COURT OF APPEAL OF YUKON

Citation: *Carlock v. ExxonMobil Canada Holdings ULC*, 2020 YKCA 9

Date: 20200430
Docket: 18-YU841

Between:

Charles A. Carlock

Respondent
(Petitioner)

And

ExxonMobil Canada Holdings ULC

Appellant
(Respondent)

And

Dissenting Shareholders as Defined in Paragraph One of the Order of June 20, 2017

Respondents
(Respondent)

SEALED IN PART

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris
The Honourable Madam Justice Shaner

Supplementary Reasons to *Carlock v. ExxonMobil Canada Holdings ULC*, 2020 YKCA 4.

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Place and Date of Hearing: Whitehorse, Yukon
November 12, 2019

Place and Date of Judgment: Vancouver, British Columbia
February 7, 2020

Written Submissions Received from the Appellant:	March 23, 2020
Written Submissions (Supplementary) Received from the Appellant:	March 31, 2020
Written Submissions Received from the Respondents:	April 6, 2020
Written Submissions Received from the Appellant:	April 9, 2020
Date of Supplementary Judgment:	April 30, 2020

Written Reasons of the Court

Summary:

The successful appellant asks for costs of the appeal to be assessed at Scale 3 and for the respondents to return the costs awarded in their favour at the Supreme Court pursuant to the terms of consent costs orders entered in that court. Held: Costs of the appeal are awarded in the appellant's favour on Scale 2; pursuant to the consent order below, the respondents must return the costs currently held in trust. Section 193(11)(b) of the Yukon Business Corporations Act, which provides that dissenting shareholders shall not, except in special circumstances, be required to pay the costs of the "application or appraisal" in s. 193 fair value proceedings, does not extend to immunize dissenting shareholders from paying costs of an appeal. With respect to the costs of the application, that section displaces the ordinary "loser pays" rule, but does not indemnify dissenting shareholders for their own costs.

Reasons for Judgment of the Court:

Introduction

[1] On February 7, 2020, the Court released judgment in this appeal: *Carlock v. ExxonMobil Canada Holdings ULC*, 2020 YKCA 4. With respect to costs, we said: "Subject to any submissions on the questions of costs, I would order that the appellant is entitled to its costs.": para. 94. The parties subsequently provided written costs submissions.

[2] The issues arising on this application are (1) whether the appellant is entitled to its costs in this Court and, if so, on what scale, and (2) what order should be made in this Court in respect of two consent orders dealing with costs in the Supreme Court of Yukon (the "Consent Orders") described below.

[3] The appellant contends that it is entitled to costs on Scale 3 in this Court; that each party should bear its own costs in the Supreme Court; and, accordingly, costs held in trust paid by the appellant pursuant to the Consent Orders should be returned to it. The respondents contend that they are immune from a costs award in this Court, that the appellant is, in any event, barred from asserting an entitlement to costs because it did not seek costs in its notice of appeal, and that the issue of costs in the Supreme Court should be remitted to that court.

[4] For the reasons that follow, we conclude that the appellant is entitled to costs in this Court on Scale 2, to be assessed, and that the respondents must return to the appellant the costs awarded in the Supreme Court of Yukon, as contemplated by the Consent Orders in that court.

Background

[5] The respondents (petitioners below) were dissenting shareholders of InterOil Corporation ("InterOil"). InterOil's approval of a Plan of Arrangement through which InterOil became a wholly owned subsidiary of ExxonMobil Canada Holdings ULC ("Exxon"), by way of an exchange of InterOil shares for Exxon shares, triggered the shareholders' right to dissent under s. 193 of the Yukon *Business Corporations Act*, R.S.Y. 2002, c. 20 (*YBCA*). Pursuant to s. 193(6), the respondents applied to the Supreme Court of Yukon to set the fair value of their shares in accordance with s. 193(3).

[6] In the Supreme Court, Exxon submitted that the fair value of the shares was $49.98. This was equivalent to the value received by InterOil shareholders pursuant to the Plan of Arrangement. The dissenting shareholders submitted that fair value was $71.46. The dissenting shareholders succeeded below, with the Supreme Court setting the fair value of the shares at $71.46: *Carlock v. ExxonMobil Canada Holdings ULC*, 2019 YKSC 10.

[7] On appeal to this Court, the appeal was allowed, the order of the Supreme Court was set aside and the fair value of the shares was determined to be $49.98.

The Parties' Positions on Costs

[8] As noted, the appellant seeks costs of the appeal assessed on Scale 3, pursuant to s. 2(2)(c) of Appendix B of the Yukon *Court of Appeal Rules, 2005*. It does not seek its costs in the Supreme Court, accepting that s. 193(11)(b) of the *YBCA* is a statutory bar to a costs award against a dissenting shareholder, except in special circumstances. We will return to that section in discussing whether it is also a bar to a costs award against dissenting shareholders in this Court. The appellant

does seek return of the costs paid into trust pursuant to the Consent Orders, contending that this result is contemplated by their terms.

[9] The respondents contend that s. 193(11)(b) insulates dissenting shareholders from a costs award in this Court as well as the Supreme Court and protects their right to retain the costs award below. Moreover, the appellant should not be permitted to resile from its position in its notice of appeal that each party bear its own costs. Accordingly, each party should bear its own costs in this Court and the issue of what happens to the costs paid into trust pursuant to the Consent Orders should be remitted if this Court does not accept the argument that the respondents are entitled to retain the costs paid in the Supreme Court proceeding.

Discussion

[10] We would not give effect to the argument that the appellant is disentitled to seek costs having sought an order in the notice of appeal that "each party bear its own costs of the petition and this appeal." In its factum, the appellant sought an order for costs of the appeal and throughout. The respondents were put on notice of the appellant's position well in advance of the hearing. We observe that R. 12(a) of the Yukon *Court of Appeal Rules, 2005*, permits an appellant to amend its notice of appeal, without leave, "before the filing of the appellant's factum." Leave to amend is only required after the filing of the appellant's factum: R. 12(b). We regard the failure to amend the notice of appeal before the factum was filed as at most a procedural irregularity which has occasioned no prejudice to the respondents. In their submissions, the respondents failed to mention the position taken in the appellant's factum and made no submission in support of an argument that the appellant was nonetheless bound by its notice of appeal.

[11] We also reject the argument that the issue of costs in the Supreme Court should be remitted to that court. Costs in the court below were the subject of the Consent Orders. On May 13, 2019, Veale C.J. issued two orders. The first simply stated that costs and disbursements were awarded to the dissenting shareholders in the specified amount. In the second order, the appellant, respondent below, was

ordered to pay the costs and disbursements to the petitioners' law firm, subject to trust conditions specifically contemplating an appeal. The order provides:

> 3. Within fifteen (15) days of this Order, [Exxon] shall pay costs and disbursements of $726,014.54 (the "Costs") to Lenczner Slaght Royce Smith Griffin LLP ("Lenczner Slaght"). The payment of the Costs is subject to the following trust conditions:
>
> (a) Lenczner Slaght shall hold the Costs in trust pending the final determination of any appeal in the within proceeding; and
>
> (b) Lenczner Slaght shall either disburse or return the Costs to [Exxon] in accordance with the final order following final determination of any appeal in the within proceeding.

[12] In our view, the effect of the Consent Orders read together is clear. The orders contemplate that the costs will be held in trust pending the final outcome of any appeal and will be either returned or disbursed in accordance with the final order. The effect of the first order is spent as a result of our final order. The Consent Orders were not appealed. They are not before us. If it were necessary to set aside the first order, we would make that order. It is, however, sufficient to confirm that effect should be given to the explicit and clear terms of the orders and the costs held in trust be returned. This conclusion is based on the terms of the Consent Orders and not on the other substantive arguments about costs to which we now turn.

[13] The principal issue before us is whether the usual principle that a successful party on appeal is entitled to its costs has been ousted or displaced by s. 193(11)(b) of the *YBCA*. The effect of that provision to a petition in the Supreme Court is clear enough. Except in special circumstances, dissenting shareholders are immune from a costs award in a proceeding to value their shares. The question is whether that protection applies also to an appeal. Section 193(11)(b) reads:

> (11) A dissenting shareholder
>
> (a) is not required to give security for costs in respect of an application under subsection (6); and
>
> (b) except in special circumstances shall not be required to pay the costs of the application or appraisal.

[14] It is helpful to set this provision in the broader context of the rights of dissenting shareholders to seek a valuation of their shares. An application to the

Supreme Court to set fair value of dissenting shareholders' shares is made pursuant to s. 193(6), which says:

> (6) An application may be made to the Supreme Court after the adoption of a resolution referred to in subsection (1) or (2),
>
> (a) by the corporation; or
>
> (b) subject to subsection (6.1), by a shareholder if an objection under subsection (5) has been sent by the shareholder to the corporation,
>
> to set the fair value in accordance with subsection (3) of the shares of a shareholder who dissents under this section.

[15] The only reference to an appraisal within s. 193, other than subsection 11(b), is in subsection 12(e), which states:

> (12) In connection with an application under subsection (6), the Supreme Court may give directions for
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> …
>
> (e) the appointment and payment of independent appraisers, and the procedures to be followed by them;
>
> …

[16] After an application is made under subsection (6), subsection (7) states that a corporation shall make a written offer to dissenting shareholders offering to pay an amount considered by the directors to be the fair value of the shares. Subsection (10) says that a dissenting shareholder may make an agreement with the corporation to accept the offer made under subsection (7) any time before the Supreme Court pronounces an order setting the fair value of the shares.

[17] The protection of dissenting shareholders from costs awards is a relatively unusual provision in corporate legislation in Canada. The presumptive immunity to costs awards is found in the respective business corporations acts of the Northwest Territories and Nunavut (*Business Corporations Act*, S.N.W.T. 1996, c. 19, s. 193(11); *Business Corporations Act (Nunavut)*, S.N.W.T. 1996, c. 19, s. 193(11)), and Alberta (*Business Corporations Act*, R.S.A. 2000, c. B-9, s. 191(11)). Otherwise, neither the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, nor any of the other provincial acts, set out a presumption against costs awards against dissenting shareholders in fair value proceedings.

[18] The question before the Court engages a matter of statutory interpretation. The modern approach to statutory interpretation requires that the words of a provision be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 87. Plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms.

[19] We begin by observing that the plain wording of the section does not suggest that the costs protection extends to appeals. The section refers only to "the application or appraisal."

[20] In our view, reading "application or appraisal" as a matter of plain text, and in its immediate legislative context, suggests that the provision only applies to first instance proceedings in the Supreme Court. Subsection (6), the provision under which applications are made, specifically refers to applications "made to the Supreme Court" [emphasis added]. Subsections (13) and (14) provide further support for the view that the "application" referred to in subsection (11)(b) ends with the Supreme Court proceedings:

> (13) On an application under subsection (6), the Supreme Court shall make an order
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> > (a) setting the fair value of the shares in accordance with subsection (3)…
> >
> > …
>
> (14) On
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> > …
> >
> > (c) the pronouncement of an order under subsection (13),
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> … the shareholder ceases to have any rights as a shareholder other than the right to be paid the fair value of the shares in the amount agreed to between the corporation and the shareholder or in the amount of the judgment, as the case may be.

[21] The reference in these sections is clearly to the application in the Supreme Court. The reference to “the application” in the costs section does not by its terms extend the protection to subsequent proceedings in a different court. An appeal is not merely an extension of the proceeding before a different tribunal. Courts of appeal are statutory and rights of appeal are created by statute. Appeals are different and separate proceedings to the proceedings that give rise to an appeal.

[22] This matters. If the legislature had intended to confer a continuing costs protection on dissenting shareholders, one would expect the legislature to evince its intention clearly. This is particularly so where the effect of continuing protection would be to displace, limit or oust an appeal court’s discretion to award costs to a successful party. It is well established that as a general rule in this Court costs follow the event and a successful party is, other things equal, entitled to costs. We can see nothing in the plain wording of the section, in its immediate context, that supports a conclusion that the words “the application” should be interpreted to mean “the application and subsequent appeals.” Part of the context in which we must interpret the provision in question is the established costs regime applicable to appellate proceedings.

[23] This, of course, is not the end of the matter. The protection of dissenting shareholders from costs awards reflects a policy choice, one that is also reflected in case law. In enacting the section, the legislature has clearly endorsed the objectives of empowering shareholders and encouraging corporations to make offers, under s. 193(7), which realistically reflect the fair value of the shares. Unless “special circumstances” justify a contrary conclusion, dissenting shareholders do not pay costs of the fair value application or appraisal. Immunizing shareholders from costs awards enhances both goals.

[24] This is a case of first impression under the *YBCA*. Some guidance is available, however, from Alberta. In *RFG Private Equity Limited Partnership No 1B v. Value Creation Inc*, 2017 ABQB 178, the court explained: "section 191(11) is a shield that protects dissenting shareholders from costs consequences while

encouraging corporations to make reasonable offers of fair value": at para. 14. That said, the provision "cannot be interpreted as a statutory presumption to keep a dissenting shareholder whole by way of indemnity costs": *ibid*.

[25] In *Deer Creek Energy Ltd. v. Paulson & Co. Inc.*, 2009 ABCA 280, the Alberta Court of Appeal confirmed that the protection offered to shareholders by this provision is strong. The Court of Appeal reversed the lower court's finding that "special circumstances" were made out to displace the presumption and justify costs against the dissenting shareholders, and held that establishing "special circumstances" required behaviour which was unreasonable or in bad faith: at paras. 20–23.

[26] While this commentary is helpful, it is not determinative of the question whether the legislature intended to extend costs protection to proceedings in the Court of Appeal.

[27] First, we do not think that the purpose of costs protection in the Supreme Court compels the conclusion that the legislature intended to extend the protection to appeal proceedings. In our view, the ordinary approach to appeal costs ensures that both parties are treated fairly, and is consistent with the objectives of empowering shareholders and encouraging reasonable fair value offers.

[28] The bulk of the costs of fair value proceedings will be incurred at the trial level, at which point expert appraisers are often involved and complicated questions of fact are settled. The cost of the trial as compared to the appeal in this case is illustrative. A corporation, knowing that it cannot recover costs from dissenting shareholders at trial absent special circumstances, is unlikely to be dissuaded from making a reasonable fair value offer simply because it might be able to recover costs of a successful appeal should that eventually occur. Similarly, a dissenting shareholder is unlikely to be disempowered simply because it may be subject to an adverse costs award if it wins at first instance and then loses on appeal.

[29] Moreover, where there is a compelling, principled reason for declining to make a costs award in favour of a successful corporation on an appeal of a fair value order, the ordinary approach to costs leaves a discretion for the Court to depart from the presumptive rule that the successful party receives costs: *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 at para. 1.

[30] It is worth breaking down the scenarios under which an award of costs might be made against dissenting shareholders on appeal. When dissenting shareholders are successful on appeal, the ordinary approach would be to grant costs in their favour. It is only where dissenting shareholders lose on appeal that the prospect of costs against them arises. This can happen in two situations: first, the dissenting shareholders might lose at trial and lose on appeal; second, as in this case, the dissenting shareholders might win at trial and lose on appeal.

[31] In the first scenario, the objective of empowering shareholders would be taken too far if the dissenting shareholders were presumptively immune to an adverse costs order. Section 193(11)(b) ensures that dissenting shareholders can take a reasonable case to the Supreme Court without fear of being subjected to an overwhelming costs order at the end of trial. We do not think the legislature intended to afford a losing shareholder opportunity to make a costs-free case on appeal having lost at first instance.

[32] The second scenario is the one facing this Court. The shareholders were successful at trial, but lost on appeal. Here there are conflicting interests. Had the shareholders been unsuccessful below, they would face no adverse cost consequences, but the price paid for an erroneous success, corrected on appeal, exposes them to some cost consequences. That said, there is also a potential unfairness in the corporation, which is already denied costs at first instance and which acted reasonably throughout, also being denied its costs of a successful appeal. Had the legislature intended to deprive a corporation that succeeds on appeal of its entitlement to costs, we would have expected that to have been evident

in the legislation. It is not. We conclude that the ordinary rules as to entitlement to costs in this Court have not been ousted by the section.

[33] We turn now to the appropriate scale of costs. We think the appellant should be awarded costs to be assessed on Scale 2.

[34] Scale 3 costs are not warranted in this case. Rule 59(1) of the Yukon *Court of Appeal Rules* provides: "Costs payable to a party under these rues or by order must be assessed under Appendix B." Appendix B, s. 2, provides:

> 2 (1) If a party is entitled to costs, the costs musts be assessed under Scale 1 unless the court or a justice otherwise orders.
>
> (2) In fixing the scale of costs, the court or a justice must have regard to the following principles:
>
> (a) Scale 1 is for matters of ordinary difficulty;
>
> (b) Scale 2 is for matters of more than ordinary difficulty or importance;
>
> (c) Scale 3 is for matters of unusual difficulty or importance.
>
> (3) In fixing the appropriate scale under which costs will be assessed, the court or a justice may take into account the following:
>
> (a) whether a difficult issue of law, fact or construction is involved;
>
> (b) whether an issue is of importance to a class or body of persons, or is of general interest;
>
> (c) whether the result of the proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

[35] This was not a matter of unusual difficulty nor of importance, although it may have had some wider importance in respect of issues to do with approaches to valuation. In our view, an award of costs at Scale 2 is warranted having regard to the more than ordinary factual and legal complexity of the issues on appeal and the importance of the proceeding.

[36] It is necessary to deal with one final argument. In our view, s. 193(11)(b) of the *YBCA*, while displacing the "loser pays" principle, does not indemnify dissenting

shareholders for their own costs. We agree with what Justice Romaine said in *RFG Private Equity* about the analogous provision in the Alberta legislation:

> [14] However, while section 191(11) may provide an exception to the usual rule of "loser pays", it cannot be interpreted as a statutory presumption to keep a dissenting shareholder whole by way of indemnity costs. As drafted, section 191(11) is a shield that protects dissenting shareholders from costs consequences while encouraging corporations to make reasonable offers of fair value. However, granting full indemnity costs to dissenting shareholders on a presumptive basis would be contrary to the policy of encouraging shareholders to accept reasonable offers, rather than undertaking litigation with no downside risk.

[37] We reject the proposition that the respondents are entitled to retain the costs award in the Consent Orders.

Disposition

[38] The appellant is entitled to its costs of the appeal on Scale 2, to be assessed. Further to the terms of the Consent Orders, which provide for the disposition of costs in the Supreme Court, monies held in trust as security for the petition costs are to be returned.

"The Honourable Madam Justice D. Smith"

"The Honourable Mr. Justice Harris"

"The Honourable Madam Justice Shaner"