Court clarifies the duty to disclose records and the documents in possession doctrine

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Summary

In January 2022, the Honourable Madam Justice E. Sidnell released a procedural decision in the case of *Signalta Resources Limited v. Canadian Natural Resources Limited*, 2022 ABQB 89. The decision was a response to an attempt by the plaintiff, Signalta Resources Limited (Signalta), to admit into evidence at trial five documents (the Five Documents) which were not disclosed in either party's Affidavit of Records (AOR).

The trial judge accorded no weight to four of the Five Documents, either for the truth of their contents or as evidence of the knowledge of their contents by the defendant, Canadian Natural Resource Limited (CNRL). In doing so, the judge clarified the "interplay" between rule 5.16 of *Alberta Rules of Court*, Alta Reg 124/2010 (the Rules) and the common-law documents in possession rule.

This decision emphasizes the importance of disclosure of records in an AOR. The Alberta Court of Queen's Bench firmly separated the doctrine of documents in possession as an exception to hearsay rule, from the disclosure requirements under Part 5 of the Rules.

Background

This action arose from a claim over non-solution natural gas in certain split title lands in Alberta. One of the issues at trial was CNRL's state of mind during its heavy oil operations from the split title lands, which is relevant to the calculation of damages for any co-production of non-solution natural gas.

At trial, Signalta attempted to rely on the Five Documents, which were:

- a decision of the Alberta Energy and Utilities Board relating to a regulatory application made by CNRL;
- a record of evidence filed by CNRL in the Alberta Energy and Utilities Board proceedings that resulted in the above decision;

- a Ministerial Order issued to CNRL by the Saskatchewan Ministry of the Economy under *The Oil and Gas Conservation Act*;
- the affidavit of a CNRL employee filed in support of a lawsuit in court in Saskatchewan; and
- a regulatory Application by CNRL to the Alberta Energy Resources Conservation Board to amend its primary recovery schemes in the same area as the split title lands at issue in the litigation.

The Five Documents were not included in either Signalta or CNRL's AOR. Signalta submitted that, even if it was required to include the Five Documents in its AOR, it had sufficient reason for failure to do so, and relied on the documents in possession rule for its use of the Five Documents at trial.

Signalta submitted that, as documents in CNRL's possession in the ordinary course of its business, CNRL's knowledge of the contents of at least some of the Five Documents was relevant to CNRL's state of mind and should have been disclosed by CNRL. CNRL disputed that the Five Documents were relevant and material at all.

The law

The Documents in Possession Rule

As the Alberta Court of Appeal found in *Canadian Natural Resources Limited v. Wood Group Mustang* (Canada) Inc, 2018 ABCA 305 (IMV Projects Inc), the "classic statement" of the documents in possession doctrine was set out in H.M. Malek, Phipson on Evidence, 19th ed.

… Documents which are, or have been, in the possession of a party will, as already have seen, generally be admissible against him as original (circumstantial) evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate, or his state of mind with reference thereto. They will further be receivable against him as admissions (i.e. exceptions to the hearsay rule) to prove the truth of their contents if he has in any *way recognised, adopted or acted upon them*. (Emphasis in original)

There are two branches of the documents in possession doctrine: the first is to show knowledge of the contents of the document, and the second is to imply an admission of the truth of the contents of the document.

Reliance on the first branch of the documents in possession rule, where a corporation possesses the record, requires proof of a person in authority having knowledge of the record, and consideration of the degree and quality of possession. Mere possession or inclusion in the corporation's records is not enough.

In comparison, under the second branch of the documents in possession rule, recognizing, adopting or acting on the documents requires more than mere possession.

Part 5 of the Rules

Parties in a litigation have an obligation to produce all relevant and material records that are under the party's control. Relevance is determined by the pleadings. If, after a party has served an AOR, the party finds, creates, or obtains control of a relevant and material record not previously disclosed, the party must give notice of it to each of the other parties and serve a supplementary AOR on each of the other parties prior to scheduling a date for trial.

Rule 5.8(4) sets out how parties are to deal with records which are otherwise producible, but which a party objects to producing on the basis of litigation privilege, including the "solicitors' work product." In appropriate circumstances, solicitors' work product may include records that a lawyer obtains for the purpose of challenging, impeaching or testing a witness called by an opposing party. The trial judge in this case referred to two previous cases dealing with solicitor's work product, which show that the Rules require disclosure in an AOR a description of the documents over which litigation privilege is claimed. Exceptions may be made where a document only comes into existence during trial and the information is known to the witness being cross-examined (*Westfair Foods Ltd, 2004 ABCA 422 at para 31*, *Cahoon v. Brideaux*, 2010 BCCA 228 at para 39). Despite referencing these cases, the judge did not apply the solicitor's work product exception in this case.

Rule 5.16 sets out the consequences of failing to produce a relevant and material record by prohibiting the use of the record in evidence, unless the parties otherwise agree or the court permits its use on the basis that there was a sufficient reason for the failure to disclose. The purpose of this rule is to prevent trial by ambush.

The court's decision

The trial judge rejected Signalta's argument that it should be able to use the Five Documents as evidence that CNRL was aware of the contents of the documents under the first part of the documents in possession rule. The judge held that "neither branch of the documents in possession rule obviates the requirement of a party to disclose its records in accordance with Part 5 of the *Rules of Court.*" Accordingly, the judge found that none of the Five Documents were admissible on the basis of the documents in possession rule.

The trial judge then applied a four-part test in *Stone v. Ellerman*, 2009 BCCA 294 to determine, whether the Five Documents could be admitted into evidence despite not being disclosed in any AOR, which considered whether:

- the other party would suffer prejudice if the use of the record was permitted;
- there was a reasonable explanation for the non-disclosing party's failure to disclose the record;
- excluding the record would prevent the determination of the issue on its merits; and
- in the circumstances of the case, the ends of justice require that the record be admitted.

The trial judge found that:

- CNRL would be prejudiced if Signalta was permitted to use four of the Five Documents which were not disclosed by AOR;
- there was no reasonable explanation as to why the four documents were not disclosed;
- Signalta failed to show that the four documents were important to the evidentiary record and that exclusion of these records would interfere with the proper determination of one of the issues on its merits; and
- simply showing that the documents were relevant and material, and were not produced by CNRL, was insufficient to allow the Five Documents to be admitted. The process for addressing failure to produce relevant and material records is set out in Rule 5.11, and it is not an answer for the party relying a record to compound a disclosure failure by also failing to disclose.

The judge found that one of the Five Documents, the decision of the Alberta Energy and Utilities Board relating to a regulatory Application made by CNRL, was excused from disclosure under the *Stone v. Ellerman* framework because it was relied upon by one of CNRL's experts in his report. The judge admitted this record into evidence and accorded it full weight on the basis that the expert witness in question was able to independently authenticate and identify the document, and relied on it in giving his expert opinion.

Takeaways

This decision serves as a lesson for counsel who seek to rely on documents, which have not been disclosed in an AOR. The court has separated the operation of the documents in possession rule as an exception to hearsay rule, from a party's disclosure requirements under Part 5 of the Rules. It is now clear that a party in a civil action cannot avoid its obligation to produce records in accordance with Part 5 of the Rules by relying on the documents in possession rule.

While the court left the door open for counsel to use documents at trial as part of "solicitor's work product" under rule 5.8, that Rule and the common law principle behind it were not the focus of this decision.

By

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