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Dockets: CI 22-01-37029  
CI 23-01-42877  
(Winnipeg Centre)

Indexed as: Carlson Commercial and Industrial Services Ltd.  
v. Canotech Consultants Ltd. et al.  
Cited as: 2024 MBKB 184

2024 MBKB 184 (CanLII)

## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

#### **CI 22-01-37029**

CARLSON COMMERCIAL AND INDUSTRIAL SERVICES LTD., ) Jonathan M. Woolley  
 ) for the plaintiff (defendant  
 ) by counterclaim), third party  
 plaintiff (defendant by counterclaim), )

- and - )

CANOTECH CONSULTANTS LTD. and ) Thomas G. Frohlinger, K.C.  
THE CITY OF WINNIPEG, ) Jeffrey D. H. King  
 ) for Canotech Consultants Ltd.  
defendants (plaintiffs by counterclaim). ) defendant (plaintiff by  
 ) counterclaim), plaintiff  
 ) (defendant by counterclaim)

### **AND B E T W E E N**

#### **CI 23-01-42877**

CANOTECH CONSULTANTS LTD. ) Evan L. M. Edwards  
 ) Jonathan A. A. Paterson  
 ) for The City of Winnipeg and  
 ) Kathy Roberts  
 plaintiff, ) defendants (plaintiffs by  
 ) counterclaim)

- and - )

THE CITY OF WINNIPEG and KATHY ROBERTS, )  
 )  
defendants. )

)

AND B E T W E E N )  
 )  
 THE CITY OF WINNIPEG, )  
 )  
 plaintiff by counterclaim, )  
 )  
 - and - )  
 )  
 CANOTECH CONSULTANTS LTD., )  
 )  
 defendant by counterclaim, )  
 )  
 - and - )  
 )  
 CARLSON COMMERCIAL AND INDUSTRIAL )  
 SERVICES LTD., )  
 )  
 third party. ) Judgment Delivered:  
 ) December 13, 2024

**INNESS J.**

**INTRODUCTION**

[1] This is a construction litigation case regarding a project at a multi-purpose recreation complex involving a general contractor, a sub-trade and a municipality. The main issue at trial will be whether the municipality acted unreasonably in shutting down the project on two occasions because of concerns regarding the release of silica within the dust at the construction site. The shutdowns caused considerable delays and increased costs. Who bears responsibility for those costs will require a determination of sub-issues such as:

- (a) the entity responsible for the dust release;
- (b) whether the dust release contained actual or dangerous levels of silica;
- (c) the organization(s) or person(s) authorized to shut down the project; and
- (d) whether the decision to shut down the project was reasonable based on the actual or potential risk of harm.

[2] This decision relates to a motion brought by Canotech Consultants Ltd. ("Canotech") pursuant to Rule 31.03 of *The Court of King's Bench Rules*, M.R. 553/88, seeking confirmation of its choice of discovery representative on behalf of the defendant municipality at the upcoming examinations for discovery.

### **BACKGROUND**

[3] On or about February 21, 2021, Canotech contracted with The City of Winnipeg ("City") to upgrade and/or renovate the Saint James Civic Centre (the "Project"). On or about March 26, 2021, Canotech sub-contracted with Carlson Commercial and Industrial Services Ltd. ("Carlson") to perform restoration and repair work on the Project.

[4] On or about July 26, 2021, Carlson began sandblasting work on the Project. Shortly thereafter, the City shut down the Project due to concerns that silica dust had been released into other areas of the building. An improvement order, dated July 30, 2024, was issued by Manitoba Workplace Safety and Health.

[5] On or about October 4, 2021, Carlson resumed its work on the Project, including sandblasting operations. On or about November 4, 2021, the City again shut down the work site as a result of the release of dust and a concern it contained silica. The job site

remained closed until about January 17, 2022. Carlson completed its work on the Project on or about June 29, 2022.

[6] On September 2, 2022, Carlson filed an action which included a claim against the City to enforce its lien pursuant to *The Builders' Lien Act*, C.C.S.M. c. B91 (the "**Act**"); a claim against Canotech for breach of contract and claims against the City and Canotech for unjust enrichment. On October 17, 2022, Canotech counterclaimed against Carlson for, among other claims, breach of the sub-contract, negligence and negligent misrepresentation. On October 20, 2022, Canotech and the City cross-claimed against each other for contribution and/or indemnification of damages arising from any finding of liability.

[7] On September 15, 2023, Canotech filed a claim against the City and its employee Kathy Roberts ("Roberts") in a second, related action (King's Bench File CI 23-01-42877) ("related action"). The claims against the City include breach of contract, a lien claim pursuant to the **Act** and negligence. The claim against Roberts, an assessment and project coordinator with the City of Winnipeg, is for misfeasance in public office ("misfeasance claim"). On April 8, 2024, the City filed a counterclaim against Canotech and a third-party claim against Carlson.

[8] On August 7, 2024, the Court, on the consent of the parties, ordered that each of the two actions (the "actions") be heard together and at the same time. The order included terms agreeing that:

- (a) The pleadings in the actions may be relied on and used interchangeably;
- (b) The parties to the actions shall exchange one set of documents, to be used interchangeably in the actions;
- (c) The parties shall conduct one set of examinations for discovery for the actions and that the transcripts of the examinations for discovery may be used interchangeably at the trial of the actions; and
- (d) The pre-trial conferences for the actions will be conducted jointly.

[9] Canotech and Carlson are unable to agree on the discovery representative to examine on behalf of the City. Carlson wishes to examine Roberts on behalf of the City. Canotech intends to examine Roberts in her personal capacity on its misfeasance claim but also wants to examine Roberts' supervisor, Robert Loudfoot ("Loudfoot"), on behalf of the City. The City agrees to produce Roberts or Loudfoot as its discovery representative, but not both.

[10] As a result of the disagreement between the parties, Canotech filed a motion in the related action for an order declaring that it is entitled to examine Loudfoot, or alternatively, granting it leave to do so. The City seeks an order requiring it to produce a single discovery representative pursuant to Rules 31.03(2), 31.03(3) and 31.03(11), as designated by the Court. It was agreed among all parties to waive the requirement that the City file a formal motion pursuant to Rule 31.03(2).

### **THE ISSUES**

[11] Is Canotech entitled to examine Loudfoot as the discovery representative on behalf of the City pursuant to Rules 31.03(1) and 31.03(2)?

[12] Alternatively, should Canotech be granted leave to examine Loudfoot pursuant to Rule 31.03(3)?

### **THE LAW**

[13] Rule 31 governs who may be examined at discovery. The general rule is that a party to an action has the right to examine for discovery any other party adverse in interest (Rule 31.03(1)). Where a corporation may be examined for discovery, the examining party has the right to select the discovery representative, except in circumstances where the examining party makes no selection, in which case the corporation will produce a person who is knowledgeable about the matters being examined upon (Rule 31.03(6)) or unless the corporation files a motion to have a different representative be examined on its behalf (Rule 31.03(2)). Where a party is entitled to examine more than one person or multiple parties who are of the same interest, and where the Court is satisfied that multiple examinations would be oppressive, vexatious, or unnecessary, the Court retains the discretion to place limits on the right of discovery as are just (Rule 31.03(11)).

[14] The general entitlement of a party to select the discovery representative to be examined is not absolute or without qualification. A party may be deprived of their choice of discovery representative where there is a real probability of mischief or prejudice or the selection is unreasonable or amounts to an abuse of process. Choice may also be overridden by legislation that supersedes the provincial rules (*MacRae v. Santa*, 2003 CanLII 30177 (ON SC), at para. 37; and *Northern Goose Processors Ltd. v. Canadian Food Inspection Agency*, 2000 CanLII 10894 (MB CA),

145 Man. R. (2d) 63, at para. 22). Whether there is some good reason to override a selection is to be decided on the facts and circumstances of the particular case (***Merchants Consolidated Ltd. v. Henderson-McIvor Foods et al.***, 1991 CanLII 12083 (MB KB), 72 Man. R. (2d) 129, at paras. 4-5).

[15] While an alleged lack of suitability or knowledge about the subject matter does not necessarily make the selection unreasonable, discovery generally proceeds in the most expeditious manner when the person who is most knowledgeable is the person being examined. In any event, the discovery representative is obliged to inform themselves of all matters relating to the subject matter upon which they will be questioned in preparation for the examination and in making undertakings to inquire of others as to answers. This includes becoming informed on matters beyond their personal knowledge (***Northern Goose Processors Ltd.***, at para. 20; ***Merchants Consolidated Ltd.***, at para. 4).

[16] In circumstances of multiple parties seeking to examine more than one discovery representative of an opposing corporation or organization, the parties are encouraged to agree upon a single selection. Where the parties have commonality of interests or issues and there are no material differences between the claims or defenses, there is good reason to restrict the discovery to examination of one representative (***Soprema Inc. v. Wolrige Mahon LLP***, 2014 BCCA 366, at paras. 25 and 30; ***Singh v. Shoker***, 2023 BCSC 616, at paras. 11-14; and ***Paul v. Mahmoud et al.***, 2005 NBQB 279, at paras. 51-59).

[17] If circumstances justify it, a motion may be brought for leave to examine another discovery representative (Rule 31.03(1)). Leave to cross-examine more than one corporate representative is not routinely granted. The moving party must exhaust its normal discovery rights and demonstrate that the necessary evidence cannot otherwise be obtained through the first discovery representative or documentary disclosure. This requires the party to ask appropriate questions and obtain appropriate undertakings from the first discovery representative and then, in any subsequent motion for leave to examine a second representative, demonstrate that the answers given by the first representative were incomplete, unresponsive or ambiguous (*Culbertson et al. v. The Assiniboine Credit Union Limited. et al.*, 2016 MBQB 46, at paras. 23-30; and *Thomas v. Winnipeg (City) et al.*, 1998 CanLII 28107 (MB KB), at paras. 13-20).

### **ANALYSIS**

[18] The positions of Canotech and Carlson overlap significantly in their primary allegation that the City is liable for their damages as a result of the unauthorized and/or unreasonable decision to shut down the project on both occasions. As such, there are more common interests and issues than material differences in their respective claims against the City.

[19] The City argues that Canotech named Roberts personally in its misfeasance claim to secure an opportunity for a second discovery representative. Regardless of whether that is the case, I agree with the City that but for naming Roberts personally, she would have been Canotech's obvious choice as the discovery representative on behalf of the



City. I also find that to permit multiple representatives to be examined on behalf of the City at this juncture is unnecessary.

[20] I have no evidentiary foundation as to what better or different information Loudfoot may have that Roberts either does not have or could not acquire. The argument by Canotech that Loudfoot, as Roberts' supervisor, may provide evidence that is inconsistent with Roberts is without foundation and speculative. Canotech has been provided with documentary disclosure as it relates to Loudfoot's involvement. Nothing has been filed on this motion that demonstrates any material contradictions relevant to Canotech's claims that can only be elicited through a discovery of Loudfoot. The Court will not grant an order that endorses a fishing expedition.

### **CONCLUSION**

[21] In conclusion, due to the commonality of the issues and interests between Canotech and Carlson in their claims against the City, I conclude that at this stage the City is only required to produce one person as its discovery representative. Roberts is the person that all parties agree was heavily involved, if not the ultimate decision-maker, in shutting down the project on both occasions and is, in my assessment, the person most suited to be examined as the discovery representative on behalf of the City.

[22] I am directing that the City produce Roberts as its discovery representative, to be examined by Canotech and Carlson at the examinations for discovery.

**COSTS**

[23] All of the parties had an interest in seeking clarification from the Court on this issue. As such, in the circumstances of this case, I am ordering that each of the parties bear their own costs for this motion.

\_\_\_\_\_ J.