SUPREME COURT OF YUKON

Citation: *Chance Oil and Gas Limited v Yukon (Energy, Mines and Resources)*, 2022 YKSC 76

Date: 20221021
S.C. No. 17-A0002
Registry: Whitehorse

BETWEEN:

CHANCE OIL AND GAS LIMITED

PLAINTIFF

AND

THE GOVERNMENT OF YUKON, DEPARTMENT OF ENERGY MINES AND RESOURCES (OIL AND GAS BRANCH), AND THE MINISTER OF ENERGY, MINES AND RESOURCES AS REPRESENTATIVE OF THE GOVERNMENT OF YUKON

DEFENDANT

Before Justice E.M. Campbell

Counsel for the Plaintiff	Jean Raymond Chartier (by videoconference) and Gol-Azin Douglas (by videoconference) and Chase Holthe (by videoconference)
Counsel for the Defendant	I.H. Fraser and Kelly McGill

This decision was delivered in the form of Oral Reasons on October 21, 2022. The Reasons have since been edited for transcription and publication without changing the substance.

REASONS FOR DECISION
(Case Management Conference)

[1] CAMPBELL J. (Oral): The Government of Yukon ("Yukon") filed an application to strike Chance's affidavit of documents on the basis that Chance had failed to meet its document discovery obligations by overproducing documents. On September 1, 2021, I

found that Yukon had demonstrated that Chance's affidavit of documents contained an unacceptable number of clearly irrelevant documents. As a result, I ordered Chance to conduct a meaningful manual review of the approximately 34,000 documents it had already produced in order to determine which records could reasonably be viewed as relating to a matter in issue, and to remove clearly irrelevant documents from its production (see *Chance Oil and Gas Limited v Yukon (Energy, Mines and Resources)*, 2021 YKSC 44 at para. 350).

[2] Chance performed/conducted the manual review I ordered and provided to Yukon a reviewed affidavit of documents containing a reduced number of documents. It appears the reviewed affidavit of documents contains approximately 22,000 documents. Chance requested that Yukon delete or destroy the database in its possession containing all the documents included in its initial affidavit of documents and replace it with the content of its reviewed affidavit of documents — or its list of documents.

[3] Yukon refused to destroy or delete its copies of the initial affidavit of documents. Yukon submits that, pursuant to Rule 26 of the *Rules of Court* (entitled "Use of Evidence Outside the Proceeding"), once a party lawfully acquires documents, they are not required to delete or destroy them. Yukon relies on the decision of Justice Gower in *Ross River Dena Council v Canada (Attorney General)*, 2015 YKSC 52 ("*RRDC*") to submit that it is entitled to retain and search Chance's initial production of documents for the purpose of identifying documents that may be used to cross-examine or otherwise challenge the credibility of Chance's potential witnesses or representatives in this proceeding.

[4] I note that Yukon is not alleging that Chance inappropriately removed relevant documents from its document production as a result of its further manual review ordered by the Court.

[5] In *RRDC*, Justice Gower found that the implied undertaking rule was not an obstacle to RRDC using an affidavit filed by Canada in a separate but related action involving similar, if not identical, parties and issues to cross-examine another representative of Canada in the proceeding before the Court for the purpose of impeaching her or challenging her credibility. At the time, that separate action was subject to a stay.

[6] Justice Gower determined at para. 27:

> Canada's counsel also objected to the intention of RRDC's counsel to cross-examine Ms. Borgford on the Joe Leask affidavit, on the basis that it ought to be subject to the "implied undertaking" common-law rule recognized by this Court in *Charlie v. Yukon (Chief Corner)*, 2010 YKSC 39, at paras. 22 to 24, and also codified in Rule 26 of our *Rules of Court*. The rule generally is that both documentary and oral information obtained on in the pre-trial discovery process in one proceeding is subject to an implied undertaking that it will be not used for in other proceeding or for any other purpose. I dismiss Canada's objection for two reasons. First, if Rule 26 applies at all, then sub-rule 26(6) creates an exception where the purpose of using evidence obtained in one proceeding, or information from such evidence, is to impeach the testimony of a witness in another proceeding. As I said earlier, RRDC's counsel suggests there is an inconsistency between the affidavits of Ms. Borgford and Mr. Leask, which could lead to Ms. Borgford's impeachment. Second, if only the common law rule applies, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the witness being examined is virtually nonexistent. [citation omitted] It is conceded by Canada that the parties and the issues in both actions are similar, if not identical.

[7] I am of the view that Justice Gower's decision is distinguishable from the present case because the initial production of documents Yukon wishes to retain, search, and possibly use to challenge the credibility of Chance's potential witnesses or representatives are documents I ordered removed from Chance's production because they were clearly irrelevant and should not have been produced in the first place, as initially argued by Yukon; whereas in *RRDC*, there was no dispute that the affidavit filed by Canada in the other matter contained information relevant to that case and had been properly filed.

[8] In addition, in *RRDC*, there was no order striking parts or the totality of the affidavit in question, no finding that part of it should be impugned based on non-relevance; nor had that affidavit been ordered replaced by another one, as per an order of the Court.

[9] I am also of the view that Rule 26 is of little assistance to Yukon, considering the order I made on September 1, 2021.

[10] Again, this is not a case where Chance would have removed or sought the return or destruction of otherwise relevant documents from its affidavit of documents.

[11] In addition, as mentioned, in *Andersen Consulting v Canada*, [2001] FCJ No 57, [2001] 2 FC 324 at para. 20, there are privacy concerns that arise with respect to information contained in the documents at issue — information related to third parties, for example. Those concerns are amplified, in my view, when what a party seeks to retain and eventually access are documents that were ordered removed because they were clearly irrelevant to the action before the Court. Therefore, I am of the view that

those privacy concerns militate against permitting Yukon to retain, search, and potentially use Chance's initial production of documents.

[12] Again, Yukon is not asserting that Chance removed relevant documents from its initial production. I note, as well, that Yukon has raised concerns with the large number of documents remaining in Chance's production following its review.

[13] As a result, I am of the view it would run contrary to the order I made on September 1, 2021, which was not appealed, to allow Yukon to retain, search, and potentially use documents that Chance was ordered to remove from its production on the basis they could not reasonably be viewed as relating to a matter in issue in this action and were clearly irrelevant.

[14] Therefore, Yukon shall delete or destroy all copies in its possession (whether in electronic or paper format) of Chance's initial affidavit of documents, which was the subject of my September 1, 2021 order.

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CAMPBELL J.