

Johnson v. Alberta (Public Works Supply and Services), 2002 ABQB 1068

Date: 20021206
Action No. 9701-18144

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

WILLIAM WALTER JOHNSON, PAUL W. JOHNSON, GABRIEL RICHARD RIEBEL,
JOHN PETER RIEBEL, ALEXANDER F. J. RIEBEL, THOMAS RIDER, CORINNE
RIDER, SHEILA ANN JOHNSON, DENNIS BENNETT and SYLVIA SAWYER

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA, THE
MINISTER OF PUBLIC WORKS, SUPPLY AND SERVICES AND THE MINISTER OF
ENVIRONMENTAL PROTECTION

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Virginia A. Engel and Lorenz Berner
for the Plaintiffs

William H. Hurlburt, Q.C. and Sheila C. McNaughtan
for the Defendants

SUMMARY

[1] The primary issue in this application is whether Alberta Land Surveyors retained by the Crown as part of a process of expropriation should be considered employees of the Crown within the purview of Rule 200(1) of the Rules of Court and therefore available for examination for discovery. If the surveyors are found to be Rule 200(1) employees, the Crown applies under Rule 200(2) to limit the number of persons examined in this case by excluding the surveyors, on the grounds that such examinations are unnecessary, and, in their effect, though not in their intention, vexatious.

[2] I find that the surveyors named in the Plaintiffs' application should be available for discovery under Rule 200(1), and decline to limit their discovery under Rule 200(2).

FACTS

[3] In mid-1998, the Crown expropriated lands of the Plaintiffs adjacent to Buffalo Lake, northeast of Red Deer, in order to complete its plan to flood the lake and stabilize the water level. Compensation for such expropriation will be determined by the Land Compensation Board of Alberta. The issue of the location of the boundary of the Plaintiffs' lands at the time of expropriation, which will determine how much land is subject to compensation, has been referred to this Court for determination pursuant to the *Expropriation Act*, RSA 2000 Ch. E-13.

[4] On the upland side of Buffalo Lake, the Crown established a "take line" for expropriation purposes that approximated where the water would reach if the lake was flooded to a specified elevation. The other boundary that had to be surveyed to determine the area to be expropriated was the natural boundary dividing the land from the lake.

[5] The survey of the natural boundary was problematic because Buffalo Lake had receded substantially since its original historical survey and the shallow slope of its shore made the extent of accretion difficult to determine.

[6] Under the *Surveys Act*, RSA 2000 Ch. S-26, only a professional Alberta Land Surveyor may determine the location of a natural boundary. The Crown does not employ staff land surveyors, and, between 1992 and 1995, retained several survey firms to prepare plans in relation to the take line and the natural boundary on the lands of the Plaintiffs. These surveys were used to create right-of-way plans which were filed by the Crown at Land Titles, and upon which the expropriations were based.

[7] The Plaintiffs allege that the surveyors retained by the Crown have improperly located the natural boundary of the lake, thereby under-representing the full extent of the Plaintiffs' land before the expropriation.

[8] The Plaintiffs have examined Crown officers and employees. They submit that none of the Crown employees can give evidence of what the surveyors took into account in establishing the location of the natural boundary nor what they saw before the flooding had occurred. The Plaintiffs have retained an Alberta Land Surveyor to give an expert opinion in connection with the expropriation proceedings, but this surveyor carried out his survey in 1997, after flooding had commenced. His opinion assumes that pumping of water had no effect on the level of the lake until the time of expropriation in 1998. The Crown unilaterally began flooding the lake in 1996, against the objections of the Plaintiffs.

[9] Section 17 of the *Surveys Act* sets out the procedure to be followed by a surveyor determining a natural boundary. A surveyor may perform the survey by any method that has the effect of accurately determining the location of the natural boundary, but Section 17(2) of the *Act* provides that “the surveyor shall determine the position of the line where the bed and shore of a body of water cease” and Section 17(3) provides that “the bed and shore of a body of water shall be the land covered so long by water as to wrest it from vegetation or as to mark a distinct character on the vegetation where it extends into the water or on the soil itself.”

[10] The Plaintiffs submit that discovery of Crown employees has provided evidence that there was extensive interaction between the employees of the Crown and the surveyors. This interaction included the Crown’s approval or rejection of draft plans prepared by the surveyors, and attempts to resolve conflicts between where some of the surveyors located the natural boundary and where certain Crown employees thought the natural boundary should be located. There is evidence of meetings of Crown employees with the surveyors to provide and discuss opinions as to the location of the natural boundary. After being informed of the opinions of Crown employees, some surveyors reconsidered their positions and altered their plans.

[11] The Crown submits that its employees did not provide “specific” instructions to the surveyors on how to conduct the surveys, nor did they tell the surveyors how to complete their tasks. It points to the contracts entered into between the Crown and the survey firms. However, there is no dispute that at least two Crown employees expressed their disagreement with some of the surveyors on the position of the natural boundaries, and meetings as described above did occur. These employees state that “in almost all, but not all cases of disagreement”, their opinions were more favourable to the Plaintiffs.

POSITIONS OF THE PARTIES

[12] The Crown intends to treat the surveyors retained by them to prepare the survey plans as expert witnesses. It has delivered expert reports from these surveyors to the Plaintiffs. These reports were prepared a number of years after the surveys were performed and are to be recast before the expropriation hearing in Rule 218.1 form. The Crown submits that the surveyors are not “persons employed” within the meaning of Rule 200(1), and there is no more reason to make them subject to examination for discovery than there is to make any other expert witness subject to pre-trial examination.

[13] The Plaintiffs submit that the best evidence on questions relevant to the expropriation proceedings must come from the surveyors directly. They are key factual witnesses that performed services for the Crown under its direction and for use in the Buffalo Lake stabilization project, as opposed to subsequent litigation. The Plaintiffs submit that the surveyors have the only available evidence of the natural boundary of Buffalo Lake shortly before it was flooded. They point out that Section 17 of the *Surveys Act* provides that a surveyor “determine” the position of the natural boundaries of a body of water, and that the report of a surveyor who does this is more than just an expert opinion. The Plaintiffs submit that the court should not permit the Crown to hide its key witnesses behind an “expert” label.

ANALYSIS

[14] The relevant portions of Rule 200(1) and Rule 200(2) are as follows:

- 200.(1) Before trial, a party to proceedings may orally examine under oath, without an order of the Court,
- ...
- (b) . . . one or more officers of the corporation, and
- (c) one or more other persons who
- (i) are or were employed by the other party, and
- (ii) have or appear to have knowledge of a matter raised in the pleadings that was acquired by virtue of that employment.
- ...
- (2) The court may on application limit the number of employees . . . of any party who may be examined and may set aside any appointment for the examination of any employee which it regards as unnecessary, improper or vexatious.

[15] Rule 200(1) is to be given wide application. Its purpose is to “afford the party opposite an opportunity to discover in advance the evidence to be given at trial by likely witnesses”: *Tremco Inc. v. Gienow Building Products Ltd.*, [2000] A.J. No. 366 (C.A.).

[16] The Plaintiffs submit that the test of who may be examined under Rule 200(1) is set out in *Cana Construction Co. Ltd. v. Calgary Centre for the Performing Arts* (1986), 30 D.L.R. (4th) 455 (Alta. C.A.). In that case, an unpaid volunteer who bore the title of Chairman of the Construction Committee was held to be an officer within the scope of Rule 200(1), and therefore subject to discovery. The Court held that, since the object of the rule is to force pre-

trial disclosure of non-privileged information, its limiting factors, being a connection with the party as officer or employee, should be given a wide application. The test is whether the person sought to be examined “can be regarded as an officer or servant in any permissible sense.” (supra, page 2, citing *Bell v. Klein (No. 3)*, [1955] 1 D.L.R. 37, 13 W.W.R. (N.S.) 193. The test also involves enquiry as to whether the proposed person is a person “connected with the company best informed of matters which may define and narrow the issues between the parties at the trial.”

[17] The Crown seeks to narrow the scope of *Cana Construction* (supra) by suggesting that it is limited to consideration of the status of potential officers, rather than employees. It prefers the test set out in *Marine Pipeline & Dredging Ltd. v. Canadian Fina Oil Limited* (1964), 48 W.W.R. 462 (App. Div.), which it submits remains the leading case with respect to interpretation of the reference in Rule 200(1) to employment. *Marine Pipeline* considered the question of whether a pipeline contractor could examine inspectors hired by a consultant to the owner. It focussed on the elements of an employer-employee relationship, and held that the inspectors were employees of the consultant and not of the owner.

[18] Kerans, J.A. in *Cana Construction* (supra, at page 458) states that *Marine Pipeline* is of little assistance because the court in that case was deciding the narrow question of whether all indicia of employment were present, and not whether the persons in question were officers within the meaning of the Rule.

[19] While *Cana Construction* may be primarily concerned with the question of whether the person sought to be discovered was an officer, the case represents a widening of the scope of Rule 200(1). The test applied by the Court in *Cana Construction* to the issue before it refers to both limiting factors in the Rule, being whether the person in question has some connection as an officer or as an employee, and the wider application taken by the Court has been continued in subsequent cases.

[20] Moore, C.J. Q.B. applied the *Cana Construction* case in several subsequent decisions relating to the employment limitation of the Rule. In *Mikisew Cree First Nation v. Canada*, [2000] A.J. No. 832 (Q.B.), he discussed the principles laid out in his previous decisions and states that consultants who are not strictly employees may be examined under Rule 200(1) if it is appropriate in the circumstances of the case (supra, para. 13). In his view, the test is not whether a person is an employee, “but whether that person is akin to an officer or employee.” (supra, para. 12). He found that a consultant to a First Nation Band performed functions “broadly equivalent” to those of employees of the Band.

[21] Moore, C.J. referred to his decision in *Adams v. Norcen Energy Resources Ltd.*, [1998] A.J. No. 1199 (Q.B.) where he found that consultants retained by Norcen for the purpose of converting a pension plan and for assistance in the termination of employees could be examined for discovery by aggrieved employees. He found that the consultants had been directly involved in the events that underlay the cause of action, and had first hand, and in some cases sole, direct knowledge of certain events. He states that a consultant may be

discovered if there is more than simply a contractor, arm's length relationship between him and the party that retains him. That relationship should be assessed on a case-by-case basis. He distinguishes the case from his decision in *Trizec Equities Ltd. v. Ellis Don Management Services Ltd.* (1994), 19 Alta. L.R. (3d) 433 (Q.B.) where the consultants became involved only after certain construction problems had occurred, and there was no more than a mere contractual relationship with them. In *Adams*, Moore, C.J. found that the consultants performed duties analogous to those of Norcen employees.

[22] In summary, factors that should be considered in determining whether a consultant or other third party may be discovered as an employee under Rule 200(1) are as follows:

- (a) The limiting factor of employment should be given a wide application in accordance with the object of the Rule. A consultant or person sought to be discovered who is not strictly an employee may be examined under Rule 200(1) if it is appropriate in the circumstances.
- (b) The test is not whether the person in question is an employee, but whether he or she is akin to an employee.
- (c) The test must be applied on a case-by-case basis.
- (d) There must be more than a mere contractual basis to make such a person akin to an employee under the Rule.
- (e) A person may be found to be akin to an employee if he or she performs duties analogous to those of employees.
- (f) If the person sought to be discovered is the person best informed of matters that may define and narrow the issues between the parties at trial, the policy behind the rule, to force pre-trial disclosure of non-privileged information, adds force to the submission that the person should be considered akin to an employee.
- (g) The test will be less likely to be met, and the person sought to be discovered will be more likely to be considered an expert witness, if the retainer is entered into after the events that found the litigation occur.

[23] In this case, there was more than a mere contractual, arms-length relationship between the surveyors and the Crown. While it is true that only professional Alberta Land Surveyors can prepare valid plans of survey, the services provided by these professionals were closely connected to the duties being performed by the Crown's Land Administration Division staff in the course of implementing the Buffalo Lake Project, and akin to the duties performed by the staff. Crown employees reviewed plans setting out boundaries between private and Crown land, including the surveys, and gave advice to the various Crown departments involved in the project as to whether or not the survey plans accurately depicted the natural boundary. They

explained their opinions in that regard to the surveyors. The Crown concedes that its employees were responsible for advising the Crown to accept or reject the work done by the surveyors. When differences arose between the surveyors and Crown employees on the determination of the natural boundary, they met to attempt to resolve them. It appears from the evidence that, in some cases, compromises were reached and the surveyors revised their plans. If the work was not accepted, the Crown would not register the survey plans at the Land Titles Office. The surveyors were members of the team charged with determining the private lands to be expropriated as part of the stabilization project.

[24] This is not a case of consultants being retained after the fact to provide litigation advice. The surveyors were involved in the events that found the Plaintiffs' cause of action prior to the flooding of Buffalo Lake and the expropriation proceedings that followed. While it is true that they may be experts in their field, and may have expert opinion to give on the location of the boundaries, they were retained to prepare plans of survey, and, for that purpose, to determine the natural boundary of Buffalo Lake in accordance with s. 17 of the *Surveys Act*.

[25] I am satisfied from the evidence that the surveyors have the best and most direct information about the location of the natural boundary of Buffalo Lake prior to the flooding. The broad objective of Rule 200 - to force pre-trial disclosure of non-privileged information - would best be served by permitting examinations of the surveyors as akin to employees of the Crown as requested by the Plaintiffs.

[26] The Crown submits that allowing such examination pursuant to Rule 200(1) gives the Plaintiffs a "one-sided advantage" in examining the Crown's experts. The Plaintiffs, however, do not seek to examine the Crown's experts retained for the purpose of providing advice or evidence relating to litigation. That the surveyors in question happen by their training and experience to be appropriate for qualification as experts to give opinion evidence does not detract from their position as analogous to employees under Rule 200(1) in the circumstances of this case. This determination does not affect the operation of Rules 218.1 to Rule 218.15 with respect to experts retained for the purpose of litigation.

[27] One of the surveyors refused to alter his plans despite disagreement with Crown employees. The Crown submits that at least he should be considered an arms-length consultant. It is clear, however, that this surveyor also had some interaction with the Crown over this disagreement, and, as a result of his refusal to alter his plan, certain parts of the lands were re-surveyed. I decline to treat this surveyor differently for discovery purposes, given the extent of interaction over his report, and his part in the history of events.

[28] The Crown's application under Rule 200(2) to limit the number of employees by excluding the surveyors is based on its view that additional examinations will add to delay and cost of this proceeding. The Crown also repeats its objection made with respect to the Plaintiffs' application that discovery of those surveyors will give the Plaintiffs a special advantage, and is therefore "vexatious". It also repeats its previous position that the Rule

218.1 procedure for exchange of expert reports is sufficient disclosure of the surveyors' evidence to meet the needs of justice.

[29] The Plaintiffs do not agree. They repeat their position that the surveyors are key factual witnesses, and submit that the expert reports prepared by the surveyors years after they completed the plans of survey provide no significant detail of what the surveyors did or observed.

[30] As stated previously, I am satisfied that the surveyors have the best and most direct evidence about the location of the natural boundary. I note that the Plaintiffs have not sought to examine all of the many Crown employees involved in the project, but have concentrated on six individuals who they submit had the greatest involvement in the matters at issue. I see no reason to limit the Plaintiffs' discovery by excluding the surveyors. Allowing such discovery does not give the Plaintiffs an unjustified advantage, but allows the principle of pre-trial disclosure of relevant non-privileged information to be satisfied.

CONCLUSION

[31] The Defendants are to produce the surveyors named by the Plaintiffs in their application for examination for discovery under Rule 200(1).

[32] The Defendants' application to limit discovery under Rule 200(2) is dismissed.

DATED at Calgary, Alberta this 06th day of December, 2002.

J.C.Q.B.A.