SUPREME COURT OF YUKON

Citation: *Carlock v. ExxonMobil Canada Holdings ULC et al.,* 2018 YKSC 20

Date: 20180417
S.C. No.: 16-A0193
Registry: Whitehorse

BETWEEN:

CHARLES A. CARLOCK

PETITIONER

AND

EXXONMOBIL CANADA HOLDINGS ULC and dissenting shareholders as defined in paragraph one of the Order of June 20, 2017

RESPONDENTS

Before Mr. Justice R.S. Veale

Appearances:
Meagan Hannam — Counsel for the Petitioner
Michael Dixon — Counsel for the Respondent ExxonMobil Canada Holdings ULC

REASONS FOR JUDGMENT

[1] VEALE J. (Oral): Carlock and other dissenting shareholders are applying to the Court for a determination of fair value of their shares in InterOil Corporation, pursuant to s. 193 of the Yukon *Business Corporations Act*. ExxonMobil, in a plan of arrangement, paid $45 per share effective February 22, 2017, the valuation date for the Exxon purchase of the InterOil shares. The arrangement also included a contingent resource payment.

[2] There has been extensive disclosure, as a result of an application by Carlock filed on September 27, 2017, in this Court, much of it by consent. However, the parties

have been unable to reach an agreement on para. l. of the application, which reads as follows:

> The agreement, letter of intent or written arrangement between Oil Search Ltd. ("Oil Search") and the Respondent Exxon or any of its affiliates in respect of the acquisition by Oil Search of the interest in PPL 474, PPL 475, PPL 476, PPL 477, and PRL 39;

[3] It appears that the document that Carlock wishes disclosed is an agreement dated May 29, 2017, after the valuation date of February 22, 2017. Carlock submits it is relevant to determine fair value. ExxonMobil objects to its relevance, as it is after the valuation date and also may have some prejudice for Oil Search. ExxonMobil has produced a copy of the agreement for my review. I will be returning it to them after this decision.

BACKGROUND

[4] The arrangement between ExxonMobil and InterOil relates to InterOil's interests in certain gas fields in Papua, New Guinea, specifically, the Elk and Antelope fields. InterOil was a joint venturer with Total SA and Oil Search. InterOil initially expressed an interest in selling its interests to Oil Search but, ultimately, InterOil concluded a sale with ExxonMobil. In effect, the sale of InterOil assets to Oil Search is ExxonMobil selling InterOil assets, now owned by it, to Oil Search.

[5] On May 29, 2017, Oil Search entered into an agreement to agree on the acquisition of a 30% interest in certain licences that are adjacent to the Elk and Antelope fields. It appears that neither Oil Search nor ExxonMobil have publicly disclosed the financial terms of the agreement, but there has been a press release by Oil Search, which essentially stated the importance of the agreement to them without disclosing any of the financial details.

[6] The agreement between Oil Search and ExxonMobil also includes a confidentiality agreement which was executed on a date close to the February 22, 2017 valuation date in this proceeding. The agreement to agree is also subject to the execution of a transaction document, which I am advised by counsel for ExxonMobil has not been reached and, hence, the use of the term “agreement to agree”. The agreement to agree or “memorandum of understanding”, as it is called by counsel for Carlock, does spell out a “carry amount” in dollar terms.

[7] There are three sources of law of disclosure in the Yukon.

[8] The first arises under s. 193(12)(b) of the Yukon *Business Corporations Act*, which states

> (12) In connection with an application under subsection (6), the Supreme Court may give directions for
>
> ...
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> (b) the trial of issues and interlocutory matters, including pleadings and examinations for discovery;

[9] Rule 50(9)(c) also applies and that rule is a chambers rule under the Yukon *Rules of Court*, and it states:

> (9) On an application, evidence shall be given by affidavit, but the court may
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> ...
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> (c) give directions required for the discovery, inspection or production of a document or copy thereof,

[10] Further, Rule 25 entitled "DISCOVERY OF DOCUMENTS" in the *Rules of Court* states as follows at (3):

> Disclosure
>
> (3) 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 rule whether or not privilege is claimed in respect of the document.

[11] In a British Columbia case determining a fair value, entitled *Cyprus Anvil Mining Corp. v. Dickson*, [1986] B.C.J. No. 1204 (B.C.C.A.), Lambert J.A. stated the following:

> [51] The one true rule is to consider all the evidence that might be helpful, and to consider the particular factors in the particular case, and to exercise the best judgment that can be brought to bear on all the evidence and all the factors. I emphasize: it is a question of judgment. ...

[12] Justice Davies in *In the Matter of Anthem Works Ltd. et al.*, 2005 BCSC 766, adopted that principle and added this at para. 72:

> (4) Mutual pre-trial examination for discovery and document production will, in my view, better inform a fair determination of value than the mere exchange of expert reports given that the courts must carefully consider the facts and assumptions out of which such opinions arise in order to resolve differences amongst or between conflicting expert opinions.

[13] In *Robinson v. Realm Energy International Corporation*, 2015 BCSC 2425, Burnyeat J. stated the following:

> [24] Regarding document production, it is incumbent upon the Defendants who had all of the information necessary to determine the value of the Shares to disclose all documents material and relevant to the issue. The case involved valuation of unproven oil and gas acreages. I am satisfied that the voluminous document production requested and ordered was not disproportionate to the complexity of the valuation undertaken by the expert retained by the Plaintiffs. The obligation was always on the Defendants to produce documents which were relevant to the proceedings. The fact that only a few of the documents that were produced were ultimately in evidence at Trial would not allow me to conclude that it was somehow inappropriate for the Plaintiffs to require the Defendants to produce what they were obligated to produce. I am satisfied that the two expert reports could not have been produced without the ordered document production and that the expert reports incorporated much of the information that had been

> produced so that it was not necessary for the documents produced to be submitted into evidence.

[14] There is no doubt that ExxonMobil has the information that assists in determining what a fair value will be for the shares of InterOil at the valuation date. The mere fact that a document made near a date that is subsequent to a valuation date does not mean that it has no relevance. It could have a high degree of relevance if the valuation has a higher value than that of the valuation date and may assist the dissenters. It may demonstrate just what the dissenters are alleging, that is, that the share value of $45 is not a fair value. On the other hand, it may assist Exxon in establishing the valuation date value is a fair value.

DISPOSITION

[15] I conclude that it is necessary for all the parties to have that information and provide it to their experts to determine whether it will be of assistance in pursuing their case. I therefore order that the agreement between Oil Search and InterOil dated May 29, 2017, be produced.

[16] ExxonMobil made very strong submissions that a public disclosure of this agreement would be prejudicial to the negotiations between ExxonMobil and Oil Search for a final agreement. However, in my view, that can be addressed by rigorous confidentiality provisions, which should be added to both counsel and experts in any derivative use of the document in this proceeding.

[17] Counsel have indicated that they may wish to discuss that or perhaps deal with those terms now, so that we can finalize the court order. I confirm that counsel have indicated that they will reach an agreement on those terms or return for a decision.

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VEALE J.