SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Norcope Enterprises Ltd,* 2021 YKSC 63

Date: 20211216
S.C. No. 16-A0180
Registry: Whitehorse

BETWEEN

GOVERNMENT OF YUKON

PLAINTIFF

AND

NORCOPE ENTERPRISES LTD. and
INTACT INSURANCE COMPANY

DEFENDANTS

AND

TETRA TECH EBA INC.

THIRD PARTY

AND

NORCOPE ENTERPRISES LTD. NORCON CONCRETE PRODUCTS INC. YUCAL PROPERTIES INC., and DOUGLAS L. GONDER

FURTHER THIRD PARTIES

Corrected Decision: The text of the decision was corrected at paras. 2 and 6 where changes were made on December 31, 2021

Before Justice A. Kent (by video)

Counsel for the Plaintiff Government of Yukon and the Third Party Tetra Tech EBA Inc.	I.H. Fraser and Lesley Banton (by video)
Counsel for the Defendant Norcope Enterprises Ltd., and the Further Third Parties Norcon Concrete Products Inc., Yucal Properties Inc., and Douglas L. Gonder	James R. Tucker (by video)
Counsel for the Defendant Intact Insurance Company	R. Nigel Beckmann (by video)

REASONS FOR DECISION

Introduction

[1] This judgment addresses two matters regarding experts and their reports, and summarizes directions that I gave regarding the trial.

Objections to the admissibility of expert reports

[2] The issue before me is whether, prior to the commencement of the trial, I, as the assigned trial judge, can and should rule on the admissibility of expert statements. Counsel for the Government of Yukon ("Yukon") says that I can because of the broad pre-trial case management powers given to me by the *Rules of Court* of the Supreme Court of Yukon ("*Rules of Court*"). Norcope Enterprises Ltd ("Norcope") and Intact Insurance Company ("Intact") say that I cannot because the *Rules of Court* specifically provide that the issue of the admissibility of expert reports is to be determined during the trial. In this case, based on the nature of the admissions, they argue that the most efficient method of dealing with the objections is during the trial, not beforehand.

[3] Rule 34 sets out the regime for expert reports. It requires pre-trial delivery of the reports to all parties, describing the form of the report; requiring a pre-trial conference of experts where the experts must provide a statement setting out the points of difference between them; and requiring parties to advise of any objections to admissibility of the report that they intend to make at trial. The rule also provides that the overriding duty of an expert is to the Court.

[4] The broad issue in this case is the quality of work done by Norcope pursuant to a contract that Norcope had with Yukon to do repairs to the apron at the Erik Nielsen Whitehorse International Airport. Yukon has filed expert reports from three parties – Tetra Tech EBA Inc. ("Tetra Tech"), Associated Engineering (B.C.) Ltd. ("Associated")

and Stantec Architecture Ltd. Objections to both the Tetra Tech and Associated reports have been filed by the defendants on the basis that the individuals proposed as experts cannot fulfill their duty to the court to be impartial.

[5] The defendants have jointly filed two reports, both by WSP Canada Inc., one authored by Mr. Cumming and one by Mr. Riffell. The Riffell Report is challenged by Yukon based on impartiality and the Cumming Report is challenged on the basis of the limits of his expertise and on the basis that some of what is contained is argument, not opinion.

[6] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ("*White Burgess*"), provides the framework for the admissibility of expert evidence generally and more specifically, when the impartiality of the expert is in question. Impartiality of the expert is addressed at two stages; first when determining whether the opinion meets threshold admissibility requirements; and second as a question of weight at the gatekeeping stage when balancing the risks and benefits of admitting the evidence. At the first stage, the threshold is not high. At para. 48, Justice Cromwell says that once the proposed expert testifies that he or she will comply with the duty to the court, the burden is on the objecting party to show that the expert cannot comply with that duty. He notes, at para. 49, that:

> [t]his threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. … Anything less that clear unwillingness or inability [to provide fair, objective and non-partisan evidence] should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

This second stage requires a more rigorous analysis of the expert's ability to be impartial.

[7] The defendants argue that the process set out in *White Burgess* can only be done within the trial since they will want to cross-examine the proposed experts to make their case at either the first or second stage of considering impartiality. In the case of proposed Tetra Tech expert, Ms. Czarnecki, she will be giving evidence as a fact witness in any event; she will be testifying at trial.

[8] I agree with the defendants that the more efficient manner of dealing with the objections to the admissibility of the expert reports is to do it at trial. Particularly when applying the cost-benefit analysis at the second stage of *White Burgess*, it is likely that some evidence will be required, not only from the proposed expert, but as part of the factual matrix that will be built during the trial. Having a separate hearing before the trial will not only be less efficient, but because I do not yet have a factual basis to assess the experts and their reports, there is a risk that I will need to adjourn the decision until after I hear some fact witnesses during the trial.

[9] The application of Yukon to have a pre-trial decision about on the admissibility of the expert reports is dismissed.

Rule 34(18) expert consultation

[10] Some of the experts met as required by Rule 34(18). After the meeting, one of Yukon's experts contacted counsel for Yukon to ask what form the report should take. In response to that request, counsel for Yukon advised his expert of several things which he then set out in a letter to defendants' counsel. Defendants' counsel has taken objection to some of the things that Yukon's counsel said to the expert.

[11] Having read the points made by Yukon's counsel to his expert, I do not see that I need to do anything. I can understand that engineers may have questions about what is expected of them. Yukon's counsel did the right thing to advise defendants' counsel of

his communication on the Rule 34(18) process that had started. The portions where he describes the civil litigation process are unobjectionable. The parts relating to what may be issues at trial can be dealt with at trial. There is nothing for me to do other than encourage the experts to provide a statement of the points of disagreement. It can be in a list or a series of paragraphs.

Trial Readiness

[12] At the trial readiness meeting, I made directions about what I expect as we move towards trial. I hope it will be useful to the parties to have this list which includes those things addressed during the meeting and a couple of other things:

1. Exhibit Book – Construction litigation usually spawns hundreds of documents. The issues become clearer through the production and discovery process. By the time of trial, the number of documents that are relevant to the issues in dispute has usually narrowed considerably. The parties will prepare an Exhibit Book of the relevant documents. They will provide a schedule which indicates which documents can be admitted as full exhibits and which may require a ruling from me.
2. Agreed Statement of Facts – The parties will prepare an Agreed Statement of Facts. Defendants' counsel was sceptical that there was anything on which there was agreement. Even knowing little about the issues, I disagree. The parties should be able to agree about the relevant actors in this dispute, the contractual relationships that existed, and what happened. For example, does everyone agree that the apron is damaged

and is it a question of how that damage occurred or is it the case that there is disagreement that the apron is damaged at all?

3. Statement of Issues – Yukon and the defendants (either jointly or separately) will provide a statement of the issues that I must decide.

4. Book of Authorities – General Practice Direction 7 should be followed. To the extent possible, the book of authorities should be divided into three parts – admissibility, liability, and damages.

[13] We have a meeting scheduled for January 5, 2022, originally booked to address admissibility of expert reports, depending on my ruling here. We will keep that meeting to address any lingering issues about expert reports and to refine any of the directions set out above.

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KENT J.