

# SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Norcope Enterprises Ltd.*,  
2022 YKSC 21

Date: 20220428  
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

Before Justice C.A. Kent (by videoconference)

Counsel for the Plaintiff Government of Yukon and  
the Third Party Tetra Tech EBA Inc.

I.H. Fraser and  
Lesley Banton

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

Counsel for the Defendant Intact Insurance Company

R. Nigel Beckmann  
(by videoconference)

## REASONS FOR DECISION

### Introduction

[1] The Defendant, Norcope Enterprises Ltd. (“Norcope”), has served an expert report late. The trial is set for four weeks, beginning on May 9, 2022, and the report was provided to the Plaintiff, Government of Yukon (“Yukon”), on or around the date of the report April 11, 2022. The trial had originally been scheduled for February 2022 but had to be adjourned because of illness. Yukon objects to this report because it is late. Counsel for Yukon warned that if the report was admitted, they would likely apply for an adjournment.

### Analysis

[2] The report is authored by Dr. Amgad Hussein, an engineer. Generally, it addresses two things: the causes of the problems of the apron at the airport and whether some conclusions reached in Yukon’s engineering report, the Czarnecki Report, were based upon sound engineering reasoning, thereby raising a question of the professionalism of the report.

[3] The Czarnecki Report is dated July 27, 2015, and has always been part of Yukon’s case, although it was just recently that Yukon confirmed that, of all the opinions contained in many documents it has produced, this is the expert report that Yukon will rely on at trial. That said, the Czarnecki Report was front and centre at an application made by Yukon in December 2021 to address the qualifications of experts to give expert evidence and also is referenced heavily in Norcope’s theory of the case, a document I requested to be completed before the first trial date.

[4] As indicated above, the Hussein Report does two things. One is to address the reasons for the deficiencies in the apron. These issues have been the centre of this litigation for a considerable length of time and certainly in the timeframe within the *Rules of Court* where expert reports were to be exchanged. As well, these issues are addressed in another of the Defendants' expert reports so this report is duplicative of that evidence. Given the late date, I will not allow Dr. Hussein to give evidence on the reasons for the deficiencies in the work.

[5] The other issue is new, namely the professionalism of Ms. Czarnecki. The Defendants say this goes to allegations of bad faith that it will be pursuing at trial.

[6] Even after hearing submissions from counsel, I continue to be concerned that the opinions about professionalism require expert evidence or whether they are matters that, I, as trial judge, can consider within the scope of the facts I hear and inferences that I can draw. For example, Dr. Hussein says that the Czarnecki Report ought to have stated that the bond breaker which is central to the deficiencies claimed was recommended by Czarnecki's firm. Since expert evidence is admissible only if it is necessary to assist the trier of fact, I am not yet convinced that this expert evidence is necessary. I need to hear from Dr. Hussein to determine whether there are professional requirements unique to engineers that have not, in his opinion, been followed.

### **Conclusion**

[7] As a result, provisionally, I will allow Norcope to call Dr. Hussein on a *voir dire* where this issue will be addressed. Norcope should plan to present Dr. Hussein for the *voir dire* early in their case, so that Yukon has as much notice as possible regarding a response to Dr. Hussein. In the meantime, Yukon should consider whether it needs to

call evidence in rebuttal. If it does, it can occur in rebuttal to the Defendants' case. It may be that that discrete issue will require a brief adjournment. However, because I am not prepared to adjourn the trial completely, this process achieves a balance between ensuring Norcope is able to answer Yukon's case with Yukon's ability to respond to this late report.

[8] If, at the end of the day, I rule that Dr. Hussein's evidence is not admissible, I will entertain submissions from Yukon regarding costs in this issue regardless of the outcome of the trial.

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KENT J.