
CANADA / JUDGMENT

CNR v. Imperial Oil Ltd.

2007 BCSC 1193

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1193 CNR v. Imperial Oil Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

CNR v. Imperial Oil Ltd.,

2007 BCSC 1193

Date: 20070807

Docket: S035482

Registry: Vancouver

Between:

Canadian National Railway Company

Plaintiff

And

Imperial Oil Limited

Defendant

Before: The Honourable Mr. Justice Ralph

Ruling on Plaintiff's Application to Amend

Counsel for Plaintiff

T.G. Keast, Q.C.,

N.J. Hopewell

Counsel for Defendant

B. Meckling

J.D. Horswill

Date and Place of Hearing:

June 19, 2007

Vancouver, B.C.

- [1] This ruling responds to an application by the plaintiff, Canadian National Railway ("CNR"), late in the trial on June 19, 2007, to amend its Amended Statement of Claim. Counsel have submitted written arguments in relation to the application. The action arises out of a lease of land by CNR to the defendant, Imperial Oil Limited ("IOL"). The first lease for part but not all of the property was entered into in 1914. A significant claim in the action is for damages to compensate CNR for the contamination of its property caused by hydrocarbons and metals.
- [2] Under the terms of the leases over a number of years, IOL had an obligation to keep the property in a clean condition. In para. 8 of the Statement of Claim filed October 14, 2003, CNR alleged that IOL had breached the terms of the lease by "failing to accept liability for the loss, damage and expense arising from its negligence in occupying and causing contamination of the Property". In paragraph (b) of its prayer for relief in the Statement of Claim CNR claimed "damages for breach of the terms of the Lease."
- [3] In its Statement of Defence, while denying that it had breached the lease, IOL stated that it was prepared to accept responsibility for the hydrocarbon contamination caused by it but denied any responsibility for the metals contamination on the land. It is the position of IOL that hydrocarbon contamination does not extend over the whole of the leased property.
- [4] In late December 2006 CNR delivered an expert report ("the Kay report") which estimated the remediation costs for the known area of contamination (also referred to as the "delineated area") to be approximately \$638,000. The Kay report stated that the known areas of arsenic exceedances had not been fully delineated on the site and that the cost of remediation of the whole site could be as high as \$3,100,000.
- [5] In February 2007, CNR sent to counsel for IOL a notice of motion and supporting affidavit seeking to amend its Statement of Claim. In support of the amendments sought, one of CNR's counsel swore an affidavit in which he stated in para. 5:

The plaintiff does not wish its rights and remedies to be restricted by the Defendant's failure to adequately delineate the contamination on the Property. The proposed amendments to the Statement of Claim are necessary to protect the Plaintiff in this regard.

- [6] The amendments were consented to by IOL. The amended statement of claim was filed on June 1, 2007. The amendments that are relevant to this application are:

11. To date IOL has conducted a limited geographic investigation of the contamination on the Property. There are areas of the Property which may be contaminated in addition to those identified by IOL.

Wherefore the Plaintiff claims as follows:

- (a) a declaration that the Defendant is required to rid the Property of contaminated materials such that the Property will not exceed regulatory standards for contamination by metals or hydrocarbons;
 - (b) debt in the amount of \$126,566.00 plus GST; [This amount was originally \$63,283.00 plus PST and GST]
 - (c) damages for breach of the terms of the Lease in an amount sufficient to allow the Plaintiff to rid the Property of contaminated materials, as those materials have been delineated by IOL at the time of trial, and without prejudice to the Plaintiff's right to take action against the Defendant pursuant to the provisions of the Environmental Management Act for further contamination which may be found on the Property in the future; (*italics added*).
- [7] CNR says that the intention of its amendment was to provide, as an alternative remedy to its claim for \$3,100,000 damages for breach of terms of the lease, a "hybrid" remedy which would result in an award of damages only for the cost of removal of the "delineated metals contamination" but would also give liberty to CNR to pursue a cost recovery action against IOL pursuant to s. 47 of the Environmental Management Act.
 - [8] In its opening statement at trial, counsel for CNR said that Mr. Kay would testify as to the cost of excavating the site and disposing of the impacted soils. He stated that the cost of remediating the property would approximate \$3,100,000.
 - [9] In opening the defendant's case counsel for IOL stated that IOL would oppose the granting of any additional damage award on account of undelineated areas which "might" contain metals in unknown quantities. Mr. Kay's "estimate" was described as "no more than a guess."
 - [10] The cross examination of Mr. Kay by counsel for IOL included questions about remediation costs, in particular about the costs related to the undelineated area. The questions related to the reliability of the assumptions made by Mr. Kay in estimating the cost, the absence of sampling and testing data for this area, and the fact that the site did not present particular problems which would inhibit the carrying out of such testing.
 - [11] At trial CNR's counsel presented a written closing argument. In its section on damages the argument asserted a claim for estimated remediation costs "that CN is entitled to damages for estimated remediation costs of \$3.1 million." It went on to present the "alternative" of awarding damages only for the removal of the delineated metals contamination in conjunction with "liberty on the part of CN" to pursue a cost recovery under the Environmental Management Act.

- [12] IOL's counsel also presented a written closing argument in which he opposed the claim for \$3.1 million on two grounds. The first ground was that the claim was contrary to CNR's pleadings. It was argued that "CN clearly sought damages for delineated areas only and cannot now depart from that claim." The second ground was that, regardless of the pleadings bar, "such an award is not supported by the evidence nor cogent theory."
- [13] In his Reply at the close of the defendant's argument counsel for CNR applied to amend the Amended Statement of Claim to restore a claim for damages for breach of the terms of the lease which was included in the original Statement of Claim and which would be broad enough to bring within its scope the claim for \$3,100,000. Clause (c) of the prayer for relief in the Amended Statement of Claim would become an alternative to the claim for \$3,100,000.
- [14] The trial of the action occurred between June 11 and 19, 2007. Three witnesses gave evidence:
- (a) for CNR:
 - (i) Mr. Philip de Leeuw of IOL;
 - (ii) Mr. James Kay (expert);
 - (b) for IOL:
 - (i) Dr. Peter Martus (expert).
- [15] Numerous documents including the expert reports of Mr. Kay and Dr. Martus comprised the balance of the evidence
- [16] In their respective reports both Mr. Kay and Dr. Martus dealt with an analysis which contemplated possible contamination of the property beyond that already delineated. Included in the report of Dr. Martus were responses to two questions relating to remediation costs for the whole site. Dr. Martus did not consider Mr. Kay's remediation estimate of \$3,800,000 for the entire site to be reasonable and set out his reasons for that opinion.
- [17] In *Teal Cedar Products (1977) Ltd. v Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.) the court stated that discretion to permit amendments is unfettered, subject to the general rule that the discretion is exercised judicially.
- [18] In *Diamond Willow Ranch Ltd. v. Oliver (Village)*, [1988] B.C.J. No. 880 (BCSC) the court considered an application to amend made at the conclusion of the evidence of the trial and before argument. In paragraphs 5 and 6 it adopted the following principles as "a good guide in considering applications to amend brought at the conclusion or late in a trial." A proposed amendment must:
- (a) not be inconsistent with the pleadings already filed on behalf of the party seeking the amendment,
 - (b) not be inconsistent with the evidence tendered by that party at trial and on discovery;

- (c) not have changed the whole course of the trial, had it been requested at the outset of the trial;
- (d) not be unfair to the opposite party; and
- (e) be necessary for the purpose of determining the real issues raised or depending upon the proceedings.

[19] The proposed amendment is consistent with the current pleadings in the sense that it is still a claim for damages for the remediation of the property, but it is a substantially increased measure of damages. Joined with paragraph 11 of the Amended Statement of Claim, which stated as a material fact that there were areas of the property which may be contaminated beyond those identified by IOL, IOL would be aware that CNR was making a claim beyond the amount allocated to the materials delineated by IOL.

[20] The claim for \$3.1 million is not inconsistent with the report of Mr. Kay and his evidence at trial and, had the amendment been sought at the outset of the trial, it would not have changed the whole course of the trial. It is possible, however, that it would have caused IOL to cross examine Mr. Kay in more detail about his estimate and to have explored in greater detail with Dr. Martus his opinion of this aspect of Mr. Kay's report.

[21] I do not think that allowing the amendment would be unfair to IOL. It is information which they were aware of, it had been referred to in the plaintiff's opening statement, and it was indirectly recognized in IOL's opening statement when it stated that IOL would oppose the granting of any additional damage award on account of the undelineated area.

[22] A claim for damages arising out of the alleged contamination in the undelineated area is clearly a real issue in this proceeding. It is unlike the circumstances in *McNeill v. British Columbia Packers Limited*, 2001 BCCA 53 where the court found at para.9:

The trial judge found with ample justification that the plaintiff was attempting to put forward a new case which would essentially involve starting over again.

[23] I therefore conclude that the plaintiff's motion to amend the Amended Statement of Claim as proposed be granted.

[24] It is possible that this ruling may lead to an application by IOL to reopen its case and call further evidence or make further submissions, although I am not suggesting that either is required. If such an application is made and granted, further trial time would be required. It is important that if such an order is to be sought that the matter be raised as quickly as possible with the court registry. If there is to be further trial time, it must take place not later than September 14, 2007. I would request that counsel confer and advise the registry of their intentions. If it is necessary for counsel to speak to the matter, I will make myself available to hear it.

Bryan F. Ralph J.

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