SUPREME COURT OF YUKON

Citation: *Valard Construction LP v. Yukon Energy Corporation*, 2015 YKSC 11

Date: 20150212
S.C. No.: 12-A0106
Registry: Whitehorse

BETWEEN:

VALARD CONSTRUCTION LP

PLAINTIFF

AND

YUKON ENERGY CORPORATION

DEFENDANT

Before the Honourable Mr. Justice R.S. Veale

Appearances:
Vince Aldridge — Counsel for the Plaintiff
Morgan Burris — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] VEALE J. (Oral): This is an application by Yukon Energy Corporation to continue the examination for discovery of Jody Rideout, a former employee of Valard Construction, the plaintiff in this case.

[2] Valard Construction is suing Yukon Energy Corporation ("Yukon Energy") for additional costs arising out of certain change orders in the construction of a 65 km power transmission line from Pelly Crossing to Stewart Crossing. Some of the claims

relate to additional, or new work, in permafrost areas, as well as expediting of work. There are issues of construction of additional structures and cross arms, as well as access issues to Selkirk First Nation lands. The trial is set for April 7 - 24, 2015.

FACTS

[3] Counsel for Yukon Energy examined Mr. Rideout for two days, on October 29 and 30, 2014. During the course of the examination, counsel for Yukon Energy put 33 requests for information on the record. The examination was adjourned on October 30, subject to further questions that might arise from the answers provided to the requests.

[4] On December 4, 2014, Valard Construction produced additional documents and a supplementary affidavit of documents. Valard Construction also provided written answers to the requests on December 23, 2014; January 9, 2015; and January 14, 2015. I note that a case management order dated December 12, 2014, required responses to requests to be delivered no later than December 31, 2014.

[5] Counsel for Yukon Energy advised Valard Construction's counsel on January 12, 2015, that they would require further examination of Mr. Rideout for one day on requests 12 and 13, 16 and 17, and 24, but indicating that they were still assessing the production and waiting for all the responses.

[6] Valard Construction's counsel advised, on January 14, 2015, that they would not consent to a further examination.

[7] On January 16, 2015, Yukon Energy, by letter to Valard Construction's counsel, set out in some detail -- which I do not consider necessary to repeat here -- the specific

facts and issues that she wished to examine on. She further advised that two hours would be required.

ANALYSIS

[8] Rule 27 sets out the procedure for examinations for discovery in this Court. Rule 27(18) applies to document issues. It states:

> Unless the court otherwise orders, a person to be examined for discovery, and the party on whose behalf the person is to be examined, shall produce for inspection on the examination all documents in his or her possession or control, not privileged, relating to the matters in question in the action.

[9] As I interpret this rule, it is incumbent on the person being examined to produce all relevant documents prior to the examination. Thus, I order that Yukon Energy's counsel can examine on the supplementary documents provided both in the supplementary affidavit and in the requests, subject only to the limitation that the questions relate generally to the issues arising out of requests 12 and 13, 16 and 17, and 24

[10] I also refer to Rule 27(20) and (21), which contemplate that the person being examined required to inform him or herself and adjourn for that purpose. In my view, this is precisely what the request process is, in that it permits the person to be examined again on those issues, subject, of course, to the supervision of the Court if necessary. I note as well that this examination was specifically adjourned for that purpose. Although I do not find that absolutely necessary, as that often results in a debate between counsel on the record. The overriding issue, in my view, is whether a full, fair, and frank examination has taken place rather than what counsel agreed to or did not agree to when the examination was concluded.

[11] There are three general categories of issues that arise out of examinations for discovery.

[12] The first was addressed by Finch J. in *Westcoast Transmission Co. Ltd. v. Interprovincial Steel and Pipe Corp.*, [1984] 59 B.C.L.R. 43, where he set out the test as being:

> ... whether there has been a full inquiry into all matters which may be relevant to the issues raised on the pleadings, and whether those inquiries have been answered either of the witness's own knowledge, or upon his informing himself. …

[13] And he further states that:

> ... it is necessary to demonstrate that questions asked have not been answered, or that answers given are incomplete, unresponsive or ambiguous, ...

[14] The second category arises when an examination for discovery has been concluded. There is a heavy onus on the applicant to show that he has not received full, fair, and frank discovery, or the complexion of the case has changed. (see *Sutherland (Public Trustee of) v. Lucas*, [1996] B.C.J. No. 2160)

[15] The third category, and the one most relevant to this application, is what right the examining party has to compel re-attendance to complete an oral examination, or whether the examining party should be content with written answers.

[16] The decision in *Senechal v. Muskoka (Municipality)*, [2005] O.J. No. 1406, in the Ontario Superior Court is helpful, and I quote from para. 5:

> The question of examining “more than once” is in practice a question of whether the examination was actually completed. Improper refusals are an interruption of the discovery while undertakings are an acknowledgment that the question is a proper one and a promise to obtain and provide the answer. Generally speaking, had the discovery not been interrupted by the refusal or the

> answer to the undertaking been available, not only would the answer have been given under oath as part of the transcript but the examining party would have been entitled to ask appropriate follow up questions as part of the examination. Arguably then an answer that genuinely gives rise to follow up questions should give rise to a right to complete the oral discovery as if the question has been answered. ...

[17] And in para. 6, it indicates that, "The right to a follow up discovery is not, however, an absolute right."

[18] However, it is clear that the Court should restrain onerous, abusive, or questions that arise out of all proportion to the matters arising in the issues.

[19] There are four useful bullet points in *Senechal*, (para. 7) as follows:

- As a general principle a party giving undertakings or answering refusals may be required to reattend to complete the discovery by giving the answers under oath and answering appropriate follow up questions. A party being examined may not compel the examining party to accept answers in writing simply by refusing to answer questions or by giving undertakings.

- On the other hand, the court will not automatically make an order for follow up discovery if it serves no useful purpose. Examples in which an order may not be appropriate would be cases in which a full and complete written response has been given to a simple question, in which the answer demonstrates that the question was not relevant or in which the parties have agreed that written answers will suffice.

- The court will generally make such an order if it appears necessary in order to fulfill the purposes of discovery. Examples of situations in which an order would be appropriate are situations in which the answers appear cursory or incomplete, where they give rise to apparently relevant follow up questions that have not been asked, if newly produced documents require explanation, or the discovery transcript supplemented by the answers will not be understandable or useable at trial.

- Even if answers do appear to require follow up, the court has discretion to order answers in writing or to decline to order further examination where it appears the cost or the onerous nature of what is proposed outweighs the possible benefit or where for any other reason it appears unjust to make such an order. Such discretion should be exercised only if the interests of justice require it.

[20] And continuing on in para. 8:

> The examples given above are not intended to be exhaustive. The point is that discovery rights are subject to court supervision and are not absolute rights. Discretion should normally be exercised to ensure the purposes of full and fair discovery are served but to prevent abuses of the discovery process. Procedural rules, it has been observed, should be the servants of justice and not its master.

[21] I add that there is no heavy onus required in the case at bar.

DISPOSITION

[22] From my review of the extensive material provided by counsel for Yukon Energy, I am satisfied that the continued examination for discovery for a further two hours is appropriate to ensure a full and fair discovery on requests 12 and 13, 16 and 17, and 24. There is no abuse of process here or onerous questioning. The issues of permafrost, permits, additional structures, and cross arm installation -- which I do not recite as an exhaustive list of the issues -- are all material in raising questions that should be answered to ensure a full and fair discovery in this case.

[23] I do not consider two and a half days of discovery in a construction case involving permafrost and change orders with an asserted claim of $3 million to be excessive.

[24] I understand Mr. Rideout resides in the Calgary area but was examined in Vancouver where counsel reside. I order that the continued examination for discovery

take place in Vancouver as the most cost-effective and convenient place to hold the examination. The examination shall take place before March 6, 2015, in light of the April trial dates.

[25] I am going to ask counsel to make submissions on costs, but I indicate that if costs are appropriate, my practice is to make a lump sum order rather than make busywork for counsel.

[26] Do counsel wish to make submissions on costs?

[27] MS. BURRIS: Well, I think costs should follow the event, Your Honour, under the circumstances.

[28] THE COURT: And do you have any recommendation on the lump sum?

[29] MS. BURRIS: I hadn't turned my mind to it, Your Honour.

[30] THE COURT: You had not or you had?

[31] MS. BURRIS: I had not turned my mind to a lump sum, no.

[32] THE COURT: Turn your mind to it.

[33] MS. BURRIS: Okay. (laughs)

(PAUSE)

[34] THE COURT: Let me give you some guidance.

[35] MS. BURRIS: Yes, Your Honour?

[36] THE COURT: For an application of this nature -- I appreciate that you have done a great deal in putting that one affidavit together -- but generally speaking, the costs in this jurisdiction for a straightforward application like this would be between $500 and $2,500, depending on the complexity in terms of preparation.

[37] MS. BURRIS: Well, the first number that came to my mind was $2,000, so it

does fall within that range.

[38] THE COURT: Okay. Thank you for that.

[39] Mr. Aldridge.

[40] MR. ALDRIDGE: Well, Your Honour, I mean, my submission and my position is that the costs should be in the cause, basically over the -- the basis of what is going to occur in the final outcome.

[41] And the reason I say that is that I don't think that it was entirely clear that this was a -- from the further -- the responses to the requests I don't think made it completely clear -- and I still don't -- that further examination is required. And that was the only basis upon which we had to decide this prior to receiving application materials which then brought into play the further document disclosure. And I think that it's my submission, appropriate, that the costs are -- follow the cause as opposed to the event.

[42] THE COURT: Thank you.

[43] In my view, it was a relatively straightforward application that Yukon Energy has been largely successful on, and I am therefore going to order the lump sum costs award in the amount of $1,500 payable in any event of the cause.

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VEALE J.