

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LTS INFRASTRUCTURE SERVICES LIMITED PARTNERSHIP

Plaintiff

-and-

ROHL ENTERPRISES LTD.

Defendant

-and-

TRAVELERS INSURANCE COMPANY OF CANADA

Defendant

MEMORANDUM OF JUDGMENT

[1] This action arises from the construction of the Mackenzie Valley Fibre Link Project (the Project) in which a fibre optic communications system was installed along a 1,200 kilometre route from McGill Lake to Inuvik, Northwest Territories. The Plaintiff LTS Infrastructure Services Limited Partnership (LTS) was the design-builder, the Defendant Rohl Enterprises Ltd. (Rohl) was a subcontractor responsible for installing buried fibre optic cable and associated appurtenances, and the Defendant Travelers Insurance Company of Canada (Travelers) was a surety under a performance bond issued to Rohl as principal and naming LTS as the obligee.

[2] LTS commenced an action against Rohl (S-1-CV-2016-000011) claiming damages resulting from defects in Rohl's work on the Project. Rohl has denied liability and counterclaimed for unpaid fees and damages.

[3] LTS also commenced an action against Travelers (S-1-CV-2016-000040) claiming damages attributable to Travelers' breach of its obligations under the bond to respond to Rohl's defaults. Travelers has denied liability.

[4] The parties agreed on November 17, 2017 that these matters could be heard together and an Order was issued consolidating the matters.

[5] The matter has been in Case Management to resolve a number of issues relating to timelines, production of documents and examinations for discovery, amongst other things. The exchange of Statements as to Documents and document production have been ongoing issues that the parties have been unable to resolve. This has resulted in the two Notices of Motion that are currently before the Court.

[6] The first Notice of Motion, filed by Travelers, seeks a number of items of relief including that LTS be directed to review photographs provided in LTS' document production, that LTS file an amended Statement as to Documents correcting and eliminating documents, and that LTS file a supplemental Statement as to Documents with respect to documents that were within LTS' possession, control or existence on or after March 1, 2016.

[7] The second Notice of Motion, filed by LTS, seeks 5 items of relief but I was advised by counsel at the commencement of the hearing that several items had been resolved by the parties and only one item of relief remained outstanding. LTS seeks that Travelers produce a further and better Statement of Documents.

Travelers' Notice of Motion

[8] Dealing first with the Notice of Motion filed by Travelers which raises issues with the document production of LTS. There were three issues argued by Travelers: 1) the production of photographs by LTS; 2) the document dates of records indicated on LTS' Statement as to Documents; and 3) the number of duplicates produced by LTS. Counsel for Travelers advised that the third issue had

essentially been resolved prior to the hearing but Travelers seeks costs as it was not resolved until after Travelers filed the Notice of Motion.

[9] The document production in this litigation involves thousands of documents and the parties have agreed to a Document Exchange Protocol (Protocol) with documents being exchanged electronically. The Protocol outlines generally how the parties are going to produce the electronic documents. LTS engaged two companies, KPMG and Heuristica, to assist them with the process. The parties agreed to produce their documents by July 31, 2017.

Photographs

[10] LTS initially produced a hard drive with approximately 677,000 photographs. Counsel for the defendants objected to the production of the photographs and in response, LTS provided a revised hard drive with approximately 371,000 photographs. Travelers and Rohl continue to object to the number of photographs produced and seek to have LTS further refine the photographs produced.

[11] Many of the photographs are aerial photographs which were taken along the Project route by cameras mounted on helicopters. The helicopter surveys involved three cameras taking a photograph every one or two seconds over all or portions of the 1,200 km route. This was done on at least three occasions during the project. Obviously, this results in a massive amount of duplication.

[12] The first hard drive was produced with no culling of photographs done. When Travelers and Rohl objected, LTS utilized a de-duplication software program to remove duplicate photographs and some photographs were reviewed manually. In reviewing the photographs and determining whether they were relevant, geo-referencing, time and date and image were considered relevant characteristics. If a photograph had two or more characteristics, the photograph was retained. The photographs were labeled and categorized into different folders, mainly by date and activity.

[13] The individual who performed the review of the photographs was cross-examined on his affidavit and was asked about determining the relevance of the

photographs. He stated, “It is not for me to say whether the photos in each of the subject areas are legally relevant and producible.”

[14] This process reduced the number of photographs to approximately 371,000, of which 314,000 are helicopter survey photographs. The second hard drive was provided to LTS’ counsel on October 16, 2017 and then to Travelers’ and Rohl’s counsel on October 17, 2017. Travelers and Rohl argue that there are still too many photographs and little consideration has been given to their relevance to the matters in issue. Rohl argues that only photographs that relate to the areas in question should be produced as set out in LTS’ Statement of Claim.

[15] In response, LTS has proposed using geo-mapping software, a program called ArcMap, and providing it to Travelers and Rohl. The parties could then load the photographs into the software. LTS is prepared to provide the other parties with technical assistance in using the software if necessary. Travelers is not opposed to using the software but argues that the photographs need to be reviewed to determine if they are relevant and that photographs of the entire project are not necessary.

[16] LTS has also argued that the photographs are all relevant because one of the issues in the litigation is whether the alleged failures were the result of Rohl’s work or were the result of poor project design which was the responsibility of LTS. According to LTS, this means that photographs of all of the Project are relevant because there are portions of the Project where there were no failures. Moreover, LTS has alleged that there are more than 100 sites where there was a default by Rohl under the contract.

Document Dates of Records

[17] LTS initially harvested 19 million records. KPMG processed the records and reduced them to 1.2 million records. Heuristica then applied search terms and reviewed the records for relevance and privilege significantly reducing the number of records. LTS produced approximately 69,000 records to Travelers and Rohl.

[18] Of the records, there are 44,000 non-email records of which Travelers claims that a significant amount have incorrect document dates. The Protocol required the

parties to identify the document date as a schedule to the Statement as to Documents. The document date has been agreed to be the date of the document. Travelers says that, for many records, the document dates listed do not match the date of the document when it is opened. Some of these errors likely arise from the document being scanned and the resulting document date being the date the document was scanned rather than the date the document was originally created. Travelers wants LTS to review the documents and correct the document dates.

[19] LTS argues that in large e-discovery cases, inaccuracy of document dates is an unavoidable by-product of the process. Further, the parties have agreed that electronic documents will be listed through the use of available metadata and the field descriptors will be supplied by metadata instead of objectively coded data. LTS also argues that to require LTS to review every single document would be a slow and expensive process.

Analysis

[20] Dealing with the photographs, it is clear that the parties have a different view of the scope of relevance which is required to produce documents in this case. Travelers and Rohl argue that relevance is circumscribed to the areas of the Project that are in issue whereas LTS views relevance more broadly and argues that the entire Project is relevant.

[21] The discovery of documents is governed by Part 15 of the *Rules of the Supreme Court of the Northwest Territories, R-010-96 (Rules)*. Rule 219 states:

219. Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this Part, whether or not privilege is claimed in respect of the document.

[22] It is the obligation of the party producing documents or a Statement as to Documents to determine what is relevant and material and what is not. Relevance and materiality are determined by the matters that are in issue in the litigation. It is the ultimate responsibility of counsel to ensure that disclosure is provided in accordance with the *Rules*. *Dow Chemicals Canada Inc v Nova Chemicals*

Corporation, 2015 ABQB 2; *Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2011 BCSC 1128.

[23] It is apparent that there was little to no review of the photographs for legal relevance to the matters in issue in this litigation. The photographs were reviewed by an individual whose role did not include reviewing the photographs for legal relevance. The photographs were provided to LTS' counsel who produced them the next day to the defendants.

[24] It is also not an answer to say that everything is relevant. The comments of Jones J. in *Demb v Valhalla Group Ltd.*, 2014 ABQB 554 at para. 92 are apposite:

I agree with the Plaintiffs that if the Individual Defendants assert that entire contents of the Hard Drive are relevant and material, then the Individual Defendants should be expected to list them in an affidavit of records. However, it is highly improbable that all 83,000 documents on the Hard Drive are relevant and material. The *Ontario Guidelines* set out the importance of reviewing electronic documents for the purpose of production:

Review of electronic documents is essential, first, to separate relevant materials, which should be produced, from irrelevant material, which should not. Over-production of irrelevant electronic documents may be just as damaging to clients' interests and the litigation process as incomplete production: at 6.

[25] In my view, LTS has not adequately disclosed the photographs in accordance with the *Rules*. There must be some review and consideration given to what photographs are actually relevant. It is unrealistic for the Plaintiff to produce 371,000 photographs and expect the Defendants in this litigation to determine whether they are relevant to a matter in issue. LTS will be required to review the photographs for relevance to the matters in issue and produce them to Travelers and Rohl.

[26] LTS' suggestion of using geo-mapping software, whether it is ArcMap or another program that the parties agree upon, would seem to be of assistance in managing the photographs once they are produced as there will, even after review, likely be a significant amount of photographs. LTS will provide the other parties

with ArcMap or another mutually acceptable geo-mapping software program and technical assistance, if needed, to utilize the software.

[27] Dealing with the document dates of records, the issue of incorrect document dates is acknowledged by LTS but one that they claim is unavoidable in large electronic discovery processes. The issue becomes one of how much is required of a party in producing documents electronically.

[28] Document production in actions such as this one is an issue that the justice system grapples with, trying to find a balance between the parties and the realities of modern day complex litigation. The issue was described in *Cameco Corp v Canada*, 2014 TCC 45 at para. 61:

At least one appeal in this Court with a high volume of documents has proceeded utilizing a unique numerical identifier for the description of the document. Justice Lane in *Solid Waste* held that in cases where large volumes of documents were involved, a more practical system calls for documents to be described using an alpha-numeric or numeric identifier:

9 The sheer quantity of documents in many modern litigations demands a precise identification system for swift and certain retrieval of documents in examinations for discovery and trial. Such a system should also enable counsel to be certain that a document produced at trial has indeed been previously produced. It must enable counsel examining a collection of the opposite party's documents to be satisfied that he has the whole collection as described in Schedule A. A modern rule as to identifying documents cannot ignore the computer and its need for a unique identifier for every item to be retrieved. Unless very extensive details about each document are entered in schedule A, an alpha-numeric or numeric identifier is necessary. The preparation of a Schedule A containing a detailed description of every document would be a truly monumental task in many lawsuits. It is not practical.

[29] The concerns with electronic discovery, as acknowledged by the *Sedona Canada Principles Addressing Electronic Discovery*, is that metadata may be inaccurate and the parties may not be able to rely on metadata alone. *Canadian Imperial Bank of Commerce v The Queen*, 2015 TCC 280 at para. 240.

[30] One of the reasons that the parties entered into the Protocol was because they were aware that there was a significant amount of documents to be produced. The Protocol was an attempt to manage and delineate how the production would occur.

[31] Part I, Section 3 of the Protocol provides that, for all records, that metadata would be used in place of objectively coded data, where available, and using agreed upon fields.

[32] Part V of the Protocol states:

1. The parties agree that the following conventions will be adopted with respect to the listing of documents and associated metadata fields describing those documents:
 - a. Paper documents will be scanned and produced electronically in searchable pdf format and will include objective coding.
 - b. Electronic documents will be listed and described through the use of available metadata.

[33] The parties agreed that metadata would be used instead of objectively coded data for all records but they also agreed that paper documents would be scanned and produced electronically in searchable PDF format and include objective coding. For electronic documents, the available metadata would be used. In my view, this means that the parties intended that scanned paper documents would have some objective coding.

[34] LTS has raised the issue of the time and expense required to correct the errors. This litigation was commenced by LTS and as stated in *Demb, supra* at para. 106:

I agree that, as a general proposition, high costs should not excuse improper disclosure or non-production of relevant and material records.

[35] While I agree that 100% accuracy in electronic discovery is impractical, I find that the parties agreed to include objective coding to scanned paper documents

and that to the extent that this has not occurred, LTS is responsible for correcting those errors.

LTS' Notice of Motion

[36] Turning to the LTS Notice of Motion, the issue is when litigation privilege arose for Travelers.

[37] LTS argues that Travelers cannot claim litigation privilege over their investigation and correspondence until the bond claim was denied which was January 14, 2016. LTS' position is that any documents created prior to that date are subject to production.

[38] Travelers' position is that litigation was clearly in contemplation of the parties by October 26, 2015 and claims litigation privilege as of that date.

[39] Determining whether litigation privilege exists is a two part test. First, was litigation in reasonable prospect at the time the documents were produced? Second, what was the dominant purpose for the documents' production? The onus is on the party claiming privilege to establish that both parts of the test are met on a balance of probabilities. *Hamalainen v Sippola*, 1991 CanLII 440 (BC CA) at p. 12-13; see also *Nuna Investment Corp. v Shell Canada Products Ltd.*, [1997] N.W.T.J. No. 55 (S.C.) at para. 12.

[40] The difficult question is what the dominant purpose of a document was as courts have acknowledged that there is a continuum where, at some point, the dominant purpose shifts from investigation to preparation for litigation. As stated in *Hamalainen, supra* at p. 14-15:

Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom

it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

[41] A significant factor, although not a determinative one, in deciding when litigation privilege arises is the date on which an insurer denies a claim. *Pound v Drake Insurance Co.*, [1984] B.C.J. No. 1874 (CA); *Celli v White*, 2010 BCSC 313.

[42] On July 22, 2015, LTS issued a notice of default letter to Rohl copied to Travelers requesting that Rohl fix the alleged defaults. The next day, Rohl advised LTS that it would not correct the deficiencies. On August 27, 2015, in-house counsel for LTS circulated a draft standstill agreement to counsel for Travelers and Rohl. The draft agreement clearly contemplated the possibility that legal proceedings might be commenced in this matter. The agreement was never executed.

[43] On October 14, 2015, LTS notified Travelers of its claim on the bond. Following this, Travelers began to investigate the claim which took some time. In early November 2015, Travelers engaged external counsel to advise Travelers on LTS' claim against the bond. This counsel was introduced to LTS on November 4, 2015.

[44] An e-mail from counsel for Travelers to LTS indicates that a meeting scheduled for November 6, 2015 was part of "Travelers' independent investigation." Further e-mails in November re-iterate that Travelers is continuing to investigate LTS' claim.

[45] On December 3, 2015, another e-mail was sent from Travelers to LTS stating that "Travelers is nearing the completion of its investigation and is working on providing its position before the winter holidays."

[46] On January 5, 2016, another e-mail was sent from Travelers to LTS acknowledging the delay in providing Travelers' position and that the position

would be forthcoming in the upcoming weeks. On January 14, 2016, Travelers denied LTS' claim on the bond.

[47] It is clear that as early as July 23, 2015, it could be argued that litigation was in reasonable contemplation between the parties as that was the date that Rohl advised LTS that Rohl refused to correct the alleged defaults. As Travelers was the surety under the performance bond, this likely would include Travelers in any potential litigation.

[48] The issue of what the dominant purpose of a document created during this period is, as acknowledged, a more difficult question.

[49] Counsel for Travelers referred to LTS claiming litigation privilege as of August 21, 2015 and that LTS' counsel circulated a draft standstill agreement between the parties on August 27, 2015, which acknowledges that claims are contemplated. This also suggests that litigation was in reasonable contemplation by then but does not assist in determining whether documents created by Travelers were for the dominant purpose of preparing for litigation.

[50] Travelers was not formally notified of LTS' claim on the bond until October 14, 2015, although Travelers was certainly aware of the possibility of a claim much earlier.

[51] Until LTS formally made its claim to Travelers, I don't think it can be said that Travelers' dominant purpose in creating documents was for the purposes of litigation. This is because while litigation was a reasonable prospect early on, Travelers also had an obligation to investigate LTS' claim and to consider whether to grant or deny the bond claim. At some point, Travelers' dominant purpose in creating documents changed from investigative purposes to being in preparation for litigation. However, there is no evidence before me to suggest that, until Travelers denied the claim, documents created by Travelers were for the dominant purpose of litigation.

[52] Therefore, Travelers' litigation privilege arises on January 14, 2016, the day that LTS' claim was denied,

Conclusion

[53] For these reasons, Travelers' application is granted. LTS will be required to review the hard drive of photographs for relevance to the matters in issue and produce them to Travelers and Rohl. LTS will provide Travelers and Rohl with ArcMap or another mutually acceptable geo-mapping software program and technical assistance, if needed, to utilize the software. LTS is also required to correct errors in scanned paper documents to include objective coding if that has not occurred.

[54] LTS' application is also granted. Travelers will produce a further Statement as to Documents which reflects that Travelers has litigation privilege over documents commencing January 14, 2016.

[55] Costs will be in the cause.

S. H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this 12th day of March, 2019

Counsel for the Plaintiff : Mr. Kevin Loo
: Mr. Stephen R. Schachter, Q.C.

Counsel for the Defendant Rohl: Ms. Janet Jardine
: Mr. Brent Kaniski

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S-1-CV-2016-000011
S-1-CV-2016-000040

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