Federal Court  Cour fédérale

Date: 20111117

Docket: T-436-05

Citation: 2011 FC 1318

Ottawa, Ontario, November 17, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

VARCO CANADA LIMITED
VARCO, L.P.
WILDCAT SERVICES, L.P. and
WILDCAT SERVICES CANADA, ULC

Plaintiffs
(Defendants by Counterclaim)

and

PASON SYSTEMS CORP. and
PASON SYSTEMS INC.

Defendants
(Plaintiffs by Counterclaim)

REASONS FOR ORDER AND ORDER

[1] In their most recent motion, the Defendants seek to expand the existing order for the taking of commission evidence at the re-opened trial in Texas. In particular, they now seek to call, as

rebuttal witnesses, Messrs. Doughtie and Finney, and to have new letters of request issued to U.S. judicial authorities to compel the attendance of Mr. Doughtie. Mr. Finney is said to be prepared to appear voluntarily.

[2] The current motion is made against the background of the Defendants' failed second motion to reopen the trial so that the Defendants might call Messrs. Doughtie and Nink (not Finney) to testify as to an April 03 1992 letter as it relates to prior disclosure and to adduce evidence of a memo by Mr. Bowden (the original patentee) regarding early use of the invention. That motion did not mention Mr. Finney.

[3] The trial was originally re-opened on the Defendants' first motion to re-open because of the discovery that Mr. Bates Sr. (the patent agent for Mr. Bowden) was alive and still had his file concerning his dealings with Mr. Bowden (the Bates file). The discovery of this evidence caused Mr. Bowden to have a different recollection of events related to Mr. Bates than his evidence at trial. The trial was therefore re-opened to allow the evidence of Mr. Bates, the introduction of the Bates' file into evidence and to permit Mr. Bowden to correct his evidence.

[4] Following the Order re-opening the trial, the Court gave directions as to how it would proceed with the Bates evidence including the taking of evidence in Texas from Mr. Bates Sr. (who is ill) and Mr. Bowden.

[5] The Direction also stated:

> To the extent that the Defendants wish to introduce as new evidence the two letters referred to in their submissions of May 6, 2011,

> independent of Mr. Bowden being recalled, it will require a motion to re-open. To the extent that the letters are relevant to Mr. Bowden's re-opened evidence, it may be put to him in cross-examination and, if necessary, his evidence may be rebutted by the Defendants.
>
> (Underlining by Court)

[6] At this time, while the parties have an inkling of what Mr. Bowden will say, no one is sure what that evidence will be – least of all the Court. Given the twists and turns this case has taken, there is no guarantee what the Bates evidence or the Bowden evidence will be.

[7] Therefore, the first problem with the Defendants' motion is that it is premature. The trial was not re-opened to allow a new canvassing of all the issues at trial but rather, for the specific purpose of allowing in the Bates evidence and the corrected testimony of Mr. Bowden. Evidence at the re-opened trial, including rebuttal evidence, must be relevant in that it must be related to the purpose of the re-opened trial.

[8] The Court is not prepared at this time to expand the order for commission evidence until the new and corrected evidence is adduced and the issue of relevancy is clear.

[9] The second problem, related to the first, is that while Mr. Finney is prepared to appear voluntarily, it is not clear that his proposed evidence is relevant or that it should be permitted at the re-opened trial. Mr. Finney is proposed to be called to speak to documents which have already been entered in the trial but for which Mr. Finney was not called to testify at the trial.

[10] The Defendants are not permitted to revisit its trial strategy under the guise of calling rebuttal evidence at a trial which has been re-opened for a specific and narrow purpose. It is not clear how Mr. Finney's evidence (and what exactly he will say is not known) could meet the relevancy test referred to earlier.

[11] Until the evidence of Bates and Bowden is received, what may be proper rebuttal evidence will not be known.

[12] The final problem is that there is insufficient time to give effect to the Court's order, even if it was prepared to grant such an order. The reality is that it is unlikely that a subpoena can be issued by the U.S. authorities in sufficient time. Mr. Doughtie is unable to attend voluntarily because his employer requires a subpoena.

[13] For these reasons, the Defendants' motion is dismissed with costs.

ORDER

THIS COURT ORDERS that the Defendants' motion is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-436-05
STYLE OF CAUSE:	VARCO CANADA LIMITED VARCO, L.P. WILDCAT SERVICES, L.P. and WILDCAT SERVICES CANADA, ULC and PASON SYSTEMS CORP. and PASON SYSTEMS INC.
PLACE OF HEARING:	Ottawa and Toronto, Ontario (by video-conference)
DATE OF HEARING:	November 16, 2011
REASONS FOR ORDER AND ORDER:	Phelan J.
DATED:	November 17, 2011

APPEARANCES:

Ms. Sheila Block Mr. Peter Wilcox Mr. W. Grant Worden	FOR THE PLAINTIFFS (DEFENDANTS BY COUNTERCLAIM)
Mr. Christopher Pibus Mr. Peter Choe Ms. Selena Kim	FOR THE DEFENDANTS (PLAINTIFFS BY COUNTERCLAIM)

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