Trans North Turbo Air Limited v. North 60 Petro Ltd., et al
2002 YKSC 31

Date: 20020521
Docket: S.C. No. 00-A174
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

TRANS NORTH TURBO AIR LIMITED

PLAINTIFF

AND:

NORTH 60 PETRO LTD., PATRICK O'HAGAN
and BRIAN LARKIN

DEFENDANTS

**MEMORANDUM OF RULING OF
MR. JUSTICE VEALE**

(Production of Documents in Expert Report of Mr. Bundy)

INTRODUCTION

[1] This is an application by North 60 Petro Ltd. (North 60) for the production of documents relied upon by Mr. Bundy, an expert of Trans North Turbo Air Ltd. (TNTA), pursuant to Rules 40A(5)(b) and 26(10) and (11). TNTA brings an application for similar production from North 60. Both parties are in agreement that all the working documents and papers of each expert should be produced and the documents relied on by the experts pursuant to Rule 40A(5)(b). I ordered that production by the experts of each

party. However, what remains in issue is a number of letters from the solicitors for TNTA to Mr. Bundy, which were listed in Mr. Bundy's report.

ISSUE

[2] Should the letters of a solicitor to the solicitor's expert, which are listed in the expert's report as being relied upon, be produced for cross-examination of the expert?

FACTS

[3] The remaining documents whose production is in dispute are listed in the expert report of Mr. Bundy. I list them numerically from the affidavit of Neil Dobson No. 4 filed March 11, 2002, as follows:

> 3. A letter with attached summary dated February 16, 2001 of Mr. Patrick Saul (3.1(g));
>
> 5. Letter from Mr. R. Patrick Saul dated May 9, 2001 with attached photographs taken by Mr. John Ward (3.1(k);
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> 6. Letter from Mr. R. Patrick Saul dated June 13, 2001 with attached documents including an interview with Bill Dean, general description of the Southeast corner of the Hanger, drawings and plans of Hanger C and its environment, Hanger C – Hazardous materials, Hanger C Power Network, external photographs of the fire, the fire witness from the Chalet Restaurant, fire department interviews and roofing materials (Items 3(k));
>
> 7. Letter from Darryl Pankratz dated July 13, 2001 (3.1(1);
>
> 8. Letter from Darryl Pankratz dated September 14, 2001 with attached documents; preliminary reports of Gage-Babcok and Associates dated January 15, 1982, Mock up testing report of Mr. D.W. McAdam dated December 1981 a copy of the undated report of Mr. McAdam entitled "Fire Protection – The Often Neglected Aspect of Building Construction" by T.K. Lenahan, (from the February 1978 B.C. Professional

Engineer, undated summary of 16mm Cine Film prepared by Mr. McAdam, and copies of various photographs taken by Mr. McAdam relating to his studies (3.1(m));

9. Letter from Mr. R. Patrick Saul, dated January 25, 2002 with attached documents; (3.1(n));

10. Letter from Mr. R. Patrick Saul, dated February 12, 2002 with attached documents; a photograph taken diagonally across the hanger, various statements of Bill Dean, a Trans North, (*sic*) various statements of Jamie Tait, various statements of Hans Lammers, statement of Bill Lammers, statement of James Wagenfehr, all of the recorded statements of the fire crew who first arrived at the scene of the fire, and a statement of Luc Paquet (3.1(o));

[4] Mr. Bundy is an expert witness for TNTA and his report has been delivered to North 60. Mr. Bundy will testify at the trial.

[5] There is no affidavit from Mr. Bundy stating that the contents of the solicitors' letters, other than the documents enclosed, were not relied on or did not form a fact or assumption on which his opinion was based.

THE LAW

[6] The leading decisions in British Columbia courts are *Vancouver Community College v. Phillips, Barratt,* [1987] B.C.J. No. 3149 (S.C.) (QL) and *Delgamuukw v. British Columbia,* [1988] B.C.J. No. 1800 (S.C.) (QL).

[7] In *Vancouver Community College v. Phillips, Barratt, supra,* Finch J., as he then was, dealt with the question of what documents in the possession of an expert witness are producible upon his cross-examination at trial. This is the same issue before me now, except that it is being made well before trial so that there will be no delays at trial.

Finch J. found that so long as the expert was a confidential advisor, privilege would be maintained over documents in his possession (para. 27). But once he is a witness, Finch J. said at para. 28:

> It seems to me that in holding out the witness's opinion as trustworthy, the party calling him impliedly waives any privilege that previously protected the expert's papers from production. He presents his evidence to the court and represents, at least at the outset, that the evidence will withstand even the most rigorous cross-examination. That constitutes an implied waiver over papers in a witness's possession which are relevant to the preparation or formulation of the opinions offered, as well as to his consistency, reliability, qualifications and other matters touching on his credibility.

[8] He summarized his view of the law at para. 34:

> When an expert witness who is not a party is called to testify, or when his report is placed in evidence, he may be required to produce to counsel cross-examining all documents in his possession which are or may be relevant to matters of substance in his evidence or to his credibility, unless it would be unfair or inconsistent to require such production. Fairness and consistency must be judged in the circumstances of each case. If those requirements are met, the documents are producible because there is an implied intention in the party presenting the witness's evidence, written or oral, to waive the lawyer's brief privilege which previously protected the documents from disclosure.
>
> (my emphasis)

[9] However, a matter of privilege could still arise to the extent that the expert witness remained a confidential advisor regarding cross-examination of the other side's expert (para. 29), for example.

[10] In *Delgamuukw v. British Columbia, supra,* the plaintiff delivered a massive report exceeding 700 pages which was described as original research. The defendants sought production of the records of the expert to determine if any of the original research did not support the opinion of the expert. The plaintiff refused to produce the records of original research until the expert witness was called at trial. McEachern C.J.S.C. made the following ruling:

> What these cases, and the cases cited in them, decide is that an expert's report or opinion, and the facts upon which they are based, even though prepared for the purpose of litigation, and originally privileged, must all be produced to opposing parties as the privilege is deemed to be waived by operation of statute law when the report is furnished in compliance with Section 11(1) of the *Evidence Act*. The privilege attaching to other communications, if any, such as correspondence with solicitors, is not deemed to be waived at that time.
>
> In my view Section 11(1) must be given a reasonable meaning which best carries out its clear purpose which is to assist opposing counsel, before an expert witness is called, to assess whether his opinion is supported by the facts upon which it is based. It is my conclusion, for the reasons just stated, that the Defendants are entitled to examine the original data, notes and writings of the anthropologist upon which his report is based.
>
> As this material is no longer privileged, if it ever was, it is timely and convenient, in a case such as this, that it be produced now although it might have been retained until the moment before the commencement of the 60 day period had the report been similarly delayed.
>
> (my emphasis)

[11] Section 10(1) and 11(1) of the *Evidence Act*, R.S.B.C. 1986, c.116, at the time, read as follows:

> Evidence of experts
>
> **10.** (1) In this section and sections 11 and 12 "proceeding" includes any judicial, quasi-judicial or administrative hearing or inquiry.
>
> Testimony of experts
>
> **11.** (1) No person shall give, within the scope of his expertise, evidence of his opinion in a proceeding unless a statement in writing of his opinion and the facts on which the opinion is formed has been furnished, at least 30 days before the expert testifies, to every party who is adverse in interest to the party tendering the evidence of the expert.

[12] This issue does not appear to have been dealt with by the British Columbia Court of Appeal until *Traynor v. Degroot,* [2001] B.C.J. No. 1935 (C.A.) (QL) where the issue was whether the raw test data of an expert should be produced. At trial, the plaintiff submitted, before Melnick J., that the raw test data of the plaintiff's expert was subject to solicitor-client privilege and therefore was not required to be produced. Melnick J. ordered the production of the raw test data for the following reason in *Traynor v. Degroot,* [2000] B.C.J. No. 2368 (S.C.) (QL), at para. 15:

> However, Rule 40A (and s. 11 of the *Evidence Act*) make it clear that when a person is involved in a lawsuit and chooses to use an opinion given to him or her by a doctor as evidence in that case, the facts underlying any opinion of that doctor of which notice is given in accordance with the Rules and the *Evidence Act* lose any privilege which would otherwise protect them from disclosure to other persons.

[13] The plaintiffs appeal to the British Columbia Court of Appeal was dismissed, not based upon Rule 40A, but rather because the parties failed to address whether the raw data was in the possession of the plaintiff (Rule 26(10)) or in the possession of the

expert (Rule 26(11)). However, the decision of Melnick J. appears to be consistent with *Vancouver Community College, supra,* and *Delgamuukw, supra.*

[14] In this case, the documents at issue fall into both categories, i.e. the possession of the plaintiff and the possession of the expert. However, this decision will be based upon the documents in the possession of and relied upon by the expert under Rule 40A(5)(b).

[15] I am setting out ss. 10, 11 and 12 of the *Evidence Act*, R.S.Y. 1986, c. 57, as amended, Rule 40A (1) to (7) of the Rules of Court and s. 37 of the *Judicature Act,* R.S.Y. 1986, c. 96 as an endnote.[1]

[16] It is important to note that Rule 40A became effective in British Columbia on August 30, 1993. It appears that the British Columbia *Evidence Act*, *supra,* was amended in July 1992 and effective on August 30, 1993, so that on the latter date ss. 10, 11 and 12 of the British Columbia *Evidence Act, supra,* no longer applied to court proceedings and Rule 40A became the only enactment applying to expert evidence. Both *Vancouver Community College, supra,* and *Delgamuukw, supra,* were based on s. 10, 11 and 12 of the British Columbia *Evidence Act, supra,* when they did apply to court proceedings. Section 10(1) of the British Columbia *Evidence Act, supra*, reads as follows:

> **10**(1) In this section and sections 11 and 12, “proceeding” includes a quasi-judicial or administrative hearing but does not include a proceeding in the Court of Appeal, the Supreme Court or the Provincial Court.

[17] In the Yukon, however, by virtue of s. 37 of the *Judicature Act*, *supra,* the Rules of the Supreme Court of British Columbia "… in force from time to time shall, *mutatis mutandis*, be followed in all causes, …" unless otherwise stated by the judges of the Supreme Court of the Yukon Territory. Thus Rule 40A was in force as a Rule of the Supreme Court of the Yukon Territory in 1993. However ss. 10, 11 and 12 of the Yukon *Evidence Act*, *supra,* were not changed and are still applicable to expert reports in the Yukon.

[18] The result is that some internal conflicts may arise in the Yukon where the *Evidence Act, supra,* prevails as a statute over the Rules according to s. 37 of the *Judicature Act, supra.* The apparent internal conflict in the Yukon between the "reasonable time" in s. 12(1) of the *Evidence Act, supra,* and the 60 days notice in Rule 40A(2) was resolved by Hudson J. in *Burton v. Fluth Estate (Public Administrator of),* [1994] Y.J. No. 129 (S.C.) (QL) as follows at paras. 12 and 13:

> In my view, the rules do not conflict with the *Evidence Act* on this point, except in so far as the 60-day period is cited as it directs itself with respect to written documents; that is dealt with in the *Evidence Act*.
>
> It is my view that the Rules in Rule 40(a) *(sic)* of oral evidence stands uncontradicted by the *Evidence Act*. It is a reasonable rule which is there in order that trials be conducted fairly and with dispatch. And I would substitute the words "a reasonable time" where "60 days" appears in order that the rule be read subject to the Act.

DISCUSSION

[19] As stated at the outset, the parties have agreed that all documents relied upon by their experts should be produced now. That is clearly required by s. 12(1) of the Yukon

Evidence Act, supra, which states that an expert report is not admissible “unless the party offering it” affords the adverse party a reasonable opportunity “to inspect and copy any records or other documents in the offering party’s possession or control on which the report or finding was based.” Section 12(1) requires that this be done “a reasonable time before trial” and at the same time as the expert report is delivered to the opposite party. This is particularly desirable in this fire liability case, where expert evidence looms large and the trial is expected to last two or three months.

[20] It is my view that s.12(1) explicitly requires the production of all records or documents in the offering party’s possession or control. Thus, it is a matter of statute law in the Yukon that documents relied upon under Rule 40A(5)(b) in the offering party’s possession or control must be produced before trial.

[21] As the documents in question in this case were all in the possession or control of the offering party, the question of production of documents under Rule 40A(5) for documents in the possession or control of the expert alone need not be addressed. However, it is my view that the treatment of those documents would be the same based on the principles in *Vancouver Community College, supra*, and *Delgamuukw, supra,* barring some special circumstance relating to the expert’s ownership of the documents.

[22] The remaining issue is whether the letters from the solicitors for TNTA to the expert for TNTA and listed in his report should be produced to the cross-examining party. Some of the letters enclosed documents while others did not refer to enclosures or attachments.

[23] Counsel for North 60 submits that on the plain reading of words by the expert, Mr. Bundy, the letters from solicitors were relied upon and thus they are entitled to know the contents as a matter of fairness.

[24] I am of the view that the general rule is that under s. 12 of the *Evidence Act, supra,* and Rule 40A, all documents, and I use that in the broadest sense of the word, relied upon for facts or assumptions by the expert, and in this case listed in his report, are to be produced along with and at the same time as the expert report. This is clearly necessary to allow cross-examination on those facts and assumptions and ultimately the opinion and credibility of the expert. It is also necessary for the other side to prepare its rebuttal report.

[25] However, if the documents in the possession of the expert do not relate or are not relevant to the facts and assumptions on which the opinion is based, it need not be produced. I refer to para. 29 of Finch J., as he then was, in the *Vancouver Community College v. Phillips, Barratt, supra,* case as well as the comments of McEachern C.J.S.C. in *Delgamuukw, supra.* Thus, letters from a solicitor to an expert are generally not produced because they do not contain facts or assumptions. Indeed, they may relate to advice on cross-examining the other side's witness or trial strategy for example.

[26] Nevertheless, when an expert like Mr. Bundy lists a letter from the instructing solicitors in the document from which his facts and assumptions are based, there arises a *prima facie* presumption that he relied on the letters for facts or assumptions. In my view, it is appropriate that I order the letters in this case produced for my preliminary review to determine if facts or assumptions are contained in the solicitors' letters as

opposed to merely enclosing documents for review or other matters of solicitor-client privilege.

[27] If they contain facts and assumptions, they should be produced. If they are not providing facts and assumptions, then they should not be produced. Nor should they be produced if they contain trial strategy issues, unless the trial strategy is somehow intertwined with the facts and assumptions of the expert. The circumstances of each case will determine whether letters from instructing solicitors listed in expert reports should be produced.

[28] To conclude on this issue, I order that the solicitors' letters listed in the Bundy report be produced for my review to determine whether they should be produced or whether a solicitor–client privilege remains, in which case the letters should not be produced.

[29] With respect to costs, I order that the defendant, North 60 Petro Ltd., the applicant in this case, be awarded costs in any event the cause. If there is a dispute over the amount, counsel may refer the matter to me for resolution.

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Veale J.

R. Patrick Saul and Darryl Pankratz	Trans North Turbo Air Ltd.
Cameron Peter Chomicki	Summit Air Charters Ltd. Alman Landair
Rick Davison and Bruce Churchill-Smith	North 60 Petro Ltd., Patrick O'Hagan and Brian Larkin

[1] EVIDENCE ACT

Use of a written report as evidence

10.(1) A written report or finding of facts prepared by an expert not being a party to the action, an employee of a party except for the purpose of making such report or finding, or financially interested in the result of the controversy, and containing the conclusions resulting wholly or partly from written information furnished by the co-operation of several persons acting for a common purpose is, insofar as the same may be relevant, admissible when testified to by the person or one of the persons making such report or finding, without calling as witnesses the persons furnishing the information and without producing the books or other writings on which the report or finding is based if, in the opinion of the court, no substantial injustice will be done the opposite party.

(2) Notwithstanding subsection (1), a report or finding that purports to have been prepared and signed in a professional capacity by

(a) a medical practitioner,

(b) a dentist, or

(c) a chiropractor,

licensed to practise in any part of Canada is, with leave of the court, admissible without testimony and without proof of his signature, qualifications or license.

(3) Where a medical practitioner, dentist or chiropractor has testified in an action and the court is of the opinion that all or part of his evidence could have been produced as effectively by way of a written report or finding under subsection (2), the court may order the party who required his production as a witness to pay as costs therefor such sum as the court deems appropriate.

Cross-examination of person making a report

11. A person who has furnished information on which a report or finding referred to in section 10 is based may be cross-examined by the adverse party, but the fact that his testimony is not obtainable does not render the report or finding inadmissible unless the court finds that substantial injustice would be done to the adverse party by its admission.

Notice requirement for reports

12.(1) Except as provided in subsection (2), a report or finding referred to in section 10 is not admissible unless the party offering it gives notice to the adverse party a reasonable time before trial of his intention to offer it, together with a copy of the report or finding or so much thereof as may relate to the controversy, and also affords him a reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control on which the report or finding was based and also the names of all persons furnishing facts upon which the report or finding was based.

(2) The report or finding may be admitted if the court finds that no substantial injustice would result from the failure to give the notice referred to in subsection (1).

RULE 40A – EVIDENCE OF EXPERTS

Application

40A(1) This rule does not apply to summary trials under Rule 18A, except as provided in that rule.

Admissibility of written statements of expert opinion

(2)*A* A written statement setting out the opinion of an expert is admissible at trial, without proof of the expert's signature, if a copy of the statement is furnished to every party of record at least 60 days before the statement is tendered in evidence.

Admissibility of oral testimony of expert opinion

(3) An expert may give oral opinion evidence if a written statement of the opinion has been delivered to every party of record at least 60 days before the expert testifies.

Idem

(4) The statement also may be tendered in evidence.

Form of statement

(5) The statement shall set out or be accompanied by a supplementary statement setting out the following:

(a) the qualifications of the expert;

(b) the facts and assumptions on which the opinion is based;

(c) the name of the person primarily responsible for the content of the statement.

Proof of qualifications

(6) The assertion of qualifications of an expert is prima facie proof of them.

Admissibility of evidence

(7) If a statement that does not conform to subrule (5) has been delivered

(a) it is inadmissible under subrules (2) and (4), and

(b) the testimony of the witness under subrule (3) is inadmissible

unless the court otherwise orders.

JUDICATURE ACT

Rules of Court

37. Subject to this and any other Act, the Rules of the Supreme Court of British Columbia in force from time to time shall, mutatis mutandis, be followed in all causes, matters and proceedings, but the judges of the Court may make rules of practice and procedure, including tariffs of fees and costs in civil matters and fees and expenses of witnesses and interpreters in criminal matters, adding to or deleting from those rules, or substituting other rules in their stead.