Trans North Turbo Air Ltd. et al v.
North 60 Petro Ltd. et al, 2002 YKSC 44

Date: 20020805
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN: S.C. No. 00-A0174

TRANS NORTH TURBO AIR LIMITED

PLAINTIFF

AND:

NORTH 60 PETRO LTD., PATRICK O'HAGAN AND BRIAN LARKIN

DEFENDANTS

AND BETWEEN: S.C. No. 00-A0226

ROBERT BRIAN CAMERON

PLAINTIFF

AND:

NORTH 60 PETRO LTD., PATRICK O'HAGAN AND BRIAN LARKIN

DEFENDANTS

AND BETWEEN: S.C. No. 00-A0211

ALMON LANDAIR LTD.

PLAINTIFF

AND:

NORTH 60 PETRO LTD., PATRICK O'HAGAN AND BRIAN LARKIN

DEFENDANTS

AND BETWEEN: S.C. No. 00-A0212

SUMMIT AIR CHARTERS LTD.

PLAINTIFF

AND:

NORTH 60 PETRO LTD., PATRICK O'HAGAN AND BRIAN LARKIN

DEFENDANTS

RULING OF MR. JUSTICE VEALE
IN MOTION FOR REPLY EVIDENCE

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[1] Trans North Turbo Air Ltd. (TNTA) applies to bring reply evidence or, in the alternative, to re-open its case to call Garry Doering as a witness. North 60 Petro Ltd. (North 60) opposes the application.

[2] This application is brought by TNTA at the end of this three-month trial at the time of its evidence in reply. The matter arose in the following manner:

1. The trial began on May 6, 2002 and TNTA closed its case on June 13, 2002.

2. The trial continued with the North 60 evidence starting on June 24, 2002.

3. North 60 applied to have the court take a view of the Whitehorse Airport area from the air traffic control tower, which has a view of the area of the former Hangar C, whose destruction by fire is the issue in this case. The court declined to take a view.

4. However, counsel for TNTA attended at the air traffic control tower on the evening of June 24, 2002, to assess the application and met Mr. David White of NAV Canada. Mr. White showed him some photographs, one of which was a photograph taken from the air traffic control tower overlooking the roof of the Whitehorse Airport Terminal and showing the remains of Hangar C after the fire.

5. During the evidence of Matthew Cornish given on June 25, 2002, an enlargement of this photograph was introduced as Exhibit B-96 for identification by counsel for TNTA. Matthew Cornish was a defence witness.

6. The photographer was subsequently identified as Garry Doering, who took the photo on January 19, 1999, the day after the fire.

7. Mr. Saul, on behalf of TNTA, deposes that the photograph will be relevant to snow accumulation at the Whitehorse Airport on the day of the fire.

8. Mr. Saul deposes that he does not think it would have been possible for him to discover the photograph in the normal course of preparing for trial.

9. Mr. Cornish's name was mentioned in the RCMP file but no statement had been taken, as he apparently did not notice anything about the hangar.

10. North 60 has not closed its case. TNTA's position is that I should exercise my discretion to allow Mr. Doering's evidence. North 60 opposes and relies on the general rule limiting reply evidence.

[3] There is no question that the issue of snow on the roof of the southeast corner of Hangar C has been a central issue in this case from the outset. No one is taken by surprise in that regard and both parties have given extensive evidence on the existence of snow and its effect on the use of an oxy-acetylene torch on the roof of Hangar C.

[4] The classic statement on the limits of reply evidence is found in *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.,* [1967] 1 O.R. 18 (C.A.) where Schroeder J.A. said the following at page 21:

> Counsel for the appellants voiced strong objection to the admissibility of this evidence on the ground that while it was offered under the guise of reply, it was overwhelmingly supportive of the plaintiffs' cause of action as proven in chief. In our opinion the objection was well taken and a consideration of the evidence admitted after it had been made clearly leads to the conclusion that while that evidence constituted to some extent a rebuttal of some of the defence evidence and theories, it was preponderantly confirmatory of the plaintiffs' case and clearly offended against the rule that a plaintiff may not split his case.
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> It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by first relying on *prima facie* proof, and when this has been shaken by his adversary, adducing confirmatory evidence: *Jacobs v. Tarleton* (1848), 11 Q.B. 421, 116 E.R. 534. … A defendant is entitled to know the case which he has to meet when he presents his defence and it is not open to a plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non-persuasion.

[5] In *R. v. Krause*, [1986] 2 S.C.R. 466 (S.C.C.), the Supreme Court of Canada cited the *Allcock, supra,* case and restated the law of reply or rebuttal evidence at page 473 as follows:

> At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars. (My emphasis)

[6] Both counsel for TNTA and North 60 agreed that the court has the discretion with regard to the admission of reply evidence. I note that Sopinka, Lederman & Bryant's *The Law of Evidence in Canada*, (Butterworths, 1992) states at page 883:

> In civil cases the discretion is wider and should be exercised in light of the broad principles which are the basis for the restriction on reply evidence. These principles are designed to ensure that the defendant knows the case to be met and that the plaintiff not be permitted to split his or her case. The rationale for the latter principle is that trials should not be unduly prolonged by creating a need for surrebuttal. Within these broad parameters the trial judge has a discretion to permit reply evidence when it is the reasonable and proper course to follow.

[7] I first consider whether the evidence could or should have been uncovered by TNTA at an earlier date and thus excluded as clearly offending the rule limiting reply. This trial involves over 500 documents and new documents have been admitted as the trial progresses. There are a number of photographs, both historical and more recent. It is easy to say in hindsight that counsel should have uncovered a further photograph. However, I think counsel would not have discovered the B-96 photograph but for the issue of taking a view and checking out the physical circumstances proposed. I cannot conclude that there was any lack of diligence.

[8] The second issue is whether admitting this evidence allows TNTA to split its case and surprise North 60. It is an important consideration that this arises before the defendant North 60 has closed its case and that North 60 has had over a month to consider the impact of the photograph. Furthermore, it is a photograph of the roof of a building to the south of Hangar C and the snow conditions on it. While it may be confirmatory of the case of TNTA, depending on the evidence of Garry Doering, I am exercising my discretion to admit the evidence of Garry Doering as it may shed light on the snow conditions and ensure that justice is done between the parties. The evidence does not come at a time when the defendant North 60 has closed its case. North 60 is at liberty to apply for time to consider its position or call further evidence.

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Veale J.

R. Patrick Saul and Darryl G. Pankratz	Appearing for Trans North Turbo Air Limited And Robert Brian Cameron
Peter Chomicki, Q.C.	Appearing for Almon Landair Ltd. and Summit Air Charters Ltd.
Rick B. Davison, Q.C. and Bruce Churchill-Smith	Appearing for the defendants