Court of King's Bench of Alberta

Citation: H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd, 2024 ABKB 536

Date: 20240909
Docket: 2101 03737
Registry: Calgary

Between:

H2 Canmore Apartments LP, Hokanson Capital Inc. and 2158318 Alberta Ltd.

Plaintiffs

- and -

Cormode & Dickson Construction Edmonton Ltd., Berend Pieter Elzen also known as Ben Elzen, Michael R. Deacon, Martin Bohm, Bruce Miller, Frank Haas, Beck Vale Architects & Planners Inc., Greg Beck, SNC-Lavalin Inc., Sebastian Roman, Wanhong Zhang, TWS Engineering Ltd., Marshall Price, PDN Construction Ltd., Amen Construction Ltd., Design 19 Painter Ltd., Walker Plant J.V. Ltd., H Group Inc., Reza Aghazadeh and McCool Construction YYC Inc.

Defendants

Endorsement
of the
Honourable Justice M.A. Marion

I. Introduction

[1] In ***H2 Canmore Apartments LP v Cormode & Dickson Construction Edmonton Ltd***, 2024 ABKB 424 (***H2 Canmore – Production***), I levied a $7,500 penalty against Cormode & Dickson Construction Edmonton Ltd (**Cormode**).

[2] At paras 141-142 of ***H2 Canmore – Production***, I said:

> [141] I also have concerns regarding the Plaintiffs' lack of compliance with the *Rules* in respect of the Cormode discovery. Had these parties engaged in reasonable discovery planning and consultation, it is quite likely a significant portion of the Application would not have been required.
>
> [142] The possibility of a rule 10.49 penalty against the Plaintiffs was not specifically addressed in the Application. The rule of *audi alteram partem* requires that a party be given adequate notice of the case against them, and provided a fair opportunity to respond: ***Kotyk (Re)*** at para 16. As I am raising the possibility of a penalty for the Plaintiffs under rule 10.49 on my own motion, I will give the Plaintiffs and the Cormode Defendants an opportunity to provide written submissions as whether a rule 10.49 penalty should be imposed on the Plaintiffs. Submissions should be no more than five pages (excluding attachments) and shall be provided to me within 30 days of this decision.

[3] The Plaintiffs and Cormode provided supplemental submissions on the question of whether I should also levy a penalty against the Plaintiffs under rule 10.49 of the *Alberta Rules of Court*, 124/2010 (*Rules*).

II. Analysis

[4] Cormode suggests that the Plaintiffs should be subject to a similar levy as Cormode. I reject that argument. There is no indication that the Plaintiffs breached any *Rules* related to the Plaintiffs' own records disclosure and production. Rather, my concern was the Plaintiffs' failure to engage early with Cormode about production which I have found could have saved expense and time. Cormode's conduct was significantly more deficient. The Plaintiffs' conduct is not comparable to Cormode's conduct.

[5] The Plaintiffs argue no penalty should be levied. I have carefully considered their submissions and have considered the legal framework and factors I set out at paras 124-132 of ***H2 Canmore – Production***.

[6] I am persuaded that a penalty against the Plaintiffs is not required or appropriate in this case, for these reasons:

(a) as noted, the Plaintiffs did not breach their own records disclosure and production obligations. They reasonably used their own in-house e-discovery team to work on their production. The Plaintiffs noted that they did not need to use e-discovery tools for their own discovery but rather did a manual review. I note that the Court encourages parties and counsel to consider use of e-discovery tools where they will reduce costs to the parties;

(b) the Plaintiffs suggest that early consultation and discovery planning with Cormode would not have saved any expense. I disagree with that notion for the reasons set

out in ***H2 Canmore – Production***. I have already concluded that time and expense would have been saved by earlier consultation;

(c) while I found that the Plaintiffs' failure to engage with Cormode was not consistent with numerous recommendations and statements of this Court, and with rule 1.2(1), there is currently not an express rule in the *Rules* requiring parties to engage and consult early about records production. In fact, at paras 35 and 36 of ***H2 Canmore – Production***, I noted that it appeared that court clarification of that obligation was required. Further, the Plaintiffs responded immediately when the deficiencies in Cormode's production became apparent. I am persuaded that, in the circumstances, these are factors against levying a penalty against the Plaintiffs. However, a different result might occur in future cases now that the obligation has been clarified;

(d) I have already held, in ***H2 Canmore - Production*** at para 87, that the Plaintiffs should materially share the costs to implement the Plaintiffs request to require Cormode to fix its deficient production. Therefore, the Plaintiffs are already likely incurring additional costs;

(e) it does not appear the other defendant parties in this action engaged with Cormode either, so it is less appropriate for the Plaintiffs to be penalized in isolation simply because they were the ones that brought a records application against Cormode. The Plaintiffs assert that the lack of early consultation and planning is consistent with general commercial litigation practice, particularly in a case involving a quantum of records such as this. They assert that e-discovery and consultation is more common with much larger records productions. I am not sure I agree with that. However, and in any event, even if it is accepted that this is the practice, commercial litigation practice must evolve to proportionately avoid wasteful missteps in the discovery process. Some consultation and planning will not be oppressive or unduly expensive where there are a material number of records (such as in this case, involving many thousands of emails and other electronic records) and can avoid significant delay and costs to litigants in many cases; and

(f) there is no need for further deterrence or denunciation. ***H2 Canmore – Production*** should hopefully suffice for that purpose.

[7] On balance, I am not satisfied that the Plaintiffs sufficiently interfered with the administration of justice to warrant a penalty, as contemplated at paras 126-130 of ***H2 Canmore - Production***. I am satisfied that a penalty against the Plaintiffs would not be fair or appropriate in the circumstances.

III. Conclusion

[8] No penalty is levied against the Plaintiffs.

[9] There shall be no costs related to this decision.

[10] I thank the parties for their helpful and thoughtful submissions on this issue.

Written submissions received on August 14th, 2024.
Dated at the City of Calgary, Alberta this 9th day of September, 2024.

M.A. Marion
J.C.K.B.A.

Appearances:

Corbin Devlin
for the Plaintiffs/Applicants

Paul Beke
for the Cormode Defendants/Respondents