Court of King's Bench of Alberta

Citation: Suncor Energy Inc v Unified Alloys Ltd, 2024 ABKB 70

Date: 20240208
Docket: 1501 10363
Registry: Calgary

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Between:

Suncor Energy Inc. for itself and as General Partner of Suncor Energy Oil Sands Limited Partnership

Plaintiff

- and –

Unified Alloys Ltd. and Salzgitter Mannesmann Stainless Tubes USA, Inc.

Defendants

- and –

Salzgitter Mannesmann Stainless Tubes USA, Inc., Unified Alloys Ltd., Aecon Group Inc., Aecon Construction Management Inc., Aecon Construction Group Inc., Aecon Construction and Materials Limited, 1447088 Alberta Ltd., Commonwealth Construction Company Ltd. Technip Canada Limited and Technip USA, Inc. and Companies A-Z

Third Party Defendants

Reasons for Decision
of the
Honourable Justice J.C. Price

I. Introduction

[1] This is an appeal of Applications Judge Farrington's decision made on November 23, 2022 rejecting an application by Salzgitter Mannesmann Stainless Tubes USA, Inc. ("SMST") against Suncor Energy Inc. for itself and as General Partner of Suncor Energy Oil Sands Limited Partnership ("Suncor"). For the reasons that follow, I dismiss SMST's appeal.

II. Background

A. The Underlying Action

[2] The underlying claim in this case involves a bitumen upgrading facility north of Fort McMurray owned and operated by Suncor. Within the facility is Suncor's Millenium Naptha Hydrogen Steam Methane Reformer ("Reformer") which produces hydrogen that is required by the bitumen upgrading facility.

[3] In June of 2014, pipes within the Reformer, known as pigtails, ruptured. The ruptures caused an explosion and large fire. Suncor investigated this event and allege that the pigtails had been improperly manufactured and did not meet the contractual specification. Suncor brought the underlying action against SMST, manufacturer of the pigtails, and Unified Alloys Ltd ("UA") the distributor that sold the pigtails to Suncor.

[4] SMST has disputed both its liability to Suncor and the damages Suncor suffered. SMST has also issued third party claims against companies involved in the design and construction of the Reformer. One of the third parties is Technip USA, Inc. ("Technip"). In Technip's Third Party Defence, they dispute SMST's liability to Suncor and the Suncor damages claim.

B. The Questioning of Mr. Fong

[5] All the parties in the underlying action agreed to a Consent Scheduling Order in November 2019 that, among other things, provided for a process for the questioning of third parties. This process allowed for parties to name the employees and former employees of the third parties that they wished to question as well as a process for parties to object to those requests. Suncor followed this process to advise all parties on November 29, 2019, that it was seeking to question Ed Fong, lead designer for Technip. No party, including SMST, objected to this request.

[6] Counsel for SMST questioned Mr. Fong over a series of half days from February to June 2021. Suncor emailed all parties on March 16, 2021 to schedule their questioning of Mr. Fong. There were no objections. Suncor was in correspondence with counsel for Technip and counsel for SMST again on May 4, 2021 to schedule Suncor's questioning of Mr. Fong. There were no objections. During SMST's questioning of Mr. Fong on June 25, 2021 Suncor again reiterated that it would be questioning Mr. Fong. There were no objections.

[7] On December 22, 2021, SMST brought an application for disclosure against Suncor as well as an amendment to SMST's Statement of Defence to further particularise its position on design (the "Omnibus Application"). This interlocutory application by SMST includes portions of the discovery evidence of Mr. Fong as support.

[8] Suncor proceeded without objection to schedule its questioning of Mr. Fong for March 17 and April 25, 2022, with the consent of all parties.

[9] During the March 17, 2022, questioning of Mr. Fong by Suncor's counsel, counsel for SMST took the position that there was not an adversity of interest between Suncor and Technip and objected to the questions that were asked of Mr. Fong. Counsel for Technip did not object to the questioning and appears to have taken no position on SMST's application.

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C. Applications Judge Farrington's Decision

[10] SMST filed an application on April 20, 2022, which was heard by Applications Judge Farrington on November 23, 2022 in morning chambers. The Applications Judge dismissed the application with brief oral reasons. He stated as follows:

> This is an application to effectively strike out a transcript in relation to the examination of a witness of a third-party, a Mr. Fong.
>
> In my view, the application ought to be dismissed. The reason for that is I do think the pleadings are sufficient to, at least on its face, create an adversity of interest. It may be that not all evidence is favourable to the – or contentious and favourable to the party that issued the third-party notice, being Salzgitter, but Salzgitter chose to name this party as a third-party and the evidence is what it is. In my view, the pleadings sufficiently raise both issues of liability and damages.
>
> I also think that some differences arise from the fact that this is a questioning of a witness as opposed to a questioning of a corporate representative. And I also think that there is sufficient protection in place in relation to the truth-finding function of the litigation process generally arising from the fact that Salzgitter is very much – and was very much able to conduct its own questioning of Mr. Fong.
>
> So, in the circumstances, I am not prepared to strike the transcript, nor am I prepared to prohibit any further examination of Mr. Fong. That has to just be taken as it comes. I don't know if there are any other reasons as to why he should not be examined, but the reason argued here is not one of them. So the application is dismissed.

[11] SMST has appealed the decision of the Applications Judge under Rule 6.14.

III. Issues

[12] The issues before me are:

(a) Did the applications judge err in finding that there was adversity in interest between Suncor and Technip?

(b) If there is adversity of interest between Suncor and Technip, should there be a limit on the scope of questioning regarding the issue of design of the Reformer?

IV. Law and Analysis

A. Standard of Review

[13] The procedure for an appeal from an applications judge's decision is set out at Rule 6.14. Relevant portions of it for this appeal are as follows:

> 6.14(1) If an applications judge makes a judgment or order, the applicant or respondent to the application may appeal the judgment or order to a judge.

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> [...]
>
> (3) An appeal from an applications judge's judgment or order is an appeal on the record of proceedings before the applications judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

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[14] The standard of review on an appeal from an applications judge's decision where no new evidence has been adduced is whether the applications judge was correct based on the record that was before him: ***Steer v Chicago Title Insurance Company***, 2019 ABQB 318 at para 9; ***Wester Energy v Savanna Energy***, 2022 ABQB 259 at para 22.

B. Test for Adversity in Interest Between Parties

[15] Rule 5.17 sets the framework of who may be questioned. Relevant for the purposes of this appeal, Rule 5.17(1)(d) provides:

> 5.17(1) A party is entitled to ask the following persons questions under oath about relevant and material records and relevant and material information:
>
> (a) each of the other parties who is adverse in interest;
>
> (b) if the party adverse in interest is a corporation
>
> (i) one or more officers or former officers of the corporation who have or appear to have relevant and material information that was acquired because they are or were officers of the corporation, and
>
> (ii) the corporate representative;
>
> [...]
>
> (d) one or more other persons who are or were employees of the party adverse in interest who have or appear to have relevant and material information that was acquired because of the employment.

[16] There is no debate as to whether third parties are included within the definition of a "party" for the purposes of Rule 5.17: ***Collacutt (Next Friend of) v Briggs Bros Student Transportation Ltd***, 2009 ABCA 17 at para 9 [***Briggs Bros***]. To determine whether a party is adverse in interest requires the examination of the pleadings and the factual context of the case: ***Briggs Bros*** at para 9; ***CCS Corporation v Secure Energy Services Inc***, 2016 ABQB 94 at para 36 [***CCS***]. It is not necessary for there to be pleadings *inter se* between the parties for them to be adverse in interest: ***CCS*** at para 37.

[17] Chief Justice Wittmann, as he then was, sets out the considerations and precedent for this in ***CCS*** as follows:

[36] It is now well established that whether parties to litigation are adverse in interest is determined by reference not only to the pleadings, but also to the record as a whole.

[37] n this regard, if there is nothing before a court but the pleadings, the pleadings will usually suffice. But it is not necessary that there be pleadings inter se between parties in order that they be adverse in interest. The correct distinction is between an opposite party and a party adverse in interest. It is to be noted that ARC 5.17 does not reference an opposite party. It references a party adverse in interest.

[38] The classic definition is contained in ***Rose & Laflamme Ltd v Campbell, Wilson and Strathdee Ltd***, 1923 CanLII 92 (SK CA), [1923] 2 WWR 1067 (Sask CA) where Lamont JA said at page 1070:

> ... 'opposite party' does not mean the same thing as 'a party adverse in interest'. To my mind, 'a party adverse in interest' is not necessarily limited to a party with whom an issue is to be adjudicated upon by the Court in the action. There are cases ... where, although no issue is stated between defendants, their interests are as adverse as if they were upon opposite sides of the record. In my opinion, therefore, under our Rules a party to a cause or matter may be said to be adverse in interest to another party if he has a direct pecuniary or other substantial legal interest adverse to the legal interest of the other party, even although they may be upon the same side of the record and there is no issue on the record that the Court will be called upon to adjudicate between them.

[39] Similarly, in ***Aviaco***, the Plaintiff objected to Defendants examining each other because no cross-claims were filed between them. Nordheimer J. said at paragraph 6-7:

> 6. A classic statement of the meaning of the expression "adverse in interest" is contained in ***Menzies v. McLeod*** (1915), 1915 CanLII 419 (ON SC), 34 O.L.R. 572 in which Chancellor Boyd said, at p. 575:
>
> > An actual issue in tangible form spread upon the record is not essential, so long as there is manifest adverse interest in one defendant as against another defendant. 'Adverse interest' is a flexible term, meaning pecuniary interest, or any other substantial interest in the subject-matter of litigation.
>
> 7. It is apparent from the above quotation that the issue of adversity in interest is not to be determined from the state of the pleadings alone but upon the state of the record as a whole. Inherent in that observation, in my view, is that an adversity of interest may

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> arise at any point in the proceeding as the record and evidence develop. Of particular importance in this regard, is the practical reality that any of the witnesses to be examined for discovery may well give evidence that is inconsistent with their pleading. Therefore, while the defendants might not appear to be adverse in interest on the face of their pleadings, it does not follow that an adversity of interest will not become apparent as the discoveries take place. Further, in a case such as this one which is based primarily on an alleged conspiracy among the defendants, and on the existence and characterization of payments that may have flowed among some or all of the defendants, it seems to me there is every possibility that some element of adversity of interest may well appear among the defendants as the discovery process proceeds.

> [40] ***Aviaco*** was a case where Nordheimer J. was called upon to determine whether co-Defendants could examine each other prior to trial. In deciding to allow it, he also stated at paragraph 16: "I am satisfied that there is currently both a measure of adversity of interest shown on the pleadings, and the very real possibility that a more apparent adversity of interest may appear during the course of the discoveries, that I would be in error to make what is essentially a declaration at this stage that the defendants are not adverse in interest."

[18] The above summary of the law is particularly apt to the present case.

C. Did the Applications Judge err in finding that there was adversity in interest between Suncor and Technip?

[19] The Applications Judge in dismissing the application found that on the face of the pleadings there was adversity of interest as between Suncor and Technip.

[20] As described above, the Statement of Defence to Third Party Claim of Technip USA states that "Technip USA does dispute SMST's liability to Suncor" and the Statement of Defence to Third Party Claim of Technip Canada Limited states that "Technip Canada does dispute SMST's liability to Suncor". As such, it is clear from the pleadings that there is an adversity of interest between Suncor and Technip.

[21] Further, looking at the factual record as a whole, I am not persuaded that Suncor's questioning is evidence of a "sweetheart examination".

[22] The authorities relied on by counsel for SMST to demonstrate that there is no adversity of interest between Suncor and Technip have involved rather distinct scenarios from what is present here.

[23] ***Elder v Rizzardo Brothers Holdings Ltd***, 2016 ONSC 7235, was regarding two defendants who had settled with each other seeking to cross-examine each other's witnesses. The court determined that there was no adversity in interest between those parties except on narrow issues and so there should be no leading questions during the cross-examination other than on those narrow issues: at para 4.

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[24] ***Dunn v Dunn***, 2000 ABQB 232, involved a wife seeking to question her husband on gratuitous services he had provided her following a motor accident in the context of an insurance case, with the justice in that case emphasising the particular context of the situation at hand: at paras 51-54.

[25] ***Alberta (Attorney General) v Alberta Power (2000) Ltd***, 2018 ABQB 100, involved the Attorney General of Alberta seeking to question a lawyer employed by the Attorney General. Justice Jeffrey highlighted several aspects of the relationship to determine that there was no adversity of interest between the parties, including: i) that the lawyer worked for, or in close connection to, the office of the attorney general; ii) the transcript of the questioning thus far; iii) counsel for the attorney general speaking on behalf of the lawyer; iv) the inference drawn by the trial judge from the attorney general's counsel in oral argument that the lawyer in question had discussed potential testimony with the attorney general's counsel prior to questioning: at para 44.

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[26] Counsel for SMST correctly noted that by the nature of the question each case is context specific. Not surprisingly, the factual record that was before the Applications Judge is distinguishable from the examples cited by SMST. To determine whether there is an adversity of interest requires looking at the pleadings and the record as a whole in this case before me. Just because some questions asked during questioning do not appear unfavourable to the party being asked, does not mean that the parties themselves are not adverse in interest.

[27] I am further satisfied by the context of the case here. The parties had devised via a consent order a procedure by which to establish notice of who they sought to question and provide objections. Suncor followed this procedure and provided notice on several occasions, yet no objection was raised by SMST until the questioning began.

[28] SMST had filed the Omnibus Application relying in large part on some of the examination of Mr. Fong and some of the questions asked by Suncor involved clarifying previous statements from the SMST questioning. I find that in this situation, the questions were appropriately focused on improving the truth-seeking purpose of the adversarial process.

[29] In sum, I find the Applications Judge was correct in his decision. Suncor and Technip are adverse in interest on the face of the pleadings, the record as a whole supports this conclusion, and the opportunities that SMST has had to question this witness as well as the procedure set in place provides that it furthers the truth-seeking purpose and fairness to allow the questioning to continue and for the transcript to still be usable.

D. If there is adversity of interest between Suncor and Technip, should there be a limit on the scope of questioning regarding the issue of design of the Reformer?

[30] Based on my reasoning above, I find that it would not be appropriate in this case to limit the scope of questioning regarding the issue of design of the Reformer. As noted in ***Briggs Bros***, "[t]he permissible scope of the discovery is a separate issue from adversity, and is determined by what is 'relevant and material'[...]": at para 9. SMST has not satisfied me that there is a reason in this case to deviate from this for the present questioning.

V. Conclusion

[31] Following the case law and principles underpinning Rule 5.17, I find that based on the record before me:

(a) There is adversity of interest on the face of the pleadings between Suncor and Technip;

(b) Considering the record as a whole and as it presently exists, I am satisfied that there is adversity of interest between Suncor and Technip;

(c) SMST has not satisfied me that the scope of questioning should be limited beyond the standard of what is relevant and material.

[32] In conclusion, I find that the Applications Judge did not err in dismissing SMST's application. Accordingly, SMST's appeal is dismissed.

VI. Costs

[33] As the successful party, Suncor is entitled to costs of this appeal. If the parties are unable to reach an agreement on the amount, they may provide written submissions, not to exceed five pages each, within 45 days of the date of these reasons.

Heard on the 15th day of November, 2023.
Dated at the City of Calgary, Alberta this 8th day of February, 2024.

J.C. Price
J.C.K.B.A.

Appearances:

Michael Dixon and Tom Wagner
Counsel for the Plaintiff/Respondent, Suncor Energy Inc., for itself and as General Partner of Suncor Energy Oil Sands Limited Partnership

Heather Treacy, KC and Katrina Edgerton-McGhan
Counsel for the Defendant/Appellant, Saltzgitter Mannesmann Stainless Tubes USA, Inc.

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