

CANADA / JUDGMENT

Long Lake Hydro Limited v. Western Versatile Construction Corp.

2019 BCSC 1760

COURT

Supreme Court of British Columbia

DECIDED

15 October 2019

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2019 BCSC 1760 Long Lake Hydro Limited v. Western Versatile Construction Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Long Lake Hydro Limited v. Western Versatile Construction Corp.,

2019 BCSC 1760

Date: 20191015

Docket: S1510333

Registry: Vancouver

Between:

Long Lake Hydro Limited Partnership, Long Lake Hydro GP Inc.,

in its capacity as General Partner of Long Lake Hydro Limited

Partnership, Premier Power Corp., Long Lake Hydro Inc.,

and Regional Power Inc.

Plaintiffs

And

Western Versatile Construction Corp., Teacon Inc. and EBC Inc.,

doing business as Wen (Long Lake) Constructors Partnership,

Valard Construction LP, Valard Construction 2008 Ltd.,

Stantec Consulting Ltd., Chris Stethem & Associates Ltd.,

Chris Stethem, Canadian Projects Limited and

Tetra Tech EBA Inc.

Defendants

And

Stantec Consulting Ltd., Chris Stethem & Associates Ltd.,

Christopher Stethem, Canadian Projects Limited, Tetra Tech EBA

Inc. (formerly EBA Engineering Consultants Ltd.) Chang Sun Eun (aka

Chris Eun), Vistech Ltd., Ian Hayward International Ltd., Westpark

Electrical Ltd., Nova Pole International Inc., Geopacific Consultants Ltd.,

Dynamic Avalanche Consulting Ltd., Alan Jones, DBS Energy Services Inc.,

Dennis Schlender, Carl Orde, Utilitech Consulting Inc. Dashiell Corporation,

Preformed Line Products (Canada) Limited, Maclean Power LLC, Domino

Highvoltage Supply Inc. Con-Tech Systems Ltd., Burndy LLC and

Johann Slam dba Johann Slam & Associates

Third Parties

Before: Master Elwood

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiffs:

I. Schildt

Counsel for the Defendants, Stantec Consulting Ltd., Vistech Ltd. and Chang Sun Eun:

R. Cleary

Counsel for the Defendants, Valard Construction LP:

T. Topliss

Place and Date of Hearing:

Vancouver, B.C.

July 16, 2019

Place and Date of Judgment:

Vancouver, B.C.

October 15, 2019

I. INTRODUCTION

- [1] This is an application by three of the defendants in a complex, multi-party commercial case for an order that the Practice Direction on Electronic Evidence apply to the proceedings. Some of the parties consent to the order sought on the condition there are no costs awarded against them. Others take no position. The plaintiffs and a defendant and third party oppose the application.
- [2] The Practice Direction on Electronic Evidence provides guidance to litigants on the use of technology for the preparation, management and presentation in court of electronic evidence. It seeks to address problems that can arise with the exchange of electronic data between parties, with standardized terms, a default standard for lists of documents and guidelines for the use of electronic documents in the litigation process. The practice direction also provides access to the court to resolve disputes over these matters.
- [3] The applicants submit that issues have arisen in this case with the manner in which electronic documents have been listed and produced by some parties. They say those issues can be mitigated by applying the practice direction and requiring some of the parties to re-issue their initial lists of documents in compliance with a protocol based on the default standard.
- [4] The parties opposing this application say it is too late in the proceeding for the practice directive to be applied. They argue that the work and expense required to comply with the proposed protocol is not proportionate with the practical benefits that would be gained.
- [5] For the reasons which follow, I have concluded that the proceeding should be conducted from this date forward in accordance with the practice direction, but the parties should not be required to re-issue their existing lists of documents.

II. BACKGROUND

A. Procedural History

- [6] This case arises out of the design and construction of an overhead transmission line as part of a hydro-electric project near Stewart, British Columbia. The action was initiated with a notice of civil claim on December 14, 2015. It now includes five plaintiffs, nine defendants and 18 third parties.
- [7] The plaintiffs allege that, as a result of negligence by the defendants, the overhead transmission line suffered from trips, de-energization and damage during the time period 2013 to 2014. The plaintiffs' estimated cost to rebuild the transmission line at the time was approximately \$44.6 million.

- [8] In a counterclaim, the defendant and third party Valard Construction LP ("Valard") claims approximately \$8 million for the cost of repairing and remediating damage to the transmission line.
- [9] Document production in this case has been extensive. On October 22, 2018, Stantec Consulting Ltd. ("Stantec"), one of the original defendants and an applicant on this application, asked the plaintiff for production of documents in "Summation format" or as pdf files. Summation is a widely used litigation support program. Portable Document Format (pdf) is a common format for saving, viewing and printing electronically scanned documents. Stantec did not otherwise address the format of the plaintiffs' document production at this time.
- [10] The plaintiffs delivered a list of documents on December 21, 2018. Valard delivered a list of documents on January 9, 2019, and Stantec delivered its list of documents on January 10, 2019. The parties produced the copies of their documents in electronic format, either as Summation compatible load files or as pdf documents.
- [11] On January 18, 2019, Stantec proposed a document exchange protocol. The protocol included an agreement on file format and a standard set of fields for the lists of the documents. The protocol would have required that all lists that had been provided to date that did not meet its terms be revised and re-issued. Plaintiffs' counsel agreed to continue exchanging documents in Summation compatible load files or as pdf documents, but otherwise did not respond to the proposed protocol.
- [12] The parties attended a case planning conference on March 7, 2019. Stantec attached a copy of the proposed document exchange protocol to its case plan proposal. Counsel discussed the proposed protocol among themselves prior to the hearing. Plaintiffs' counsel stated that he did not agree to the protocol. The parties did not pursue the matter further with the master presiding at the CPC.
- [13] The case plan order made following the CPC included a direction that the parties were to complete their document production by May 31, 2019.
- [14] Most, if not all, of the parties have now delivered their initial lists of documents. Approximately 85,000 documents have been listed to date, consisting of more than 242,000 pages. All of these documents have been produced electronically.

B. Electronic Document Production

- [15] When documents are produced electronically, they must be "coded" in a database. Each document is linked to a set of fields with information such as a document number, document type, date, author and recipient. The database may then be used to create lists of documents and load files that are exchanged and then sorted, searched and reviewed by the parties using litigation support software.

- [16] The time and cost to code documents manually varies. The applicants have provided evidence that the standard cost is between \$0.85 and \$1.25 per document.
- [17] Depending on the format in which they are saved, electronic documents may have "metadata", which is information stored within or linked to an electronic file. Metadata can be used to code documents automatically, by populating database fields from the information stored electronically. Metadata is generally reliable for this purpose for e-mails; but it can be inaccurate for other document types. For example, the metadata associated with a Word file will tend to indicate the date on which the document was last edited and the username on the computer on which the file was edited, which are not reliable indicators of the date or author of the document itself. Even if metadata is available, therefore, some document types must be coded manually in order to create a fully reliable and useful database.
- [18] Electronic documents may also be capable of optical character recognition ("OCR"). This means that the text of the document may be searched with litigation support software to obtain information such as the document type, date, author and recipient. However, not all documents are searchable. For example, poor quality copies, faded documents, handwritten documents, photographs and charts are not searchable. Even if OCR is available, therefore, some document types must be reviewed manually for basic identification purposes.

C. Applicants' Concerns with the Lists of Documents

- [19] The applicants have raised the following concerns with the plaintiffs' list of documents in this case:
- a) It appears that the plaintiffs relied exclusively on metadata for all of the document dates. As a result, the dates are inaccurate for some documents, while for others, there is no date at all;
 - b) Other than for e-mails, the list does not identify the author or recipient of the document, meaning that, for approximately 31,000 documents, these fields are missing;
 - c) The list does not include a descriptive document type field; instead, the plaintiffs have provided the file extension associated with each document (e.g. msg, pdf, doc). The file extension provides limited information about the document itself; for example, a pdf could be a contract, drawing, invoice report, letter, etc. The plaintiffs' list includes approximately 20,000 pdfs and 1,400 doc/dox;
 - d) It appears that the plaintiffs also relied on metadata for the document title field. As a result, the list may not provide a meaningful or accurate description of the document. For example, a document with the filename "April 11 all.pdf" appears to be a drawing dated March 7, 2011;
 - e) The plaintiffs' list of documents does not include a field for the date on which the document was produced in the litigation.

[20] The applicants have raised the following concerns with the lists of documents of the defendant and third party, Valard, and the third party, Dashiell Corporation ("Dashiell"):

- a) 10,641 of Valard's documents and 1,416 of Dashiell's documents are coded with a 00/00/000 document date. Many of these documents have dates that are obvious when they are opened and reviewed;
- b) Other than for e-mails, the author and recipient fields are inaccurate or missing;
- c) The documents have been produced in their native electronic format, rather than in Tagged Image File Format (TIFF), which is a standard format for electronic document discovery.

[21] The applicants say that the cost to them to re-code the plaintiffs' list of documents to make it reliable and fully usable will be between \$26,000 and \$38,000, and the cost to re-code the Valard and Dashiell lists will be \$9,000 to \$13,301, and \$1,160 to \$1,7515, respectively.

D. Practice Direction on Electronic Document Production

[22] The Practice Direction on Electronic Evidence was issued by Chief Justice Brenner on July 1, 2006. It establishes a default standard or framework for document exchange in electronic format. This default standard represents the lowest common denominator for electronic databases, which means that litigants are not required to use sophisticated litigation support software in order to exchange electronic documents using this standard.

[23] The default standard is set out in part 4 of the practice direction. It prescribes standard document formats, database fields, data types and field lengths.

[24] The practice direction provides that parties are free to depart from the default standard if they can agree, so long as their production meets the minimum criteria of the default standard. In the absence of an agreement, the practice direction provides that the default standard governs.

[25] As to when and how it applies, the practice direction provides as follows:

2.2. This Practice Direction applies to any civil proceeding:

2.2.1. where the parties agree it will apply, in whole or in part and sign a Protocol; or

2.2.2. where the Court orders that it apply at a pre-trial conference held pursuant to Rule 35.

2.3. Parties are encouraged to adopt this Practice Direction in a proceeding where one or more of the following apply:

2.3.1. a substantial portion of the Potentially Discoverable Documents consist of Electronic Material;

2.3.2. the total number of Potentially Discoverable Documents exceeds 1,000 Documents; or

2.3.3. there are more than three parties to the proceeding.

...

2.5. A party of record to a proceeding may apply

2.5.1. within 21 days after the close of pleadings; or

2.5.2. at any other time with leave of the Court

for an order that the proceeding be conducted in accordance with some or all of the provisions of this Practice Direction.

[26] The practice direction further provides that:

2.9. In a proceeding to which this Practice Direction applies, the Court may, on application by a party:

...

1.9.3. resolve disputes between the parties as to matters the subject of this Practice Direction, and give directions accordingly;

...

2.9.6. make any other order that it considers appropriate.

E. The Positions of the Parties

[27] The applicants seek an order that the practice direction applies in this proceeding and that the parties comply with a document exchange protocol based on the default standard. The applicants submit that requiring all parties to comply with this protocol with respect to further lists of documents and, where necessary, to re-code any inaccurate or missing fields in existing lists of documents, will be beneficial to all involved and consistent with the objective of proportionality.

[28] The plaintiffs, who oppose the application, argue that the practice directive does not apply in this proceeding. The plaintiffs rely on s. 2.2, which states that the practice direction applies if all parties agree or the court orders that it applies at a trial management conference. All parties do not agree in this case, and the applicants did not seek an order that the practice directive applies at the CPC in March. Accordingly, the plaintiffs say, as of the date of this application, the practice direction does not apply.

[29] Further, the plaintiffs argue, it is too late in the proceeding to apply the practice directive. They submit that any application that the proceedings be conducted in accordance with the practice direction should be made early in the proceedings. In this case, a document exchange protocol was first raised by the applicants after the plaintiffs had produced their initial list of documents, and all of the parties are now past the deadline for production of documents. At this stage of the proceeding, the plaintiffs estimate, it will cost them approximately \$38,878 and require two to three weeks of work by three or four coders, to bring their existing production into compliance with the proposed protocol.

- [30] Finally, the plaintiffs submit that the deficiencies in their list of documents are not as substantial as the applicants assert. While they acknowledge errors in their current list, the plaintiffs say the problems are not wide-spread. Those errors are easily corrected they say when the documents are opened and reviewed. No other party except the applicants has said they cannot work with the plaintiffs' existing list. Moreover, the plaintiffs submit that similar errors are present in other lists of documents, including the applicants' own list. The applicants are not asking for an order that all of the parties re-code their documents. Accordingly, the plaintiffs argue, the order sought will not resolve the perceived problems.
- [31] Valard argues that the applicants' delay is fatal to their application. The practice direction, in part 6, requires parties to consider potential issues with electronic document production at an early stage of the proceeding. Valard also argues that the order sought by the applicants will have no practical benefit. Where metadata was available, Valard says it has already effectively complied with the proposed protocol. Where metadata is not available, Valard says, it would still be necessary to manually review each document to confirm the date and other information, regardless of whether the practice direction applies.

III. ANALYSIS

- [32] I agree with the plaintiffs and Valard that the practice direction encourages litigants to consider and discuss the issues that may arise with electronic document production as early in the litigation process as possible, so as to avoid, as much as possible, duplication of effort and the resulting expenditure of time and resources.
- [33] However, I do not agree that there is any particular stage of a proceeding at which it is too late to apply the practice direction; nor do I agree that the applicants' alleged delay prevents them from bringing an application for an order that it applies in this case.
- [34] While the practice direction contemplates a protocol between parties that applies at every stage of document production, its benefits are not entirely lost if it is applied after the initial exchange of documents has been completed. In a case like this, there will undoubtedly be document requests and further amended lists of documents. The document requests the parties will make will be more specific to the issues in the case. The documents that the parties actually rely on will be identified and culled from the current production and future production. Ultimately, the parties will be well-advised to enter into a comprehensive document agreement and prepare an index and common book of documents. They may decide on conducting an electronic trial.
- [35] At each stage of this process, the practice direction can provide guidance, common standards and dispute resolution by the court, should the parties disagree further on matters that are the subject of the practice direction.
- [36] I find it difficult to fault the applicants for not bringing this application sooner. The issues that cause the applicants concern would not have been evident until they reviewed the production by the plaintiffs and Valard. The applicants proposed a document exchange

protocol shortly after they received the plaintiffs' documents. That proposal seems to have gone largely ignored by the plaintiffs and Valard. The applicants again proposed the document exchange protocol as part of their case plan proposal. Counsel for the plaintiffs made it clear prior to the CPC hearing that he did not agree. This application required affidavit evidence and almost two hours of argument in chambers. It is unrealistic and unfair, in my view, to assert that the applicants ought to have made this application at the CPC in March.

- [37] Section 2.5 of the practice direction expressly authorizes an application such as this outside the confines of a CPC. Section 2.5 states that a party may apply within 21 days after the close of pleadings, or at any other time with leave of the court. While this provision biases an early application, it also allows later applications in the discretion of the court. Read together with s. 2.2, it allows such applications as late as a TMC.
- [38] In *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2011 BCSC 1128, the plaintiffs in a class action applied, following the defendants' initial production of documents, for an order compelling the defendants to produce a further and better list of documents in searchable electronic format and in conformity with the practice direction. The defendants acknowledged errors in the data they had produced, but said this was understandable and a minor issue given the size of the production, and that they would rectify the errors and work with the plaintiff in solving other problems identified.
- [39] Mr. Justice Masuhara decided that requiring the defendants to incur the cost of the work requested by the plaintiff was not warranted given: legal uncertainty in the plaintiff's case as a result of recent appellate decisions, evidence of the defendants that several of the plaintiff's complaints could be resolved using tools in Summation, and indication that the defendants had offered solutions and agreed to work with the plaintiff to resolve problems with the electronic production. If problems arose or difficulties persisted, Mr. Justice Masuhara held, then further directions or orders of the court could be sought at that time.
- [40] Mr. Justice Masuhara's decision in *Pro-Sys* - the only published decision of which I am aware to consider the practice direction - supports an application such as this being made following initial document production and unsuccessful efforts by the parties to resolve issues with the production.
- [41] In my view, the applicants should be granted leave to apply for an order that the proceeding be conducted in accordance with the practice direction. This case clearly meets the criteria for adoption of the practice direction:
- a substantial portion of the documents in this case consist of electronic material within the definition in the practice direction;
 - the total number of discoverable documents exceeds 1,000;
 - there are more than three parties to the proceeding.

- [42] I do not agree with Valard that the practice direction will have no practical benefit. The practice direction was developed after extensive consultation with members of the legal profession and litigation support professionals. A document exchange protocol based on the default standard in the practice direction will benefit the parties and the court in this complex, multi-party case as it goes forward. Although, ideally, it would have been adopted by the parties at the outset, its practical benefits are not lost at this stage of the proceeding. The parties' reliance on metadata to create their lists of documents to date has caused issues. Even if the errors in the lists cannot be eliminated altogether, the issues can be mitigated going forward with the adoption of the proposed protocol.
- [43] Having said this, I agree with the plaintiffs and Valard that the practice direction should not be given retroactive effect so as to require the parties to re-code their existing lists of documents.
- [44] Section 2.5 of the practice direction authorizes the court to make an order "that the proceeding be conducted in accordance with some or all of the provisions of this Practice Direction". This is prospective language. It suggests to me that the effect of an order under s. 2.5 is that further steps in the litigation are to be conducted in accordance with the practice direction. I don't think s. 2.5 authorizes an order that a party re-code a list of documents.
- [45] The applicants rely on decisions which establish the minimum standards for a proper list of documents. Those standards were set out by Mr. Justice Goepel (then as a judge of this Court) in *Bronson v. Hewitt*, 2007 BCSC 1705, at paragraph 32, drawing from an Alberta decision:

Disclosure of documents must:

- be assessed from the perspective of the party requiring production rather than from the perspective of the party providing the documents;
- be meaningful, reliable, and complete;
- provide sufficient detail to enable the party requiring disclosure to understand generally what the documents contain, where they originated, when they originated, and the number of documents within the group;
- allow the party requiring disclosure to retrieve the documents;
- allow the party requiring disclosure to object to the tendering of any document into evidence at trial on the grounds that it had not been produced;
- be appropriate to the circumstances of the particular case;
- be more descriptive than mere numbering.

- [46] Documents must be listed in a way that will allow the opposing party to understand what the documents are and where and when they originated: *Anderson v. Anderson*, 2003 BCSC 3763, at para. 12. However, there is flexibility in terms of what is required of a list of documents in the circumstances of each case: *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada* (1992), 14 C.P.C. (3d) 74 (B.C.S.C.) at para. 23.
- [47] I agree with the plaintiffs that, while there are errors, the existing lists of documents do not fall beneath the minimum standards required by Rule 7-1(1). The evidence does not establish that errors such as missing or inaccurate dates are endemic or so pervasive that the lists are not meaningful, reliable or complete. The existing lists do not meet the default standards of the Practice Direction on Electronic Evidence; however, they are compliant with the minimum standards required by Rule 7-1(1).
- [48] Moreover, I accept the submission of the plaintiffs and Valard that the cost of re-coding the existing lists of documents is not proportionate with the practical benefits that would be gained. While a document exchange protocol would have mitigated many of the concerns raised by the applicants, the cost of re-coding the lists of documents is too high, in my view, to warrant an order at this stage of the proceeding requiring the parties who are opposed to do all of the work demanded by the plaintiffs.

IV. CONCLUSION

- [49] In my view, the right balance is struck in this case by an order that the proceeding be conducted from this date forward in accordance with the Practice Direction on Electronic Evidence and the protocol set out in the draft order prepared by counsel for the applicants, as amended prior to the hearing in consultation with other counsel.
- [50] The parties will not be required to re-code or re-issue their existing lists of documents.
- [51] If issues arise or difficulties persist, the parties may apply for appropriate orders or directions under s. 2.9 of the practice direction.
- [52] As the applicants were substantially successful on this application, they will have their costs of the application from the plaintiffs, Valard and Dashiell, in the cause.

"Master Elwood"

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