In the Court of Appeal of Alberta

Citation: Great North Equipment Inc v Penney, 2025 ABCA 16

Date: 20250121
Docket: 2401-0220AC;
2401-0238AC
Registry: Calgary

Between:

Great North Equipment Inc and
1185641 BC Ltd

Appellants

- and -

Bradley Penney, Neil Macdonald, Dustin Monilaws,
Paloma Pressure Control LLC, Paloma PC Holdings LLC,
Paloma Pressure Control Canada Ltd

Respondents

- and -

Indeed Oil Field Supply LLC and Indeed Alberta Corp

Non-Parties to the Appeal

The Court:

The Honourable Justice Jack Watson
The Honourable Justice Kevin Feehan
The Honourable Justice William T. de Wit

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice N.F. Dilts
Dated the 13th day of August, 2024
Filed on the 1st day of October, 2024
(Docket: 2301-08144)

- and -

Appeal from the Order by
The Honourable Justice M.J. Lema
Dated the 6th day of September, 2024
Filed on the 10th day of December, 2024
(2024 ABKB 533, Docket: 2301-08144)

Memorandum of Judgment

The Court:

[1] Great North Equipment and 1185641 BC appeal two interlocutory decisions of chambers judges addressing document production, a temporary prohibitory injunction, and sealing order in this corporate intellectual property litigation. There were also initially applications for extension of time to apply for admission of new evidence on appeal and for the admission of that new evidence. Great North advised the Court shortly before the hearing that those applications would not be proceeding. Counsel for Great North also narrowed the focus of the appeals by withdrawing concerns over the non-solicitation provisions in an earlier consent order.

[2] The appeals as they now remain before the Court firstly arose from a decision respecting access to evidence possessed by an Independent Supervising Solicitor, whose role in the litigation was established by the initial consent order for the production and classification of confidential information and then elaborated upon by a second consent order establishing forensic protocols for that investigation. Great North raised concerns about the decision of the first chambers judge respecting her interpretation particularly of the forensic protocols order.

[3] The second order under appeal not only declined to extend aspects of the first consent order respecting interlocutory injunctive relief but was taken by counsel for Great North to have rescinded that order in its entirety. On appeal, counsel for the individual respondents, former employees of Great North, did not agree with Great North's interpretation of either decision but said the decisions were both correct so far as they went.

[4] Despite the diligent efforts of counsel for Great North to persuade us that this Court should interfere in the hard-fought interlocutory proceedings in the Court of King's Bench, we are not satisfied that the high degree of deference owed to that Court in its exercise of discretionary pre-trial decision-making is overcome by the challenges to either of these orders: see ***Canada v Fontaine***, 2017 SCC 47, para 36, [2017] 2 SCR 205, where Justices Brown and Rowe observed that "[a]ppellate intervention is warranted only if the judge has clearly misdirected himself or herself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice", citing ***P(W) v Alberta***, 2014 ABCA 404, para 15, 378 DLR (4th) 629; ***Balogun v Pandher***, 2010 ABCA 40, para 7, 474 AR 258. Subject to what follows, we are satisfied that both orders were exercises of discretion by the respective chambers judges and are not satisfied that either of them misdirected themselves on facts or law, or reached an arbitrary or unjust conclusion.

[5] Both orders were exercises of discretion on procedural steps in the litigation. While we are prepared to accept that there is some ambiguity in the language used by both chambers judges, we are not persuaded that the intended meaning and language of their decisions operate as a form of

res judicata in relation to any crucial issues to be addressed on the upcoming application to compel further records production or to be ultimately determined at trial.

[6] One key issue, for example, concerns the scope and nature of the "Confidential Information" said to have been improperly misused by the respondents underlying, in one way or another, the various claims in contract, fiduciary relationship, unjust enrichment, and so on. That topic is one of several addressed in the reasons of both chambers judges, but remains live for the trial judge. That topic, and others we need not expand upon, were only assessed within the framework of the issues before each chambers judge. Even though each judge necessarily expressed forms of findings about the topics, in doing so they could not, and did not, give final determination or grant summary judgment on them.

[7] As with the first consent order, the decisions under appeal made no permanent or final determinations of fact or law, but rather made interlocutory determinations to progress this litigation to trial. The fact that terms of that first consent order were effective "until further order" did not make them final, even if their end date was not specified with particularity.

[8] It may be helpful to this ongoing litigation to clarify three points. First, the decision under appeal on the document production of the Independent Supervising Solicitor, read attentively, and notably at paragraphs 23 to 26 of the reasons, considered in light of the forensic protocol schedule A to the second consent order, left the resolution of any disputes about the disclosure of any records or other issues concerning records possessed by the Independent Supervising Solicitor with the Court on application for advice and direction. We do not read these reasons to mean more than that in the event of a legal dispute between the parties as to relevance and materiality, the parties were expected to have the Court of King's Bench resolve the dispute. The chambers judge called this a matter of the documents being considered by the Independent Supervising Solicitor to be "in the middle" between items that he found were clearly Confidential Information and those that he found were not clearly Confidential Information.

[9] We were given to understand that there is a hearing booked in May 2025 before the Court of King's Bench to address the supplementary affidavits of records filed in the litigation which do not include the documents "in the middle". We do not see that this decision of document production of the Independent Supervising Solicitor should be taken as binding on the King's Bench judge on that future hearing. Indeed, the chambers judge did not purport to do so, saying "[i]f the Plaintiffs are not satisfied that the Defendants have diligently discharged their disclosure obligations, they can resort to the tools available to them under the Rules of Court". Put another way, the debate on those documents may occur afresh.

[10] The second point concerns the interlocutory injunction decision under appeal and what was taken by counsel for Great North to rescind the first consent order in its entirety. More specifically, counsel understood the decision to revoke paragraphs 7(a) to (c) of the first consent order, also touching on the topic of Confidential Information and business competition. Counsel for Great North said she acceded to a formal order reflecting that the first consent order was entirely revoked,

albeit she now submits the chambers judge erred in doing so and got to that conclusion in an improper manner.

[11] It is proper for counsel to approve a formal order adverse to their position where, as here, counsel sincerely believe it is what the judge decided. Indeed, it would be improper to do otherwise. That said, having read the reasons of the chambers judge as a whole, and despite the ambiguity in what he wrote on this point, we are satisfied it was not his considered intention to revoke those elements of the first consent order. The issue of revocation of those paragraphs was not before him, and the individual respondents before us did not dispute the perseverance of that element of the order, to which they had consented, until trial. While a future trial judge will be entitled to do what that judge finds to be just and appropriate, it was not for this chambers judge to grant summary judgment to the opposite effect. We do not think he intended to do so. We conclude that the formal order on the injunction should simply be understood to say those paragraphs 7(a) to (c) from the first consent order continue as worded, subject to what a trial judge may do.

[12] Counsel for Great North also invited us to amend those contents of paragraphs 7(a) to (c) of the first consent order to reflect 'facts on the ground'. We are not persuaded that this Court can exercise such an amending function, particularly when it bumps up against the concept of Confidential Information in this case. In due course a trial judge can make the final determination. We are not persuaded there would be material prejudice to any party to leave those paragraphs "as is" in place pending trial.

[13] The third point concerns Great North's request for a sealing order respecting certain aspects of the affidavits and documents before the Court of King's Bench and now before this Court. This again touches on the topic of Confidential Information. All the parties agree that the contents of those affidavits and documents do not restrict access to or by any of the parties within the action. These parties are bound by the implied undertaking of confidentiality. But counsel for the Paloma respondents argued that Great North failed to act with due diligence to obtain an earlier sealing order and they cannot meet the case law criteria for sealing orders. In that regard, the Paloma respondents appear to be defending general public access to those affidavits and records.

[14] Bearing in mind that some of the contents of those affidavits and records appear to refer to matters where confidential information of third parties is included, and that a sealing order to protect the contents of the affidavits and documents would not prejudice any of the parties to this litigation, we are satisfied there should be a sealing order in place until the trial. Counsel for Great North says such an order would only affect about 28 records. To effectuate this, we direct counsel for Great North to prepare a second set of materials to be kept on the public record of the Court of King's Bench and this Court which is redacted in relation to the limited list of documents mentioned in its factum and ensure that the original materials remain on file in a sealed part of the records.

[15] In the end, we are not persuaded there would be any improvement in these proceedings by our intrusion into these two decisions except to the limited way these reasons interpret them. We amend the order on the injunction consistently with our reasons in paragraph 11 above; paragraphs 7(a) to (c) of the first consent order continue until a trial judge disposes of the case. More generally, we do not find that either decision under appeal has an operative *res judicata* effect upon what a trial judge may adjudicate in relation to whether or not Great North can make out their claims or prove their damages. Accordingly, the appeals from the orders made are dismissed, except as set out above.

[16] At the end of submissions on the main issues, counsel for the parties engaged in a discussion about costs. It was evident the parties have a fair amount to say about costs. Under those circumstances, we invite counsel to provide the Court on or before month end with letters no longer than five pages setting out their position as to costs of the appeals. As to costs of the proceedings below, since the appeals are dismissed, we make no disposition on those costs.

Appeals heard on January 13, 2025

Memorandum filed at Calgary, Alberta
this 21st day of January, 2025

Watson J.A.

Feehan J.A.

de Wit J.A.

Appearances:

K.R. Noonan
M.C.C.L. Lemmens
D. Price (no appearance)
C. Penn
for the Appellants

M.C. Dransfeld (no appearance)
M.E. Andresen
D.C. McAllister (no appearance)
T. Green (no appearance)
for the Respondents, Bradley Penney, Dustin Monilaws and Neil Macdonald

G.N. Stapon, KC
K.R. Cameron
N. Kaur
for the Respondents, Paloma Pressure Control LLC, Paloma PC Holdings LLC and Paloma Pressure Control Canada Ltd