SUPREME COURT OF YUKON

Citation: *Dawson (Town of the City of) v. Carey*, 2012 YKSC 59

Date: 20120718
S.C. No. 10-A0040
Registry: Whitehorse

Between:

THE TOWN OF THE CITY OF DAWSON

Plaintiff

And

DARRELL CAREY

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

James A. Dowler — Counsel for the Town of the City of Dawson
Nicholas Weigelt — Counsel for Darrell Carey

REASONS FOR JUDGMENT
(Case Management)

INTRODUCTION

[1] The Town of The City of Dawson (the "City") has brought an action in trespass against Darrell Carey (the "Miner") who operates a placer mining operation within the municipal boundaries of the City. In *Dawson (Town of the City of) v. Carey,* 2012 YKSC 56, I ruled that there was a trespass and awarded damages to the City.

[2] This judgment is about the role and importance of case management. The case proceeded under case management with appropriate timelines. On the morning of the hearing on April 10, 2012, counsel for the City filed a 22-page Plaintiff's Argument raising new legal issues that took counsel for the Miner by surprise.

[3] As a result, the hearing was one sided in favour of the City. I offered counsel for the Miner a remedy of his choosing including an adjournment with costs. The offer was declined and the hearing proceeded with counsel for the Miner being granted the right to file further written argument and counsel for the City having a right to reply.

[4] Counsel for the Miner filed a Further Written Argument of 6 pages on April 30, 2012, and counsel for the City replied with a Response of 16 pages on May 7, 2012.

BACKGROUND

[5] Counsel for the City filed the original Statement of Claim on June 14, 2010. There was a change in counsel and an Amended Statement of Claim was filed on July 9, 2010. Counsel for the Miner filed a Statement of Defence on August 4, 2010.

[6] In this jurisdiction, a mandatory case management conference is required within 90 days from the filing of the Statement of Claim. This conference took place on September 7, 2010. Counsel indicated that Lists of Documents would be exchanged and a further case management date was set for September 21, 2010. That date was adjourned generally at the joint request of counsel.

[7] Both of the counsel that ultimately proceeded to trial are out-of-town counsel. Case management took place by teleconference for their convenience.

[8] The next case management conference took place on January 21, 2011, and counsel indicated the factual and legal complexities of the court action that needed to be addressed for the action to be ready for trial. The City was considering retaining an engineer to examine the roadway in question. Counsel for the Miner queried whether the City owned the right of way in question.

[9] The next case management date was February 15, 2011. Counsel for the Miner provided a helpful four-page outline explaining the history of the placer mine and the roads. He indicated that the City's affidavit of documents was not delivered until January 25, 2011 via a facsimile which was not legible, although a hard copy was provided at a later date. At this conference call, the issue appeared to be whether the City could impose further municipal restrictions on the Miner's Water Use Licence. A trial date was set for September 26 – 30, 2011, with a further case management conference on June 30, 2011.

[10] On June 30, 2011, counsel advised that considerable progress had been made at a recent examination for discovery and that both sides had a better understanding of the issues involved. Counsel for the City indicated an Amended Statement of Claim would be filed.

[11] At a case management conference on September 7, 2011, counsel for the City presented a Further Amended Statement of Claim. Both counsel agreed that the trial could not proceed and the Further Amended Statement of Claim was filed October 14, 2011. The reason for the delay was the factual complexity of the case and the discovery that a second roadway was allegedly also the subject of trespass. Both counsel agreed that it would be appropriate to prepare an Agreed Statement of Facts, as the issue of the Water Use Licence and the roadways needed to be clarified.

[12] A Case Management Order was made on September 7, 2011, adjourning the trial date to February 6 – 10, 2012. The City was ordered to produce an outline of facts and issues with case law on or before January 6, 2012. Counsel for the Miner was

ordered to provide an outline of facts and issues on January 13, 2012. Counsel for the Miner filed an Amended Statement of Defence on January 11, 2012.

[13] Counsel for the Miner filed his outline on January 16, 2012 (dated January 13, 2012) and counsel for the City filed its outline on January 27, 2012 (dated January 6, 2012). I assume that counsel exchanged their outlines on the January 6 and January 13 dates as ordered, because they addressed the same issues: i.e. did the City control the roads, did the Miner trespass on the roads and what would the damages be? The City's outline was very brief consisting of three pages plus statutes and case law, and the Miner's outline was nine pages in length with a more extensive discussion of the issues and the law.

[14] There was a further case management conference on January 25, 2012, prior to the trial dates of February 6 - 10, 2012. Counsel indicated a great deal of progress had been made in resolving the factual and legal background. They said that an Agreed Statement of Facts on the trespass allegations and the damages would be prepared, resulting in a reduction of the anticipated trial time from one week to two days.

[15] By e-mail in February, counsel indicated there was great progress with the Agreed Statement of Facts, and that the trial would consist solely of legal argument and require only one day. It was agreed that the trial would be heard in Whitehorse on April 10, 2012.

The Trial

[16] On April 10, 2012, the trial commenced with counsel for the City filing the following documents:

1. Agreed Statement of Facts (filed April 3, 2012) containing the background, relevant legislation, information on the Dome Road and Mary McLeod Road, the alleged trespasses on Sites A and B with agreed-upon damage calculations and an agreement to admit aerial photographs and applicable Water Use Licences.
2. The Second Agreed Statement of Facts outlining the City's management and control of the Dome Road and Mary McLeod Road and two further documents.
3. A Joint Book of Legislation consisting of:
    a) the Highways Acts;
    b) the Municipal Acts;
    c) the Placer Mining Acts and regulations;
    d) excerpts from the Devolution Transfer Agreement.
4. A Joint Book of Documents containing thirteen maps, aerial photographs and Water Use Licences and Water Board Decisions.
5. A Dome Road Site Survey and Volume Determination Report
6. A chronology of factual and legislative events.

[17] And finally the two controversial documents:

1. The Plaintiff's Argument consisting of 22 pages; and
2. the Plaintiff's Book of Authorities consisting of nine case precedents.

[18] The City's Argument and Book of Authorities had not been discussed in case management and counsel for the Miner had not received copies in advance.

[19] At this point, I inquired of counsel for the Miner whether he wished an adjournment or any other remedy with respect to the filing of the City's Argument and Book of Authorities. Both counsel had come up from Vancouver and counsel for the Miner indicated his surprise but said he preferred to wait until he had taken an opportunity over the lunch hour to read the documents and assess his situation.

[20] After the lunch break, counsel for the Miner indicated that he would proceed on the understanding that he could respond in writing by April 30, 2012, and the City could reply by May 7, 2012. Counsel for the Miner expressed surprise at the City's focus on s. 18 of the *Placer Mining Act*, S.Y. 2003, c. 13, which had not been referred to in the City's Outline or pleadings.

Case Management Law

[21] The Supreme Court of Yukon is a mandatory case management jurisdiction, except for family law proceedings (which have a separate procedure), estate matters, collections and adoptions. Rule 1(7) and Practice Direction 48 require a mandatory case management conference within 90 days of the filing of a Statement of Claim or Petition. The mandatory meeting is usually brief. Counsel who wish to move their cases along have already reached agreement on timelines for document disclosure and discovery, and a second case management conference is scheduled to assess progress and make future procedural orders to move the case as quickly as possible. Where no party requests further case management, Rule 1(9) requires that the case be called forward in one year for the parties to explain why there is no settlement or trial date. Any counsel or party can request a case management conference at any time. There is no

threshold requirement, as the Court considers that case management is essential in moving cases forward to settlement or trial.

[22] Some of the advantages of case management are:

1. counsel are required to communicate with a judge, which in this jurisdiction is generally the assigned trial judge;
2. dates or timelines can be set to accomplish the production of documents and discovery;
3. trial dates and judicial settlement conference dates can be set where counsel and the court can make a reasonable estimate of the time required;
4. the case management judge can discuss and resolve procedural disagreements or set dates for interim applications; and
5. all of the above provide better access to justice at reduced cost.

[23] These are but a few of the general advantages to case management. Rule 1(8) gives the following objectives:

> (a) encourage the parties to co-operate with each other in the conduct of the proceeding;
>
> (b) identify the issues at an early stage;
>
> (c) decide promptly which issues need full investigation and trial and which may be disposed of summarily under these rules;
>
> (d) decide the order in which issues are to be resolved;
>
> (e) encourage the parties to use alternative dispute resolution procedures the court considers appropriate, and facilitate the use of those procedures;

> (f) help the parties to settle the whole or part of the proceeding by using judicial settlement conferences;
>
> (g) set realistic timetables or otherwise control the progress of the proceeding;
>
> (h) consider whether the likely benefits of taking a particular step justify the cost of taking it;
>
> (i) deal with as many aspects of the proceeding on the same occasion as is reasonably practicable;
>
> (j) make use of technology, including telephone conferencing and video conferencing;
>
> (k) give directions to ensure that the proceeding proceeds quickly and efficiently; and
>
> (l) make any other orders and give any other directions the court considers appropriate.

[24] The practice followed is to file any case management orders following the case management conference, so every one is notified of the procedure to be followed and can assess whether timelines and objectives have been met at the next meeting. Case management conferences proceed on the date set unless all counsel agree on an adjournment. A case management order is the same as any order of the court and if timelines cannot be met, they must be addressed in a further case management conference. While these principles would be well understood by the resident bar, there are counsel resident in other jurisdictions who may not be familiar with Yukon case management practices.

[25] The object of the *Rules of Court* is set out in Rule 1(6):

> The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by

> the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,
>
> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
>
> (c) the complexity of the proceeding.

[26] As the submissions of counsel focussed on whether it was appropriate to raise the issue of s. 18(1) of the *Placer Mining Act* at such a late date, I am setting out the relevant section of Rule 20 of the *Rules of Court,* which has some bearing on the point. The *Rules* address whether a specific statutory section must be addressed in pleadings.

> **Contents**
> (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.
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> …
>
> **Objection in point of law**
> (9) A party may raise in a pleading an objection in point of law.
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> **Pleading conclusions of law**
> (10) Conclusions of law may be pleaded only if the material facts supporting them are pleaded.
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> …
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> **Pleading after the statement of claim**
> (17) In a pleading subsequent to a statement of claim a party shall plead specifically any matter of fact or point of law that
>
> (a) the party alleges makes a claim or defence of the opposite party not maintainable,
>
> (b) if not specifically pleaded, might take the other party by surprise, or

> (c) raises issues of fact not arising out of the preceding pleading.
>
> …
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> **General denial sufficient except where proving different facts**
> (22) It is not necessary in a pleading to deny specifically each allegation made in a preceding pleading and a general denial is sufficient of allegations which are not admitted, but where a party intends to prove material facts that differ from those pleaded by an opposite party, a denial of the facts so pleaded is not sufficient, but the party shall plead his or her own statement of facts if those facts have not been previously pleaded. (my emphasis)

[27] Counsel for the Miner alleges that at the hearing date on April 10, 2012, counsel for the City advanced for the first time the argument that s. 18 of the *Placer Mining Act* applied to this dispute. This section requires that the Miner give security before entering on the City roads. Counsel for the Miner submits that this was never pleaded, not raised at case management conferences, nor referred to in the outline filed by counsel for the City on January 27, 2012. In short, counsel for the Miner says he was “ambushed” by the change in the Plaintiff’s argument.

[28] Counsel for the City submits that he pleaded all the material facts and trespass law relied upon at trial and that the Miner was required to plead the facts and law to establish his lawful authority to mine. Counsel for the City submits that the City was not required to plead s. 18(1) of the *Placer Mining Act* because the new facts and legal argument arose from the Amended Statement of Defence filed on January 11, 2012. In this document, the Miner took the position that he had complied with all legislated requirements. Counsel for the City says he is not required to file a subsequent pleading

to rebut this statement. In addition, the Amended Statement of Defence was filed after the Outlines and counsel for the City says that no further pleading was required.

ANALYSIS

[29] Both counsel referred to the case of *Fuller v. Schaff et al*., 2009 YKSC 22, in which Gower J. set out at paras. 7 and 8:

> [7] The essential purpose of pleadings is to define the issues, giving the opposing parties fair notice of the case they have to meet, and to provide the context for effective pre-trial case management, the extent of disclosure required, as well as the parameters or necessity of expert opinions: See *Keene* v. *British Columbia (Ministry of Children and Family Development*), 2003 BCSC 1544; and *No. 1 Collision Repair & Painting (1982), Ltd.* v. *I.C.B.C.* (1994) 30 C.C.L.I. (2d) 149 (B.C.S.C.).
> [8] In *Harry et al.* v. *British Columbia*, 1998 CanLII 6658 (B.C.S.C.) Smith J. stated at para. 5:
>
> > "[5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide."

[30] In *Fuller v. Schaff*, counsel for the defendants made submissions on both a "policy" defence and a "statutory bar" defence that had not been pleaded. The material facts supporting the defences had also not been pleaded. It was understood that the arguments would be made in court, subject to a decision on whether they could be considered pursuant to the *Rules*. If the defences were allowed, both counsel indicated they might seek to re-open their cases for further evidence and argument.

[31] I will focus on the statutory bar as it is similar to the s. 18(1) issue in this. In *Fuller v. Schaff,* the statutory bar arose from s. 18(7)(b) of the *Highways Act*, R.S.Y. 2002, c. 108, which reads as follows:

> (7) No action shall be brought against the Government of the Yukon for the recovery of damages caused
>
> …
>
> (b) by or on account of any construction, obstruction, or erection or any situation, arrangement, or disposition of any earth, rock, tree, or other material or thing adjacent to or in, along, or on the highway that is not on the travelled surface.

[32] Gower J. rejected the statutory bar defence for the following reasons, among others:

1. There was no reference to the relevant facts or statutory bar defence in the preceding pleadings, which contravened Rule 20(17); and
2. Rule 20(22) applied and required that "where a party intends to prove material facts that differ from those pleaded by an opposite party, a denial of the facts so pleaded is not sufficient, but the party shall plead his or her own statement of facts if those facts have not been previously pleaded".

[33] There is no doubt that these Rules, if raised at the trial, could have resulted in the defence of s. 18(1) being rejected as a deemed waiver of the defence. I decline to make this ruling in the case at bar, as it was not a matter that was addressed on April 10, 2012, when it could have been raised. The case proceeded on the basis that there would be further written submissions, but not on the basis that s. 18(1) would not be argued on its merits. Counsel for the Miner and the Court are placed in an invidious position by the last minute filing of new arguments and material by counsel for the City.

Both counsel were from Vancouver and were prepared to make final submissions with their clients present. There were clearly significant cost and preparation considerations at the day of trial that rendered an adjournment and new trial date undesirable. The parties had invested a significant amount of time and money to determine the agreed-upon factual and statutory basis to proceed to trial on. As well, this case is of significant importance to both the Dawson City residents and the jurisprudence of the Yukon.

[34] Although I ultimately agreed with the s. 18(1) argument, I nevertheless find that counsel for the City did indeed "ambush" counsel for the Miner, particularly in the context of the case management that had been carried out. The case management had gone exceedingly well up to the point of trial, and counsel had cooperated extensively to bring a complex factual and legal matter to court. Counsel for the City ought to know, after two years of managing every aspect of the case, that it was wholly inappropriate and unfair to raise the s. 18(1) defence at the last minute and catch his fellow counsel by complete surprise.

[35] The fair and proper procedure would have been to raise the new issue of s. 18(1) or the request to file a new argument at case management, so that each party could prepare arguments to address the new issue. Counsel for the City unfortunately chose the old trial by ambush technique, which is always difficult to deal with fairly on the morning of the trial. On the one hand, the court is always receptive to further written submissions and case law. On the other hand, counsel faced with new written submissions must weigh the cost of requesting an adjournment and preparing for a new hearing date, as opposed to completing the case in the timeline and cost expected by his client.

[36] In my view, the only fair way to address this blatant abuse of case management practice is to consider a remedy in court costs.

[37] In the normal course, costs would follow the event pursuant to Rule 60(9) and the City would recover its costs and reasonable disbursements from the Miner, unless the Court otherwise orders. I am ordering otherwise in this case. There shall be no costs payable to either party and each party shall be responsible for their legal fees and disbursements.

[38] In fairness to the City, I point out Rule 60(36) provides that the Court can disallow a lawyer's fees and disbursements between a lawyer and his or her client where they were incurred without reasonable cause, or as a result of delay, neglect or some other fault.

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VEALE J.