SUPREME COURT OF YUKON

Citation: *45787 Yukon Inc./Mobile Solutions and Research Inc. v ALX Exploration Services Inc.,* 2021 YKSC 60

Date: 20211123
S.C. No. 19-A0002
Registry: Whitehorse

BETWEEN:

45787 YUKON INC./MOBILE SOLUTIONS AND RESEARCH INC.
and MIDWEST INDUSTRIAL SUPPLY INC.

PLAINTIFFS

AND

ALX EXPLORATION SERVICES INC. and
SOILWORKS LLC

DEFENDANTS

Before Justice K. Wenckebach

Counsel for the Plaintiffs	Scott Pollock (by telephone)
Counsel for the Defendant ALX Exploration Services Inc.	Mark E. Wallace
Counsel for the Defendant Soilworks LLC	Timothy Cullen (by telephone), Michael S. Rankin (by telephone),and Ricki-Lee Williams, Articled Student (by telephone)

This decision was delivered in the form of Oral Reasons on November 23, 2021. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): I have my decision and it is as follows.

INTRODUCTION

[2] Two applications have been filed in this proceeding and were heard together. In the first application, the plaintiffs, 45787 Yukon Inc./Mobile Solutions and Research Inc. ("MSRI") and Midwest Industrial Supply Inc. ("Midwest"), seek a protective order.

[3] In the second application, the defendant Soilworks LLC ("Soilworks") seeks that the plaintiffs provide a further and better affidavit of documents and the production of documents, unredacted, that have already been produced in redacted form.

[4] The parties are all in the business of producing or selling dust suppressant. Midwest manufactures a dust suppressant called EK-35. MSRI acts as distributor of EK-35.

[5] On the defendants' side, Soilworks manufactures and also distributes a dust suppressant called Durasoil. ALX Exploration Services Inc. ("ALX") is a distributor of Durasoil.

[6] This action concerns a request for proposals ("RFP") from the Government of Yukon for dust suppressant. ALX and MSRI both put bids in and ALX won the contract. In essence, the plaintiffs are alleging that ALX should not have won the contract, but rather, MSRI should have.

[7] The essential question with regard to the protective order is whether the defendants could obtain a business advantage over the plaintiffs if they were to have access to the documents. If they could, the second question is whether the prejudice to the defendants outweighs the benefits of granting the protective order.

[8] The issue with regard to the application for a further and better affidavit of documents is whether the documents in question are relevant.

[9] Finally, ALX seeks elevated costs against the plaintiffs. The question there is whether the plaintiffs had a basis upon which to allege that ALX had defrauded the Government of Yukon.

[10] In my analysis, I will look first at whether the plaintiffs should provide a further and better affidavit of documents.

[11] I will then address whether a protective order should be granted.

[12] Lastly, I will address the question of elevated costs.

ANALYSIS

Should the plaintiffs provide a further and better affidavit of documents?

[13] The defendant Soilworks is seeking that the plaintiffs provide a further and better affidavit of documents with regards to the plaintiffs' financial documents. It also says that some documents that have been provided in redacted form should be provided in unredacted form. The defendant ALX takes no position on this application.

[14] Soilworks and the plaintiffs agree on the test for determining relevancy of documents. At para. 19, in *Chance Oil and Gas Limited v Yukon (Energy, Mines and Resources)*, 2021 YKSC 44, Campbell J. cited the *Peruvian Guano* decision, as adopted by Gower J. in *Ross River Dena Council v Canada (Attorney General)*, 2009 YKSC 4. The test was described as follows:

> … every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may--not which must-- either directly or indirectly enable the party requiring

> the affidavit either to advance his own case or to damage the case of his adversary. ...

[15] The parties disagree about whether the documents sought by Soilworks are relevant.

[16] Soilworks says that these documents were requested by Soilworks' damages expert in order to assess the profitability and value of the Government of Yukon contract to the plaintiffs, and to assess the plaintiffs' alleged losses.

[17] The plaintiffs state that the documents requested are not relevant to their claim. The assessment of damages in these circumstances is simple. It can be determined by subtracting revenue from costs to determine profits. It says that the broad financial disclosure being sought by the defendants is not related to lost profits and is therefore not relevant.

[18] I conclude that a further and better affidavit of documents should be provided.

[19] While the plaintiffs may seek to prove their claims for damages by subtracting revenue from costs, Soilworks is not bound by the way the plaintiffs frame the issue.

[20] In its Statement of Defence, Soilworks articulated its approach to the plaintiffs' claims for damages when it stated at paras. 38-39:

> If any damages are owed, which is not admitted but expressly denied, such damages are excessive, exaggerated, remote, unforeseeable, and not recoverable at law or otherwise from Soilworks.
>
> In the further alternative, if the plaintiffs sustain any damages or losses as alleged in the Statement of Claim, it failed to mitigate those damages or losses.

[21] The information Soilworks seeks could assist in determining whether MSRI's and Midwest's claims are exaggerated, or if they could have mitigated their losses, amongst

other things. The documents sought may not be relevant to the plaintiffs' case, but they are relevant to Soilworks' case.

[22] I have also concluded that the plaintiffs should provide unredacted copies of the documents that were provided in redacted form. The plaintiffs have pleaded that they would have been awarded the contract if ALX had not been. As Soilworks argued, this opens up the entire bid for review. The documentation sought may help Soilworks assess MSRI's bid.

[23] Soilworks provided a draft order with an attachment setting out the relief it was seeking. In their response, the plaintiffs stated that some of the documents sought by Soilworks had been provided.

[24] I grant the order as drafted by Soilworks, including the attachment, but with two exceptions:

1. Paragraph 6 of the attachment, which concerns expert reports, does not form part of the order.
2. The plaintiffs are not required to produce any documents in para. 2 of the order that they have already produced.

[25] I trust that the parties can come to agreement about the documents that have already been produced.

Should a protective order be granted?

[26] The plaintiffs are seeking a protective order with regard to eight documents. If granted, the protective order would restrict access to these documents to only the defendants' counsel and experts. No one working in the defendants' businesses would be able to see the documents.

[27] As a preliminary issue, the plaintiffs provided the Court with the eight documents in question. Because the plaintiffs are seeking to restrict the defendants' access to the documents, however, a copy was not provided to the defendants. I heard submissions about whether I should review the documents for this application. In the end, the information provided by the plaintiffs about the documents was sufficient for my analysis, and I did not review the documents when making my decision.

[28] The test for determining whether a protective order should be granted is set out in *Larkin v Johnson*, 2019 BCSC 164 ("*Larkin*") at para. 49. There, the Court said that a protective order will be granted where three conditions are met:

> [49] ...
>
> (a) the information that the applicant seeks to protect must be shown to be confidential and commercially sensitive;
>
> (b) the applicant must put forward an "adequate factual basis" showing that in the absence of the protective order sought, there is a "real and substantial" risk of "serious financial harm" flowing from production of that information to the respondent; and
>
> (c) the applicant's interest in obtaining the protective order must be shown to outweigh the prejudice to the respondent in granting it ...

[29] In this case, the parties agree that the information is confidential. On all other aspects of the test, the parties disagree.

[30] The plaintiffs argue that the information is commercially sensitive. If the defendants have access to this information, they will be able to determine the costs of

production of EK-35. The defendants would then be able to undercut the plaintiffs in bids provided in response to RFPs.

[31] In addition, the plaintiffs would be at a risk of serious financial harm because the market for the production and supply of dust suppressant is very tight. There are, essentially, two producers and only a handful of suppliers. The parties are frequently in competition. If one competitor can undercut the other on a regular basis, this would greatly increase their competitive edge.

[32] The defendants have also acted in bad faith. Under the Government of Yukon's RFP, bidders of dust suppressant with binder had certain advantages over bidders of dust suppressant without binder. ALX purported that Durasoil has binder, but the plaintiffs contacted the Government of Yukon and told them Durasoil did not have binder. The Government of Yukon asked for proof from ALX that Durasoil had binder in it. Soilworks forwarded a lab test showing that Durasoil had 70% wax to ALX, which ALX provided to the Government of Yukon. ALX then received the contract.

[33] The plaintiffs got the lab report ALX gave to the Government of Yukon. It was the same lab results that Soilworks had provided in another instance where the parties had argued about whether Durasoil had binder. There was, however, one crucial difference. In the original document, the lab results stated that the amount of wax in Durasoil was, in units of mass percentage, "0.71". In contrast, the lab results sent to the Government of Yukon state that the mass percentage of wax was "71%". The plaintiffs state that they contacted the lab that produced the results and the lab stated that they, too, had concerns that modifications had been made to the report. On this basis, the plaintiffs

assert that the defendants defrauded the Government of Yukon when submitting their proposal.

[34] The plaintiffs submit that the defendants have shown that they will not act fairly when competing with the plaintiffs, but will use any means necessary to achieve their aims. They cannot be trusted to not use the commercially sensitive information they obtain from the plaintiffs.

[35] On the other hand, the prejudice to the defendants can be mitigated. Soilworks states that it needs access to the information to be able to discuss the matter with their experts. The plaintiffs suggest that they can achieve this end by hiring an expert in the industry to provide the same kind of information the defendants would otherwise provide.

[36] In my analysis, I will apply the *Larkin* test, first, to Soilworks, and then to ALX.

[37] Soilworks takes the position that the information contained in the eight documents is not commercially sensitive, and there is no risk of harm to the plaintiffs if it has the information.

[38] I agree. The documents in question are from 2019. Since then, there have been changes to the market from the impact of COVID-19 and other events. The price of production has, therefore, changed significantly. The cost of production of 2019 says little about what the costs of production in 2021 are.

[39] The plaintiffs say that the prices have only gone up since 2019. As a result, the 2019 costs are the floor upon which the defendants can base their decisions with regard to pricing. However, an RFP bid would include not only costs of production but also an additional amount for profit. In order to undercut the plaintiffs, then, Soilworks' current

costs of production and profit combined would need to be less than the plaintiffs' costs of production in 2019. I question how likely this possibility is.

[40] Moreover, and perhaps more importantly, the plaintiffs' profit margin is another factor that must be considered. If the profit margin is stable and the costs of production are known, it is then easier to determine how much the other party will bid in any given RFP. If their profit margins vary then the eventual bid price becomes more difficult, if not impossible, to predict.

[41] Here, the profit margins are not stable. Matthew Lyons, who is the Manager of Research and Development for Midwest, filed an affidavit. In his first affidavit he stated, at para. 38(c):

> Many contracts that [Midwest] is involved in are contracted through government procurement programs. As a result, the profit on any given contract may not have any relationship to the profit for any other contract, as individual procurement bids are discrete bids which have greater or lesser profit baked into the bid based on numerous market factors.

[42] As the plaintiffs' profit margins vary, Soilworks would not have a good sense of one of the variables if it were to try and predict the plaintiffs' future bid prices. In addition, the data that they would have about another variable - cost of production - would not reflect the current costs of production but would be stale-dated.

[43] With two changing and unreliable variables, I am not convinced that the information is commercially sensitive or that there is a real risk of substantial financial harm to the plaintiffs if the information is disclosed.

[44] I am also unconvinced by the plaintiffs' allegation that Soilworks defrauded the Government of Yukon. A party alleging fraud bears a heavy onus of proof. In this case, Mr. Lyons attested that upon noting the discrepancy in the reports, he contacted the lab

that had produced the report. He exchanged emails with Nathan Brilz, who is Operations Customer Support Lead for the company that had produced the lab results. The email is attached as Exhibit 41 to Mr. Lyons' Affidavit #1. Mr. Brilz' email is brief, and states:

> Hi Matthew,
>
> The file with 0.71% matches what we have. I am concerned that your copy of the report has the Soilworks LLC Confidential notation on the report so they have taken our report and modified it.

[45] The plaintiffs are asking that the Court make a finding of fraud on the basis of hearsay evidence. The hearsay evidence submitted, moreover, is sparse. Additionally, no other information about the person providing the evidence is given other than that he is the "Operations Customer Support Lead" for the lab that had produced the report. I therefore place no weight on the hearsay evidence.

[46] What is left is that there are two different versions of the same report. Chad Falkenberg, who is Chairman and CEO of Soilworks, attested in his first affidavit, at paras. 15-16, that he was the person who located the report that was forwarded to the Government of Yukon. When he learned that the report was different than the original, he questioned other employees at Soilworks about this different report. They all did a search of the server and were unable to locate any other version of the report. Mr. Falkenberg attested that he did not provide the report to the Government of Yukon with the intent of defrauding the government.

[47] There are questions about these two versions of the report that remain unanswered. The evidence presented by the plaintiffs, however, is entirely insufficient to establish that Soilworks was involved in fraud.

[48] The final prong of the *Larkin* test is about what prejudice would be caused to Soilworks if the protective order is granted.

[49] I conclude that the prejudice to Soilworks would be significant. Soilworks has provided evidence from Mr. Falkenberg, at para. 27 of his Affidavit #1, and its expert that individuals working at Soilworks require access to the documents. They state that access to the documents would help them provide industry context to counsel and the expert and help them assess the plaintiffs' evidence.

[50] In other cases, courts have rejected a party's statements that they require access to the documents where, as here, the party asserts that they would require them in order to instruct counsel. In those other cases, the courts found that the party provided only "bare assertions" that they needed access to the documents in order to provide instructions. In contrast, here, Soilworks has provided concrete reasons for requiring access to those documents.

[51] Restricting access to documents that are relevant to these matters would create an impediment to Soilworks in receiving information relevant to the issues at trial, and giving instructions on them. The financial documents the plaintiffs seek to restrict access to go to the question of damages, which is an important issue in dispute. I do not see how Soilworks can properly instruct counsel without the information that would help them assess the plaintiffs' damages claim.

[52] The plaintiffs' suggestion that the defendants could hire another expert to provide the industry context does not mitigate the prejudice to the defendants. Rather, it would impose another expense on the defendants and complicate Soilworks' litigation process further.

[53] There is, as well, the spectre of the return to court on the issue of what documents should or should not be subject to a protective order. Although the plaintiffs have stated that there are eight documents at issue, the draft order the plaintiffs filed is not restricted to those eight documents, but applies to any document designated as confidential by the party producing it.

[54] There is no reason to doubt that the parties will act in good faith and only designate documents as confidential when they believe the document is truly covered by the order. However, the order's definition of "confidential information" is broad, allowing a potentially wide sweep of documents to become subject to the order.

[55] The burden would then rest on the party seeking access to the documents to go to court for a determination of whether there should be restricted access to the documents.

[56] Here, because I have ordered that the plaintiffs provide a further and better affidavit of documents, there are documents left to be produced. Counsel to the plaintiffs candidly admitted that the plaintiffs may seek to restrict access to some, though not all, of the documents if I order them produced.

[57] Thus, if I grant the protective order as presented by the plaintiffs, there is a good possibility that the plaintiffs will designate other documents, aside from the eight, as subject to the protective order. In that case, the defendants may need to challenge the designation in court.

[58] If I grant a narrower order, covering only the eight documents the plaintiffs referred to, the risk is that the plaintiffs will come to court seeking a restrictive order for

additional documents. There is therefore an added burden of further applications before this issue is fully dealt with.

[59] As a result, I conclude that, in relation to Soilworks, the information in the eight documents is not commercially sensitive nor would there be serious risk of financial harm if the documents were produced to Soilworks. On the other hand, I find that Soilworks' right to litigation fairness and the probability of continued litigation on this issue would unduly prejudice it if the order were granted.

[60] Turning to ALX, I conclude that, as with Soilworks, a protective order is not warranted. However, the facts applicable to ALX are somewhat different than those of Soilworks. My analysis about whether the plaintiffs' information is commercially sensitive applies equally to Soilworks and ALX. However, my analysis about the issues of serious risk of harm and prejudice is different.

[61] One of the reasons the plaintiffs allege that they would be at serious risk of financial harm if the information is disclosed to the defendants is that there are really only two sets of competitors in the dust suppressant market: the plaintiffs and the defendants. Because of this, any advantage the defendants may obtain would have a significant impact on the plaintiffs.

[62] The evidence, however, shows that, while MSRI is the sole distributor of EK-35, ALX is not the sole distributor of Durasoil. There are other distributors of Durasoil that also compete in RFPs for dust suppressant. Moreover, counsel to ALX presented evidence that ALX's real competitor is not MSRI, but other distributors of Durasoil.

[63] Thus, even if the information were commercially sensitive, there would be no grounds to make a protective order against ALX, as I do not believe that ALX would

benefit from having the information and the plaintiffs would not be at serious risk of financial harm by disclosing the information.

[64] With regards to prejudice, it is not clear to me that, if the plaintiffs had established the need for a protective order, the prejudice to ALX would outweigh the benefits of an order. Unlike Soilworks, ALX provided no evidence about the reason it needs to access the documents. Unlike Soilworks as well, it is not a manufacturer, but a distributor. This may put it in a different position with regard to how useful the information would be for it in conducting the litigation. I am therefore reluctant to conclude that Soilworks' evidence is equally applicable to ALX. I am therefore also unable to conclude that ALX would be prejudiced if the protective order were warranted.

[65] Ultimately, however, the plaintiffs have failed to demonstrate that the protective order is warranted. I therefore deny the plaintiffs' application.

Should ALX be awarded elevated costs on the plaintiffs' application for a protective order?

[66] ALX sought elevated costs against the plaintiffs. It argued that the plaintiffs have no evidence that ALX engaged in fraud against the Government of Yukon. The affidavits from Soilworks and ALX show that ALX received the lab results from Soilworks and simply passed them on to the Government of Yukon. There is, therefore, no evidence that ALX tampered with the report. Despite having this evidence, the plaintiffs chose to make baseless allegation of fraud against ALX.

[67] The plaintiffs say that there is evidence that ALX engaged in fraud. Emails between employees from both companies showed that they discussed and strategized the binder issue. There is also no explanation of how the change to the test results

occurred. It is therefore not clear or apparent that Soilworks is solely involved in the alleged fraud.

[68] Elevated costs are not automatically warranted when a party alleges fraud. In discussing the circumstances in which elevated costs may be granted, the Supreme Court of Canada stated in *Hamilton v Open Window Bakery Ltd.,* 2004 SCC 9 at para. 26:

> ... allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent ... costs on a solicitor-and-client scale are appropriate …

[69] In the case at bar, the evidence from Soilworks is that it provided the report that indicated that Durasoil contained 71% wax to ALX.

[70] The evidence about Soilworks and ALX's discussions about the binder issue also do not point to fraud. The emails filed show that the defendants discussed how to determine whether Durasoil's binder would be considered "binder" by the Government of Yukon. They also spoke after the Government of Yukon sought evidence that Durasoil had binder.

[71] Given the history of the parties, including that the binder issue had been raised before in another tender application, none of this is surprising. It is sheer speculation to conclude that ALX and Soilworks were in cahoots to defraud the Government of Yukon based on these emails. The plaintiffs made, without foundation, serious allegations against ALX that could have a damaging impact on the company's reputation.

[72] I am therefore ordering that they pay elevated costs to ALX for the protective order application.

[73] There were no submissions made about what the elevated costs would constitute and so I will leave it to counsel to discuss what scale the costs should be provided at. If they cannot come to agreement, we can address that in a case management conference. Otherwise, costs may also be spoken to in case management if the parties are unable to agree.

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WENCKEBACH J.