

Date: 1999 01 11
Docket: CV 07853

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

Applicant

- and -

851791 N.W.T. LTD.

Respondent

Motion to introduce new evidence on an application where full argument had been made and judgment reserved. Motion denied.

Application made October 30, 1998
(Motion filed November 23, 1998)

Reasons filed: January 11, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for Applicant: Pierre J. Mousseau

Counsel for Respondent: Gary J. Draper

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REASONS FOR JUDGMENT

[1] The Commissioner's application for declaratory relief and interpretation of an indemnity clause, brought by originating notice pursuant to Rule 22, was heard by me in Chambers on October 20, 1998. The parties had filed pre-hearing briefs pursuant to Rule 391. Each counsel attended Chambers on October 20 and presented oral submissions. At the conclusion of the hearing on October 20, judgment was reserved.

[2] On October 30, 1998, respondent's counsel sent to me in Chambers a letter and enclosures, at the same time providing copies of same to applicant's counsel. The enclosures are copies of recently filed (i.e., filed on October 30, 1998) pleadings in two related Court actions. The letter refers to the enclosures and reiterates some of the respondent's submissions contained in the pre-hearing brief and in oral argument on October 20.

[3] Applicant's counsel objects to this attempt to introduce further evidence and further argument.

[4] At the Court's direction, counsel have filed written submissions on the point.

[5] As I am not *functus*, the law is clear that I have the discretion to allow new evidence and reopen the hearing. *Castlerigg Investments Inc. v. Lam and Lam Skin Care Products Ltd.* (1991) 2 O.R. (3d) 216 (Ont.Ct.Gen.Div.); *Clayton v. British American Securities Ltd.* [1934] 3 W.W.R. 257 (B.C.C.A.); *Carpenter v. Carpenter* (1993) 19 C.P.C. (3d) 18 (Ont.Ct.Gen.Div.).

[6] However, receiving new evidence and/or further submissions is a departure from the ordinary practice and ought not to be encouraged. There should be some finality to final argument. The power to reopen a case should be exercised sparingly and only to prevent a miscarriage of justice.

[7] Upon consideration I see no reason to invoke the power here.

[8] The "new evidence" is a group of legal pleadings presumably crafted by respondent's counsel within days of the October 20 hearing. The nature of such documents gives them the colour of "further submissions" rather than "new evidence".

[9] At the close of the October 20 hearing counsel did not seek leave to subsequently file supplemental submissions. Nor did counsel request an adjournment of the hearing for the purpose of filing pleadings in the related Court actions CV 07279 and CV 07855 so that reference could then be made to them in the within proceeding. No explanation is offered for the failure to explore these avenues.

[10] The particular nature of the Commissioner's application requires an interpretation of the parties' agreement at the moment in time that the application was made. The application was made on ample notice to the respondent, there was full and able argument by both parties, and judgment was reserved. It would be an injustice to now allow reference to documents created post-hearing.

[11] The respondent's motion to introduce the new pleadings into evidence on the within application is denied. The applicant Commissioner shall have its costs in any event of the main application.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
11th day of January 1999

Counsel for Applicant: Pierre J. Mousseau
Counsel for Respondent: Gary J. Draper

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