

Court of Queen's Bench of Alberta

Citation: Alliance Pipeline Ltd. v. Smith, 2003 ABQB 843

Date: 20031021
Docket: 0303-15619
Registry: Edmonton

Between:

Alliance Pipeline Ltd.

Plaintiff

- and -

Vernon Joseph Smith, Lloyd Ernest Smith and Susan Ellen Smith

Defendant

**Memorandum of Decision
of the
Honourable Madam Justice Rosemary E. Nation**

INTRODUCTION

[1] The subject of this afternoon chambers application is whether the Applicant, Alliance Pipeline Ltd. ("Alliance") is entitled to an injunction against Vernon Smith restraining him from interfering with or counselling others to restrict Alliance's access to lands subject to an easement.

FACTS

[2] Alliance has an easement across certain lands of Vernon Smith. The wording as set out in exhibit D to the affidavit of Everett Altenhof, gives Alliance the right to use the easement lands to construct and maintain a pipeline: "together with the right of access to and from the easement lands across the remainder of the said lands by all necessary means and with all necessary personnel and equipment in emergency situations only."

[3] This easement, as indicated in the property sketch attached to exhibit D, intersects a government road allowance which is currently a ditch. The easement is slightly south of another government road allowance that is also not developed into a road.

[4] The pipeline was built around 1999. There have been several negotiations and agreements entered into between Vernon Smith and Alliance to do with access, temporary work space, and compensation. There was a dispute about the reclamation which Vernon Smith did of his own accord, and that has been the subject of an arbitration hearing before the National Energy Board. Neither party is any stranger to easements and access. The evidence is clear that the relationship between Alliance and Vernon Smith has been and remains strained.

[5] Dale Olsen was a land agent for Alliance and attended at Vernon Smith's lands originally on June 2, 2003. His purpose and the discussion on that day was to negotiate access onto the easement via 100 ft. of Mr Smith's private land.

[6] Dale Olsen and Vernon Smith were unable to agree on a price to complete the proposed access agreement, the form of which is exhibit one in the cross-examination of Dale Olsen. The demands by Vernon Smith extended not only to an entrance fee to cross the private land, but also crop loss on the easement and other matters. On June 5, when there was a failure to come to any agreement, Vernon Smith indicated that Alliance should not bother to come on the property, and he and Dale Olsen left on good terms.

[7] On June 6, Dale Olsen delivered a letter to Vernon Smith. It is the reaction to the delivery of this letter on which Alliance relies to obtain injunctive relief. The letter is exhibit F to the affidavit of Dale Olsen. It indicates that Alliance intends to undertake reclamation works on the easement lands starting June 9, and that Alliance understands that Vernon Smith has "indicated an intention to prohibit Alliance from accessing its right-of-way" unless demands for compensation are met. It goes on to state Alliance's position about its legal rights.

[8] What happened upon delivery of the letter is set out in a report marked as exhibit G to the affidavit of Dale Olsen. As Vernon Smith did not swear an affidavit in this proceeding, the account is uncontradicted. Vernon Smith had some (but it is not clear exactly what) information about a letter that had been earlier delivered to a relative. Vernon Smith made threats against Everett Altenhof, an employee of Alliance and said words to the effect that if Alliance set foot on his property he would sue Alliance, and that if Alliance tried to bring the Mounties in, he would take a few of them with him if he "goes down." Dale Olsen reported Vernon Smith to be so upset he did not want to leave him that way and stayed to calm him down for fifteen minutes. Vernon Smith then shook his hand, told him to have a good weekend and a safe drive home. Dale Olsen was concerned about his safety and reported the incident to the RCMP.

[9] On July 9, Dale Olsen spoke to Vernon Smith and asked if he had changed his position on an entry fee and prepayment of his damages. He said no, but named a price for a temporary access agreement. Dale Olsen described Vernon Smith's demeanour as gentle and concerned, and expressing upset with the person who went to the RCMP.

[10] Alliance commenced this action by way of Statement of Claim on July 10, 2003, asking for an interlocutory and permanent injunction prohibiting Vernon Smith from interfering in any way with its rights to have unhindered access onto the easement lands.

POSITIONS OF THE PARTIES

[11] Counsel for Alliance went through the reports by Dale Olsen in detail, in an attempt to establish that when Vernon Smith was talking about “my lands,” he was referring to the easement lands also, so that his comments between June 2 and June 6 should be seen in the context that he was refusing access to any of the easement lands not just access across his private land. Alliance also argued that the threat of violence was uncontradicted, and thus it is concerned about the safety of any employees working on the right of way, as Alliance does not want them to be exposed to violence. Alliance’s position is that it can and will access the right of way from the road allowance, and it intends to do that, without crossing any of Mr Smith’s private land not covered by the easement. Alliance wishes an injunction in the form attached as Schedule A to this decision, to protect its workers and to clearly set out its legal rights.

[12] Counsel for Vernon Smith argued that it was not clear Alliance intended to access the easement in a method other than across private lands until Alliance filed its brief a few weeks ago. No explanation or apology for the outburst of June 6 was provided. Counsel argues the words spoken by Vernon Smith between the June 2 and 6 are not clearly referring to the easement lands, it is Vernon Smith’s position he was denying access to his private lands to access the easement, unless he received compensation. It is his position that the test for an interlocutory injunction is not met.

ANALYSIS AND DECISION

[13] Having reviewed the evidence, it is not clear that Alliance told Vernon Smith that it was changing its position, and intending to access the easement from the road allowance or ditch, as opposed to going across his private land. The whole context of the discussion until June 6 related to a price for crossing private land. The letter of June 6 does not make any change of position clear. The letter had not been read by Vernon Smith prior to his outburst, although clearly he had some communication from another lay person about the contents.

[14] Vernon Smith did not prevent Dale Olsen from walking onto the easement lands (cross-examination pp. 4-5) and his discussions with Dale Olsen were about crossing 100 feet of private land (cross-examination p. 9 and p. 11).

[15] The evidence about access to the easement is in the cross examinations on the affidavits of the Alliance deponents. Dale Olsen in his cross-examination on p.10 is unclear about access not using the private land, but raises an issue about fencing. Everett Altenhof indicates the access would be through the ditch (the road allowance) but confirms there is no approach there currently. Mr Altenhof could not say if anyone from Alliance had ever discussed with Vernon

Smith any alternate access to the easement lands other than via the private land (cross-examination pp. 28-29).

[16] If Alliance had decided not to access the easement lands over private lands on June 6, it surprises me that Dale Olsen contacted Vernon Smith on June 9, and was specifically talking again about terms of access across his private lands.

[17] Vernon Smith's outburst on June 6 triggered this application. It has to be viewed in the context that it would not be clear to him that Alliance had changed its position and was not intending to cross his private land to get to the easement. His comments that he would sue Alliance are not offensive, his threats about Everett Altenhof and what he would do if Alliance brings Mounties to his property are not acceptable. Dale Olsen's evidence is that he stayed with Mr. Smith to calm him down, and Vernon Smith then suggested he have a good weekend and a safe drive. On June 9, Dale Olsen describes his conversation with Vernon Smith as amicable, with no threats.

[18] Considering this, is it appropriate that Alliance receive an injunction, in the general terms set out in the attached Schedule A, which is the order proposed by counsel? The law is not in issue. A party applying for an injunction must meet the tripartite test: a serious issue to be tried, whether the applicant would suffer irreparable harm if the application were refused and which of the parties would suffer greater harm from the granting or refusal of the relief (the balance of convenience test).

[19] I have to consider here that the easement is clear in its terms: Alliance has the right to maintain the easement lands, but it only has the right to access it over private lands in an emergency. This is clearly not an emergency. Thus, Alliance to do routine and non-emergency maintenance has the right to access the easement lands from the road allowance and but not across private lands not covered by the easement, without an agreement with the land owner.

[20] It can be said that there is a serious issue to be tried, Alliance wants a permanent injunction against Vernon Smith, there are certainly issues for the court to consider, the action is not frivolous or without merit.

[21] Alliance suggests it must have the order as a responsible employer before it sends workers onto the easement, in light of Vernon Smith's behaviour. This is the irreparable harm it argues, that he might be violent toward the workers and his words are to be taken to mean he will restrict access to any part of the lands covered by the easement.

[22] On the evidence I am not convinced that Alliance can meet the test of irreparable harm. Taken in context, I have difficulty on the evidence before me finding that the outburst of June 6 means Vernon Smith would inflict harm on someone properly on the easement lands. This is the irreparable harm upon which the applicant relied, there is no suggestion here that the work that needs to be done is urgent, or any irreparable harm will occur if the work is not done between now and the trial of this matter.

[23] It was argued by Alliance that there was a clear breach of the contractual terms by Vernon Smith, and so the rules requiring irreparable harm are relaxed, as was discussed in *Debra's Hotels Inc. v. Lee*, [1994] A.J. No. 748 (Alta. Q. B.) and *McDonald's Restaurants of Canada Ltd. v. West Edmonton Mall Ltd.*, [1993] A.J. No. 523 (Alta. C.A.). These cases make it clear that there must be a clear breach of a covenant, an anticipatory breach is not sufficient. I do not find on the evidence before me that Vernon Smith's words or actions, seen in context, were a clear breach of the quiet enjoyment clause of the easement lands.

[24] I cannot say that the balance of convenience test is compelling one way or the other on this application.

CONCLUSION

[25] As a result, I dismiss the application of the applicant. The parties are at liberty to address costs of this application before me, if necessary, at a later date.

Heard on the 02nd day of October, 2003.

Dated at the City of Calgary, Alberta this 14th day of October, 2003.

Rosemary E. Nation
J.C.Q.B.A.

Appearances:

Munaf Mohamed of Fraser Milner Casgrain LLP
for the Plaintiff

Richard C. Secord / Trina Kondro of Ackroyd Piasta Roth & Day LLP
for the Defendant

SCHEDULE 'A'

Action No: 0301-10820

IN THE COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

ALLIANCE PIPELINE LTD.

Plaintiff

-and-

**VERNON JOSEPH SMITH,
LLOYD ERNEST SMITH AND SUSAN ELLEN SMITH**

Defendants

BEFORE THE HONOURABLE) At the Court House in Edmonton, Alberta,
)
JUSTICE _____) on Thursday the 2 nd day of October, 2003.
)
IN SPECIAL CHAMBERS)

ORDER

UPON THE APPLICATION of the Plaintiff, Alliance Pipeline Ltd. (“Alliance Pipeline”), for an injunction as set out in its Notice of Motion filed August 7, 2003; **AND UPON READING** the Affidavit of Everett Altenhof and Dale Ohlson, both filed August 7, 2003; **AND UPON READING** the transcripts of the cross-examination on Affidavit of Everett Altenhof and Dale Ohlson conducted August 26, 2003; **AND UPON HEARING** submissions for counsel for Alliance Pipeline and counsel for Vernon Joseph Smith; **IT IS HEREBY ORDERED THAT:**

1. The Plaintiff, Alliance Pipeline Ltd. is granted a permanent injunction restraining and enjoining the Defendant, Vernon Joseph Smith, from interfering in any way or counselling or otherwise causing any persons to impede, restrict or interfere in any way with Alliance Pipeline’s rights to have unhindered access on the lands subject to the Easement Agreement dated June 16, 1999, entered into between Vernon Joseph Smith and Alliance Pipeline Ltd. for any of the purposes set out in the Easement Agreement which is attached as Appendix “A” to this Offer; and

2. This Honourable Court authorizes any peace officer to arrest and remove any person who the peace officer has reasonable and probable grounds to believe contravenes paragraph 1 above.

J.C.Q.B.A.