

CANADA / JUDGMENT

Araya v. Nevsun Resources Inc.

2020 BCSC 53

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 53 Araya v. Nevsun Resources Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Araya v. Nevsun Resources Inc.,

2020 BCSC 53

Date: 20200117

Docket: S148932

Registry: Vancouver

Between:

Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle

Plaintiffs

And

Nevsun Resources Ltd.

Defendant

Corrected Judgment: The front page of the judgment was corrected on January 22, 2020

Before: The Honourable Madam Justice C. Ross

Reasons for Judgment Re Information Requests No. 2

In Chambers

Counsel for Plaintiffs:

J. Fiorante, QC

J.D. Winstanley

Counsel for Defendant:

M.D. Parrish

R. Schechter

Place and Date of Hearing:

Vancouver, B.C.

November 4, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 17, 2020

Introduction

[1] This is Nevsun's application pursuant to R. 7-2 of the British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009, to compel responses to a series of requests made at examination for discovery of several of the plaintiffs. These reasons for judgment are organized according to similar requests, grouped and identified under respective headings.

Requests to inform regarding counsel's notes: Woldemariam Request 4 and 10; Mengstab Request 7, 8 and 11; Okbagergsh Request 1, 8 and 11

[2] The first series of outstanding requests follow a similar pattern. The pleadings in these actions include a limitations defence and a plea of postponement in reply by the plaintiffs. In reasons indexed at 2019 BCSC 260, Abrioux J., as he then was, concluded that the plaintiff had waived privilege over certain matters and made the following order at para. 112 (the "Waiver Order"):

I make the following orders:

- (a) the plaintiffs in each of the Actions have waived privilege over all communications and documents, in any way relating to the pursuit of the Actions or the claims advanced therein, by reason of the plea of postponement asserted in the reply;
- (b) for the plaintiffs in the non-Araya actions, to the date upon which each plaintiff first met Canadian counsel (each a "First Meeting") in the remaining actions, and includes:
 - (i) all communications among any of the plaintiffs and any third party, including but not limited to legal counsel, relating to the action, the subject matter thereof, or the allegations made therein;

(ii) all notes, agreements, reports, memoranda, correspondence, or other documents related to the plaintiffs meeting with and engagement of Canadian counsel, and associated documents giving rise to a solicitor-client relationship; and

(iii) all documents prepared in contemplation of, to record or refer to the proceedings arising from the First Meeting;

(c) the plea of tolling by a particular plaintiff(s) does not of and by itself amount to a waiver of privilege;

(d) the relief sought against the Araya action plaintiffs is adjourned pending their application to amend the reply in that action; and

(e) the particulars of Ms. Chyrum's retainer agreement is to be disclosed.

[3] The plaintiffs appealed. In reasons indexed at 2019 BCCA 205, the Court of Appeal dismissed the appeal. Pursuant to the Waiver Order, the plaintiffs produced First Meeting notes as defined in the Waiver Order.

[4] In the examinations for discovery at issue, questions were posed concerning matters which were recorded in counsel notes of a First Meeting. The witnesses gave evidence inconsistent with what is recorded in the notes, or otherwise suggested that the notes were in error. Requests were left that the witnesses inform themselves, by making inquiries of other persons who were present at the applicable meeting, including Ms. Chyrum or legal counsel for the plaintiffs, of their recollection of that meeting and whether the statement attributed to the plaintiffs was in fact made.

[5] In each case, the plaintiff objected on the basis that the request seeks information that is subject to one of, or both, solicitor-client and litigation privilege. The plaintiffs take the position that the notes were ordered to be produced for the sole purpose of providing information relevant to the claim of postponement of the limitation period advanced. Further, the request seeks information that is not relevant to the issue of postponement.

[6] Nevsun's position is that an objection based upon privilege cannot be sustained by virtue of the Waiver Order. Counsel submits that the waiver of privilege over the First Meeting is total and complete and no residual privilege exists which can be asserted. Nevsun submits that the plaintiffs must inform themselves from counsel so that Nevsun can know whether the statements attributed to the plaintiffs in the First Meeting notes were in fact made.

[7] Further, Nevsun submits that while there are reasonable limits on the obligation to inform oneself, requesting a witness to inform himself as to what his lawyer said, did or saw is not objectionable per se provided privilege is not engaged, citing *Saunders v. Nelson* (1994), 35 C.P.C. (3d) 168 at paras. 26-27 (S.C.); *Whistler Mountain Ski Corp. v. Harbers* (1997), 46 B.C.L.R. (3d) 307 at para. 39 (S.C.).

- [8] Finally, citing *Can. Free Speech League v. CBC* (1989), 40 B.C.L.R. (2d) 138 at 143 (S.C.), citing *Phoenix v. Metcalfe*, [1974] 5 W.W.R. 661 (B.C.C.A.), counsel submits that the fact the witness is requested to seek information from a lawyer who is acting as counsel in the action is not a basis upon which otherwise proper requests can be refused. In this regard, Nevsun confirms it will not take the position that counsel must withdraw or recuse themselves if their evidence becomes necessary to the resolution of the proceedings.
- [9] The plaintiffs submit that the Waiver Order is limited to communications and documents pertaining to identified matters. The requests seek counsel's recollections concerning what was communicated to them at the First Meeting. In the plaintiffs' submission, counsel's memory of the First Meeting is not subject to the Waiver Order and is a matter of solicitor-client privilege. The notes of the First Meeting were ordered to be produced for the sole purpose of providing information relevant to the claim of postponement of the limitation period. The information sought is not relevant to this issue.
- [10] The plaintiffs submit further that they should not be required to respond because:
- a) The probative value of the information sought is negligible while the potential prejudicial effect is significant, citing *Fraser v. Houston* (1997), 36 B.C.L.R. (3d) 118 at para. 22 (S.C.). Counsel points out that the interviews took place through translators. They took place years ago and counsel have conducted dozens of such interviews over the years all of which have a high degree of overlap. Counsel is unlikely to have accurate recall of the details of individual interviews. Thus, the probative value is minimal while the situation is highly prejudicial given the potential for counsel to be put in conflict with their clients;
 - b) The plaintiffs' right to protect confidential or sensitive information outweighs Nevsun's right to full discovery on topics of marginal probative value, citing *Fraser* at para. 22; *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.* (1992), 70 B.C.L.R. (2d) 180 at para. 16 (S.C.), *M.(A.) v. Ryan* (1994), 98 B.C.L.R. (2d) 1 at para. 45 (C.A.), *aff'd* [1997] 1 S.C.R. 157 at paras. 36-38; *Merth v. Merth* (1993), 18 C.P.C. (3d) 361 at paras. 12-13 (S.C.).
 - c) Canadian courts have forcefully warned against the proposition of compelling counsel as a witness against counsel's own client, citing *R. v. 1504413 Ontario Limited*, 2008 ONCA 253 at para. 13, *Geo. Forrest Int. Afrique S.P.R.L. v. Forsys Metals Corp.*, 2010 ONSC 5670 at para. 27; *Williams and Williams v. Stephenson et al.*, 2005 BCSC 450 at para. 56. Counsel submits that in the present case the issue is one of peripheral importance to the claim and there is an alternative source of the evidence; namely, the plaintiffs themselves.

[11] Rules 7-2 (18)(a) and (22) provide:

Scope of examination

- (18) Unless the court otherwise orders, a person being examined for discovery
- (a) must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action, and

Person must inform self

(22) In order to comply with subrule (18) or (19), a person being examined for discovery may be required to inform himself or herself and the examination may be adjourned for that purpose.

[12] Rule 7-2(18) clearly provides the court with a discretion to "otherwise order". In *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education)*, 2013 BCSC 1739, Wilcock J., as he then was, noted that the rule is subject to reasonable limits, stating at para. 51:

The rule confirms the obligation of a representative of a party to inform himself or herself with respect to material issues. The Court of Appeal has held that the words "means of knowledge" must have some limit and must be based on reasonableness. In *Cominco Ltd. v. Westinghouse Canada Ltd.* (1979), 11 B.C.L.R. 142 (C.A.) and in *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.* (1988), 29 B.C.L.R. (2d) 109 (S.C.), our courts have held that what is reasonable will depend on the case, the importance of the information to the case, the expense and difficulty entailed in obtaining the answers, and other circumstances.

[13] I note that the general rule is that questions on examination for discovery which only go to credibility are not permitted: *Shickele et al v. Rousseau* (1965), 53 W.W.R. 567 at 570 (S.C.). A question that goes to credibility is permitted when it is related to a matter at issue in the action: *Bank of British Columbia v. Pickering et al.* (1984), 53 B.C.L.R. 318 at 322 (S.C.). In my view, the questions to the plaintiffs about what they said at the First Meeting fall into the permissible category in *Pickering*. However, the requests of the plaintiffs to inform themselves from other participants at the applicable First Meeting, including their counsel of their recollections of what the plaintiffs said at that First Meeting, for the stated purpose of establishing that the plaintiffs made an earlier inconsistent statement, are in my view questions that go solely to credibility.

[14] This is not the routine circumstance of a witness who has no knowledge of a material fact being asked to inform himself from a third party as in *Saunders*. Here the witness has recollection, which he has provided. The purpose of the information request is not to obtain information about some material fact but to establish that the witness made a previous inconsistent statement.

[15] In any event, I agree with the submissions of the plaintiffs that the probative value of such evidence is very low and the potential for prejudice is very high. Requiring counsel to respond would be disruptive to the relationship with their client. Notwithstanding the Waiver Order, these requests do not in my view fall into the narrow class of circumstances in which counsel should be compelled to respond.

[16] I have concluded that this is an appropriate circumstance to exercise the court's discretion and direct that the witnesses need not answer.

Requests to identify witnesses: Yohannes Request 4, 5 and 6

[17] These are requests for the full name of witnesses which Nevsun submits are material witnesses. Nevsun submits that it is entitled to responses, as these are material witnesses.

[18] In submissions, plaintiffs' counsel did not dispute that these were material witnesses but stressed that their location in Eritrea and Sudan placed them at risk of harm from agents of the Eritrean state should their identity and connection to the litigation become a matter of public record.

[19] Rule 7-2 (18)(b) provides:

Scope of examination

(18) Unless the court otherwise orders, a person being examined for discovery

(b) is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action.

[20] *Sienema v. British Columbia Insurance Company*, 2001 BCCA 440 at paras. 10-14, a case decided under the previous version of the Rules, is authority for the proposition that there is discretion to decline to make an order for the names and addresses of persons to be provided.

[21] In the present case there is an order dated December 14, 2018, which provides for the designation and treatment of confidential documents (the "Confidential Documents Order"). The plaintiffs have designated certain documents as "Confidential Documents" pursuant to the Confidential Documents Order based on a perceived risk of harm by agents of the Eritrean state to friends and family members who reside in Eritrea and Sudan.

[22] In reasons indexed as 2019 BCSC 1932, the plaintiffs' designation of asylum and refugee applications as Confidential Documents pursuant to the Confidential Documents Order were held to be appropriate, in part on the basis of findings that, at para. 35:

a) The record, including the affidavits filed in this applications and the United Nations' Human Rights Council Detailed findings of the commission of inquiry on human rights in Eritrea (A/HRC/32/CPR.1) dated June 8, 2016, establishes that there is an evidentiary foundation for a pattern of human rights violations and reprisals against friends and family by the agents of the state of [Eritrea].

b) There is an evidentiary foundation for a risk of harm to persons who remain in the state of [Eritrea] and in the Sudan.

[23] In my view Request 4, 5 and 6 were appropriate. There is an approach to address concerns with respect to the safety of the persons resident in Sudan and Eritrea through the use of the provisions of the Confidential Documents Order that is open to the plaintiffs. This is not an appropriate circumstance to decline to direct that the response be provided.

[24] The plaintiffs can avail themselves of the provisions of the Confidential Documents order with respect to safety and security concerns.

Requests concerning what plaintiff says he ought to have been paid: Woldemariam Request 11

[25] This request was to provide particulars of the amount which Mr. Woldemariam says he ought to have been paid while working at the Bisha mine. The plaintiff objected on the basis that the request was an impermissible request for particulars and to the extent the request was intended to be a demand that the plaintiff inform himself, the request is objectionable because the amount the plaintiff will argue he is entitled to is not a question of fact that he can inform himself of.

[26] Nevsun submits that it has clarified in recent communications between counsel it is not seeking particulars in the pleadings sense through this request. It is seeking information with respect to his wage loss claim which is an appropriate inquiry at discovery, citing *Yewdale v. Insurance Corp. of British Columbia*, [1994] B.C.J. No. 1892 at para. 68 (S.C.); *Mansoor v. Majeed*, 2008 BCSC 1347 at paras. 9, 29-30.

[27] The plaintiff submits that the claim is that, as a conscript, he was not paid a fair wage. A response to the question would require an expression of opinion, which is outside the appropriate scope for discovery of this plaintiff. However, during the course of submissions, counsel stated that he had recently communicated to Nevsun the benchmark fair wage that is being asserted by this plaintiff.

[28] This would appear to deal with the request; however, if there is a remaining concern Nevsun has liberty to renew this application.

Requests regarding communication with Ms. Chyrum: Yohannes Request 10; Alemayo Request 8 and 9

[29] These three requests are set out in letters exhibited to the first affidavit of Rhea Alcantara, sworn October 16, 2019 ("Ms. Alcantara's Affidavit"), and requested production of:

- a) correspondence and documents relating to the organizing of the meeting in Sweden in May of 2016 between Ms. Chyrum, counsel, and Mr. Yohannes ("Yohannes Request 10"): Exhibit V to Ms. Alcantara's Affidavit at 87;
- b) whatever communications Mr. Alemayo has had with Ms. Chyrum from 2012 to the present which in any way relate to the allegations made in the litigation ("Alemayo Request 8"): Exhibit O to Ms. Alcantara's Affidavit at 56; and
- c) any notes from any interview or discussions Ms. Chyrum had with Mr. Alemayo ("Alemayo Request 9"): Exhibit O to Ms. Alcantara's Affidavit at 56.

[30] With respect to Yohannes Request 10, the plaintiff responded, as set out in Exhibit E to the 29th affidavit of Kimberly Oleson, affirmed October 30, 2019, at 30-31:

There are no records of written communications between Ms. Chyrum and Mr. Yohannes scheduling the meeting.

The plaintiff objects to production of other documents in relation to the request. Document requests of this nature should be made in writing pursuant to the rules. The scope of the request is unclear because Nevsun has not specified the categories of documents which it believes are relevant. The relevance of the documents that were discussed is also unclear because Nevsun does not appear to have fully articulated its position.

Documents generated by plaintiffs' counsel regarding availability of counsel to travel to meet Mr. Yohannes are not relevant to a postponement claim because Mr. Yohannes had no authority to instruct counsel until a retainer was agreed to.

[31] With respect to Alemayo Request 8 and 9, the plaintiff initially responded that non-privileged communications and documents related to the issues in this lawsuit have been and will be listed: Exhibit P to Ms. Alcantara's Affidavit at 61; plaintiffs' application response at para. 2.

[32] The plaintiff further respond to Alemayo Request 8 and 9 in the plaintiffs' application response at paras. 5-6:

With regard to request 8, all communications listed to date as solicitor-client privileged took place after the date at which Mr. Alemayo first met with Canadian counsel and are unaffected by the court's ruling on waiver. One document previously listed as privileged is currently being evaluated again for privilege and relevance, and if it is determined to be producible it will be produced.

With regard to request 9, non-privileged documents in Ms. Chyrum's possession that are related to the issues in the actions have been produced. To date, Ms. Chyrum has not located any notes regarding Mr. Alemayo.

[33] Nevsun submits that the responses are not sufficient because they are vague and cryptic, citing *Ellingsen v. Desjardins Securite Financiere Compagnie D'Assurance Vie*, 2017 BCSC 1208.

[34] In *Ellingsen*, the request was to confirm that a short term disability file had been disclosed. The defendants responded that all relevant documents in the defendant's possession had been produced. Master Wilson concluded that the response was not sufficient noting:

- [16] In his submissions, defence counsel said that the short-term disability benefits are completely separate from the defendant's policy, are administered by a different party and if the plaintiff wants those documents, she should apply for an order that D.A. Townley produce them. He says that the defendant does not have the short-term disability file and that there is no reason to expect that it would have it.
- [17] There are two problems with the defendant's position. First, there is no evidence to support counsel's submissions. Second, the written answer provided is not responsive to the plaintiff's question.
- [18] The answer provided by the defendant is cryptic - it neither confirms nor denies that the defendant has the file or ever had the file; the defendant may or may not have disclosed the file; the defendant may or may not have redacted the file.
- [19] If the defendant says that it does not have and has never had the D.A. Townley short-term disability file, which was the evidence of counsel, it would have been an easy matter for the defendant to say so.
- [20] The defendant is ordered to answer the question within 10 days.
- [35] With respect to Yohannes Request 10, the plaintiff merged a response and an objection and responded to a request for "correspondence and documents" with a response addressing "written communications". Given these issues, it is not clear to me if the answer to the question in relation to Ms. Chyrum and Mr. Yohannes is that there is no correspondence regarding the meeting, or there are no documents relating to the organizing of that meeting between Ms. Chyrum and Mr. Yohannes, or perhaps both.
- [36] In my view, the request is clear and appropriate and Nevsun is entitled to a clear response. I direct the plaintiff to clarify.
- [37] With respect to communications involving counsel in relation to organizing the meeting, the plaintiff contends that such communication is beyond the scope of the Waiver Order, excerpted above at para. 2.
- [38] In my view, the documents sought in the request fall within the scope of the Waiver Order, which includes all documents prepared in contemplation of the First Meeting. The plaintiffs are directed to respond to the request and to produce any of the requested documents that have not already been produced. This addresses Alemayo Request 8 and 9.

"Ross J."

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