SC CIV 74 001

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CADILLAC EXPLORATIONS LTD.

Plaintiff

- and -

PENARROYA CANADA LIMITEE,

Defendant

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE W. G. MORROW

The present matter came before me in Chambers as a result of Notices of Motion filed on behalf of each party seeking directions and relief in respect to the production of documents and certain questions asked on the examination for discovery of the respective officers of the parties.

At the opening of the hearing before me both counsel agreed that as a result of undertakings made by each to the other as well as because of certain agreements made, the applications were to be adjourned *sine die* except as to certain ones argued at the time. Accordingly the two notices of motion stand adjourned *sine die* except as to those points either settled or those points now to be considered in this judgment.

In brief it is to be observed that the Amended Statement of Claim shows that the plaintiff relying on an agreement entered into between the two parties on February 11, 1970,

alleges that the defendant undertook to carry out an exploration program in accordance with good mining exploration practices on certain Mining Claims owned by the plaintiff in the Nahanni Mining District of the Northwest Territories. The defendant is alleged to have gone into possession and control. An option to acquire an undivided 50 per cent interest in the claim was open to the defendant upon the happening of certain events. Certain results were to flow from the exercise of the option. The defendant is alleged to have exercised the option but to have failed to proceed with the construction and equipping of mining facilities although requested to so do, all of which is alleged to be in breach of the agreement. Damages in the sum of $5,000,000.00 are claimed as a consequence of the default. In the alternative the plaintiff alleges that the agreement has been discharged and terminated by the failure of the defendant, rescission is sought, and resulting from what is termed a condition subsequent permitting the interest to be determined, the plaintiff claims damages for loss of market, cost of development, and so on, in the sum of $25,000,000.00. In the further alternative it is alleged that the option was not properly exercised for reasons as set forth in detail in the claim and that by continuing in possession the defendant has caused damage to the plaintiff.

The above recital is not intended to be a full review of the various claims or positions taken by the plaintiff but is set forth as a short resume only.

In its defence the defendant alleges the option was exercised and that there has been no default. Among other defences raised is estoppel, that conditions did not permit the defendant to as yet commence the equipping and developing as sought, and generally that the defendant is excused from acts alleged to be required of it by reason of events and factors as detailed in the defence.

The defendant by counterclaim asks for a grant and conveyance of its interest in the Mining Claims to be ordered.

An Amended Reply and Defence to the Counterclaim closes the pleadings.

Specific reference will be made to certain paragraphs of the pleadings as necessary in considering the points still to be settled on these motions.

The plaintiff asks for a ruling in respect to objections made to questions asked of Jean Yves Eichenberger, President of the defendant company who was being examined in Paris, France, as the selected officer of the defendant.

The first question found at page 70 of the transcript is:

> "Q. Was any budget submitted by Penarroya Canada to Penarroya France for approval apart from ... for approval?

"Mr. Rolls What relevance does that have to the law suit, as you know you have abandoned your claims against Penarroya France? There is no mention of Penarroya France in the statement of claims amended. On what basis is any dealing, with respect to budget at least, between Penarroya Canada and Penarroya France, any longer relevant in this action?"

The second questions found at page 80 are:

"Q. In February, 1970 did Penarroya Canada Limited contemplate that the sum of three million dollars would be required for the purpose of carrying out the exploration program then considered by it?

Q. Well, did Penarroya Canada Limited estimate that the sum of three million dollars would be required to carry out the exploration program then proposed by it?

On my examination of the pleadings I am unable to see any basis for requiring an answer to the question on page 70. With respect to the two questions on page 80 it seems to me that if such an estimate was or was not made such fact might be material to some of the allegations made by the defendant that the required program was carried out.

The defendant officer will be required to answer the latter two questions but cannot be required to go into details of the manner in which the budget was to be realized.

The final question sought of this officer is found at page 372 et seq.:

> Q. There is a reference on the document to "Blocking out", I think, something. Does that portion not relate to the Nahanni Project?
>
> Mr. Rolls: It does not relate to Nahanni, or in any event it is not relevant."

Counsel for the plaintiff relied on the reasoning of Ewing, J. as found in Corlett v. Canadian Fire Insurance Co. et al 1939 2 W.W.R. 527 and in particular to a quotation in the judgment at page 529 taken from Wedin v. Robertson (1907) 7 W.L.R. 72 as follows:

> "As to conversations between him and others, not parties to the action, I doubt whether he should be asked as to statements made by such others during those conversations, but he should be compelled to testify as to the statements made by him during any such conversation."

After a careful examination of the pleadings in the present action I am satisfied that questions can be asked as to whether there were discussions with Conwest or anyone else with respect to the efforts made, if in fact any efforts were so made, for disposal of the particular property, but the questioning must not go any further.

There will be an Order for the officer of the Defendant, namely, Jean Yves Eichenberger to attend in the same manner as

has been provided for by this Honourable Court to answer the questions referred to.

The defendant asks for a ruling in respect to objections made to questions asked of Lawrence Cyril Morrisroe, President of the plaintiff company, who was similarly being examined as the selected officer of the plaintiff. This examination was at Calgary, Alberta.

Questions 146 and 155 are the first to be considered.

> "146 Q. I would like you to find out for me, please, what use and with what result was made of the electro-magnetic survey to which I have just referred and which is numbered 3 of your productions.
>
> 155 Q. Did Mr. Christie make use of it?"

The main objection here is to the effect that the defendant is attempting to find out what use experts made of it. Counsel in objecting relied on two Alberta decisions which discuss Rule 240 (now 200) of the Alberta Rules of Court which are applicable here, namely: *Marine Pipeline & Dredging Ltd. v. Canadian Fina Oil Ltd.* (1964) 48 W.W.R. 462; and *Canadian Utilities Ltd. v. Mannix Ltd. et al* (1959) 27 W.W.R. 508.

These cases are concerned with, among other things, the relationship of client and professional man. To the extent that the above questions reach into that area there will be no

requirement to answer, that is the plaintiff's officer is not required to seek out his experts and ascertain what use they may have made of the survey. I do think however that the officer is required to answer to the extent that he himself has knowledge and further to ascertain from his company employees or officers the use made of the report. If he can find out from them without inquiring further, what use Mr. Christie made of it he must so do and answer accordingly.

I agree that the practice that has grown and developed under our Rule 200 is as expressed by Riley, J. at page 521 of the *Canadian Utilities* case where he says:

> "I am of the opinion that the words 'touching the matters in question' and 'relating to' quoted ... (our Rule 204) ... permit more latitude on discovery than is permitted by the rules of admissibility at trial."

Counsel for the defendant was satisfied to accept the answers found from Questions 1343 to 1346 as the answer to Question 1093 if Counsel for the plaintiff agreed. Accordingly unless this agreement is not made I have no need to discuss this question any further.

The next questions 1400, 1402, 1416 - 1419 raise quite different issues. The officer Morrisroe had apparently produced a copy of a letter addressed to the plaintiff company from its solicitors. This production took place on the occasion of one

of his meetings with the Paris solicitor of the defendant company. Counsel for the plaintiff objects to the questions on the basis that the letter was between solicitor and client. Counsel for the defendant argues the privilege was waived as soon as it was shown to the other side. The letter has been marked as Exhibit 31. Among other things it makes a statement as to an understanding that the defendant company had completed all of the exploration program it intended to carry out and also expresses an opinion in respect to what construction could be placed on certain clauses of the agreement.

On the material before me it appears to be clear that Mr. Morrisroe, in an effort to persuade the solicitor to encourage his client to take a different course, gave a copy of the letter to him. This in my opinion constituted a clear and unequivocal waiver of whatever privilege the plaintiff may have had: *Phipson on Evidence*, 11th Ed., comm. page 596 *Carey v. Cuthbert*, (1872) I.R. 6 Eq. 599; *Caldbeck v. Boon 7 I.C.L.R. 32.* Accordingly the plaintiff's officer will be ordered to answer questions 1400, 1402, 1416, 1417, 1418 and 1419.

Defendant company had made a pre-feasibility report and in Questions 1833 to 1835 defendant's counsel seeks to have the officer of the plaintiff company disclose any facts by which the propriety of the report could be challenged. Counsel here relies on the reasoning set forth in *Ohl et al v. Cannito* (1972) 26 D.L.R. (3d) 556. I agree with the reasoning of Osler, J.

in this case but cannot see that the present situation is the same. By merely providing for a pre-feasibility report which may be based on or refer to certain factual situations or assumptions, where the report itself or its findings is not directly in issue in the pleadings, surely cannot place the officer being examined in the position where he can be required to challenge factual statements therein. The examining solicitor himself can by direct questioning arrive at the same position. I think I would be going far too far here if I were to give the direction sought. The plaintiff's officer will not be required to answer here.

By Questions 2057 to 2059 the officer of the plaintiff is asked as to the company's knowledge or information as to the value of Millhead grades of metals whether this knowledge or information was obtained before or after the commencement of the action. It is clearly in issue in the pleadings. I direct that the questions be answered as to the facts known only. There will be no requirement to expand any answers in respect to what conclusions the company may have reached from such facts.

By Question 2081 defendant's counsel seeks information as to whether there have been any complaints or enquiries from shareholders of the plaintiff company respecting the defendant's obligations. I cannot see the relevancy of this line of inquiry. The officer need not answer or make further enquiry here.

Question 2163 seeks to find out from the plaintiff what the defendant failed to do or what it did contrary to good mining practice. In my opinion this question is required to be answered as the pleadings have clearly made good mining practice a basis of the action. The questions and answers here are restricted to things or matters factual and opinions cannot be sought out or required.

By Question 2179 counsel for defendant states: "I want to know what it is in the reports which specifically deals with these allegations and on which the plaintiff relies." The allegations are contained in paragraph 16(i)(a) of the Amended Statement of Claim and are as follows:

> "(i) At the time of the purported exercise, Penarroya was in default under the Agreement, as follows:
>
> (a) it had failed to carry out a program of prospecting, exploration and other mining work on the Mining Claims in accordance with good mining exploration practices and, in particular, had not explored and evaluated, or not fully explored and evaluated, the lands to determine the extent of feasible commercial production;"

I think counsel is entitled to answers as to the facts forming the basis of the allegations made in the same manner as in respect to Question 2163 above but I do not agree that the officer can be required to analyze reports or be examined on such reports. There will be an order accordingly.

In its Reply to the Amended Statement of Defence, the plaintiff states "the value of payable metals within such meaning of clauses 6(a)(i) as may be attributed to it, exceeds U.S. $53 per ton after deducting taxes and royalties in the production thereof." Its officer was asked on what fact the company relied on in support of this allegation. The answer was objected to as it would require reliance on expert opinion. In my opinion the party here has made a firm allegation. If in arriving at its factual basis the party required the assistance of experts that surely does not avoid the responsibility to answer. The officer will be required to answer as to the fact or facts but may not be required to give the names of any experts he has had to call on for his answer or any opinions they may have expressed. See *Rubinoff v. Newton* 1967 1 O.R. 402 and *British Columbia Forest Products Ltd. v. Yarrows Ltd.* (1965) 52 W.W.R. 430.

There will be an order for the officer of the Plaintiff, namely Lawrence C. Morrisroe, to attend in the same manner as previously ordered to answer as directed above.

Either counsel may apply to this Court should there be any further difficulties experienced in completing the respective examinations or obtaining attendance of the respective officers. Costs will be in the cause.

W. G. Morrow

Yellowknife, N.W.T.
January 11, 1974.

Counsel:

C. D. O'Brien, Esq.,
for Plaintiff

R. J. Rolls, Esq., Q.C.,
for Defendant.