exhibit C. It is page 64 of the discovery transcript, and it starts in the middle of an answer at the top of the page, which I understand is an answer by Mr. Peters, because he was the only one being discovered. At line 2 it says:

> A ...I have no problem putting all the stuff together that you require; but, I mean, until I'm able to talk and find out when I can put it together, I can't give you a fixed date. Hopefully by the end of the day or by tomorrow, I will be able to talk to the people that I have to talk to.
>
> Q The trial date is set December 10th. Can you provide me the information that has been requested by October 10th?
>
> A I don't see a problem with that. I don't see a problem with that.

> Q So, that would be provide information requested by not later than October 10th? ...As you understand Mr. Peters, that if I don't receive it by that date, I'll end up making another court application in order to get the materials early enough before trial that we can proceed in December?
>
> A Sure.

Again, that underscores that the issue of the outstanding documentation was red-flagged by the plaintiff, and by several justices of this court, very early on in these proceedings.

[15] We are hearing today for the first time from Mr. Peters that although he made an initial request for some documents from Mr. Garry shortly after the examination for discovery in late August, he apparently did not find out until later on that some of the documents that Mr. Garry had pertaining to the defendants had been seized by the R.C.M.P. At that point those documents were no longer in the defendants' possession or control. However, at no point did Mr. Peters make any attempt to disclose that problem to the plaintiff. He says he was embarrassed, and I think he said that he was hoping that perhaps he could get by with the documents that he did have on the Watson Lake end. That was a tactical decision that he made.

[16] As with all the decisions that Mr. Peters has made in this court action since the outset, he must bear the consequences of those decisions, whether he does or does not have counsel. In fact, from what I understand, it has been his choice to proceed with this action and, indeed, with this trial without the benefit of legal counsel. When Mr. Peters makes decisions without legal advice, he must bear the consequences of those decisions.

[17] As I said earlier yesterday and before, my job as a trial judge is to make sure that the process is fair to both sides. It is simply not fair to the plaintiff to allow you to produce documents at virtually the last minute which you have known for some time not only existed, where they existed and what the circumstances were of their being, at least, temporarily out of your possession and control, you have not previously made disclosure to Mr. Parkkari about those documents. He quite correctly says you have not given him any notice, you have not sent him a letter, you have not said "There is a bunch of stuff that I have here that can solve all of the questions in this trial, I just need time to get them to you; why do you not consider an adjournment of the trial so that we can put all the cards on the table and exchange the cards?"

[18] As I said yesterday, there was never an effort by you to do that, sir, and you must bear the consequences of that conduct and those decisions.

[19] In my view, the case law sets out a two-stage decision that must be made in whether or not to exercise my discretion under Rule 26(14). The first question that must be answered is whether you have a reasonable justification for the late production and the earlier non-disclosure. If you do, then the next question is whether the document is indeed relevant and whether it would be in the interests of justice to allow you to use the document. By approaching it in that way, even if you have a document which is clearly relevant, such as the document in question which gave rise to this *voir dire*, it does not matter if you have no reasonable justification for disclosing it late.

[20] It appears, from what I have heard in this *voir dire*, that that applies not only to the document in question but to all the other documents that you want to use in this trial, many of which may be relevant; I do not know. It would have been very helpful

to the plaintiff and to the court if you had disclosed those documents earlier or, at least, given the plaintiff an indication that you had a problem in getting the documents here in time. You did not do so, so you have to bear the consequences of those decisions.

[21] The consequence is I am not going to allow you to use this document, or any similar document, for the purpose of cross-examination or for the purpose of presenting your case, and that is my ruling.

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GOWER J.