

COURT OF APPEAL OF YUKON

Citation: *Yukon (Government of) v. Norcope Enterprises Ltd.*,
2023 YKCA 7

Date: 20230809
Whitehorse Dockets: 22-YU894; 23-YU900

Docket: 22-YU894

Between:

Government of Yukon

Respondent
(Plaintiff)

And

Norcope Enterprises Ltd.

Appellant/
Respondent by Cross Appeal
(Defendant)

And

Intact Insurance Company

Respondent/
Appellant by Cross Appeal
(Defendant)

And

Tetra Tech EBA Inc.

Respondent
(Third Party)

And

**Norcope Enterprises Ltd., Norcon Concrete Products Inc.,
Yucal Properties Inc., and Douglas L. Gonder**

Respondents
(Further Third Parties)

- and -

Docket: 22-YU900

Between:

Government of Yukon

Respondent/
Appellant on Cross Appeal
(Plaintiff)

And

Norcope Enterprises Ltd.

Respondent/
Appellant on Cross Appeal
(Defendant)

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Tetra Tech EBA Inc.

Respondent/
Appellant on Cross Appeal
(Third Party)

And

**Norcope Enterprises Ltd., Norcon Concrete Products Inc.,
Yucal Properties Inc., and Douglas L. Gonder**

Respondents
(Further Third Parties)

SEALED IN PART

Before: The Honourable Mr. Justice Hunter
(In Chambers)

On appeal from: Orders of the Supreme Court of Yukon, dated November 14, 2022
and April 3, 2023 (*Yukon (Government of) v. Norcope Enterprises Ltd.*,
2022 YKSC 57 and 2023 YKSC 17, Whitehorse Docket 16-A0180).

Counsel for Norcope Enterprises Ltd.,
appearing via videoconference:

J.R. Tucker

Counsel for the Government of Yukon and
Tetra Tech EBA Inc., appearing via
videoconference:

L. Banton

Counsel for Intact Insurance Company,
appearing via video conference:

R.N. Beckmann

Place and Date of Hearing:

Whitehorse, Yukon
July 17, 2023

Place and Date of Judgment:

Vancouver, British Columbia
August 9, 2023

Summary:

The appellant applies for a stay of execution of a trial judgment and a sealing order over the affidavit filed in support of the stay application. Held: applications granted. The appellant is prepared to provide security for part of the judgment in a form acceptable to the respondent. The respondent has other forms of protection for its judgment. A sealing order over the affidavit is necessary to protect confidential financial information required for the stay application.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] The appellant Norcope Enterprises Ltd. (“Norcope”) applies for a stay of execution of a trial judgment in which the appellant was ordered to pay the respondent Government of Yukon (“Yukon”) the sum of \$2,362,388 plus interest and costs. The appellant also applies for a sealing order over the affidavit tendered in support of its stay application.

[2] The trial judgment arose from a contractual dispute between Norcope and the Government of Yukon concerning work on the apron at the Erik Nielsen Whitehorse International Airport commencing in 2014. The work performed by Norcope under its contract with Yukon included removal of the old apron, preparation of the soil beneath the old apron, and pouring two layers of concrete, one on top of the other, which would become the new apron.

[3] On June 11, 2014, Yukon sent Norcope a letter with respect to apparent settlement in the apron lean mix concrete. In the letter, referred to by Norcope as a waiver and by the trial judge as a warranty letter, Yukon stated that Norcope would not be responsible for subsurface conditions, including any vertical shifts due to seasonal fluctuations.

[4] Cracks appeared in the concrete poured by Norcope. A question arose as to whether the cracks were the consequence of poor construction practices by Norcope, or as a result of the movement of the soils beneath the apron.

[5] On February 23, 2017, Yukon commenced an action against Norcope for breach of contract, claiming the full cost of replacing the apron. The trial of the action

was approximately 5 weeks in duration and commenced May 9, 2022. On April 3, 2023, the trial judge released reasons for judgment holding Norcope liable for breach of contract, but apportioning liability for the apron between Norcope (as to 35%), Yukon (as to 15%) and the respondent Tetra Tech Eba Inc. (“Tetra Tech”) as to 50%. The effect of this apportionment is that Norcope is liable to Yukon for \$2,362,388, plus interest and costs.

[6] Judgment was also entered against the appellant Intact Insurance Company (“Intact”). Intact, which had supplied the performance bond for the project, was held jointly and severally liable to pay Yukon \$1,781,103.03 (the amount of the bond) of the amount awarded against Norcope.

[7] Norcope seeks a stay of execution of the judgment against it, pending appeal. It is prepared to offer partial security for the trial judgment, but asks that it not be required to provide that security in cash.

Stay of Execution

Test for a Stay

[8] The application for a stay of execution is made pursuant to s. 13 of the *Court of Appeal Act*, R.S.Y. 2002, c. 47, which permits a judge of the Court of Appeal to grant a stay “on those terms that are just”.

[9] The test for granting a stay of execution pending appeal was summarized by Justice Gower in *Ross River Dena Council v. The Attorney General of Canada et al.*, 2009 YKCA 2 (Chambers) in these terms:

[4] The test for a stay of execution of an order pending appeal is the three part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, which was adopted by the Yukon Court of Appeal in *Gonder v. Velder Estate*, 2001 YKCA 4. Specifically, the onus is on the appellant to show:

1. That there is some merit to the appeal, in the sense that there is a serious question to be determined;
2. That irreparable harm would be suffered by the applicant if the stay is refused; and

3. On balance, the inconvenience to the applicant if the stay is refused would be greater than the inconvenience to the respondent if the stay is granted.

[10] Where the judgment is for a significant sum, granting the respondent security for costs or for the judgment given below, can strike the right balance between the interests of the parties, but the full amount need not always be provided. Ultimately, the question is what would be in the interests of justice: *Senft v. Vigneau*, 2019 YKCA 14 at para. 16 (Chambers).

The Merits Test

[11] The threshold for the merits test is a low one. The appropriate question is whether there is a serious issue to be tried on appeal: *Cowichan Valley Regional District v. Cobble Hill Holdings Ltd.*, 2016 BCCA 160 at para. 15 (Chambers), application to vary dismissed 2016 BCCA 215.

[12] The appellant raises a number of issues for appeal, and specifically refers to the following passages from the trial judgment dealing with the standard of proof applied to the claim against Norcope, and the significance of the waiver or warranty letter:

[173] ... the question is how much of the damage to the apron was caused by inadequate construction and how much was caused by seasonal movement. I cannot conclude all the problems in the southwest portion were caused only by seasonal movement as there is nothing that would allow me to conclude poor construction practices employed elsewhere on the apron were not employed in the southwest corner.

[174] ... it is reasonable to conclude that Yukon gave that warranty on the understanding that the construction in the area of seasonal movement would be done properly. It cannot be an answer to the claim that even though the construction was poor, that letter is a defence. It is not.

[13] The appellant submits that the trial judge effectively reversed the onus of proof in circumstances where there was no evidence that Norcope employed poor construction practices which would have caused or contributed to cracking of the apron when it poured the concrete or otherwise worked on the southwest corner of

the apron. The appellant also submits that the trial judge erred in giving no effect to the waiver letter from Yukon relating to responsibility for seasonal movement.

[14] Without making any comment on the strength of these grounds for appeal, I am satisfied that they raise a serious issue for consideration. The merits test is met.

Irreparable Harm

[15] Norcope is a civil construction company based in Whitehorse, Yukon. The principal construction season is from May to October. The company owns several large vehicles and pieces of equipment which will be used in the current construction season. Some of these vehicles are encumbered by various liens, but Norcope owns three large pieces of equipment that are unencumbered (“the Unencumbered Pieces”) with a total value approximately the same as the value of the trial judgment. The Unencumbered Pieces are needed for Norcope to honour specific work contracts during the Construction Season of 2023, including Norcope's largest contract of the 2023 Construction Season.

[16] Norcope has asserted that if the stay application is denied, it may be necessary to sell some of the Unencumbered Pieces and to draw down on a Reserve Fund it maintains to satisfy foreseen and unforeseen disbursements and expenses which arise throughout the construction season so that its work can continue. If some of the Unencumbered Pieces are sold, they will no longer be available for Norcope’s use, jeopardizing its ability to honour specific work contracts.

[17] Norcope is prepared to offer Yukon security in the Unencumbered Pieces as a condition of a stay, should one be ordered.

[18] I am satisfied that being required to pay such a substantial judgment would interfere with Norcope’s ongoing business activities so as to constitute irreparable harm.

Balance of Convenience

[19] Assessing the balance of convenience requires weighing the impact on Norcope of not granting the stay against the impact on Yukon of granting it. The judgment is a large one. I would not be inclined to grant a stay without substantial security being available for Yukon to protect the trial judgment.

[20] On the record before me, it appears that Yukon has effectively three forms of security to provide that protection. First, Norcope has offered to provide security in the Unencumbered Pieces, and Yukon has indicated that this is an acceptable form of security in the circumstances. Second, the trial judgment also applies to Intact, which is jointly liable for \$1,781,103.03 of Norcope's judgment debt. If Norcope were unable to pay, Yukon can collect this amount from Intact. Finally, Norcope has alleged that Yukon has not made required payments in respect of an unrelated contract with Norcope, thereby engaging in a form of self-help to protect its position. Norcope has also stated that it does not object to some or all of the money owed to it by Yukon under the unrelated contract to be held as security.

[21] I am satisfied that in the circumstances, Norcope's offer of security over its Unencumbered Pieces provides adequate protection for Yukon, provided the appeal proceeds without undue delay. Yukon has requested that if a stay is ordered, the order should permit Yukon to apply to vary or set aside the stay if the appeal is not heard in November 2023, the next scheduled date for appeals to be heard in Whitehorse. I consider that a reasonable term for the stay.

Conclusion

[22] For the foregoing reasons, execution on the trial judgment will be stayed pending appeal or further order, subject to the following conditions:

- (i) Norcope will not encumber the Unencumbered Pieces pending disposition of the appeal, and will execute any documents reasonably requested by Yukon to perfect the security; and

- (ii) Yukon will be at liberty to apply to vary or set aside this order if the appeal is not heard in November 2023.

Sealing Order

[23] The appellant also requests an order sealing the affidavit of Douglas L. Gonder filed on its behalf on June 29, 2023, in support of the stay application. Yukon takes no position on this application.

[24] The basis for the application for a sealing order is that the affidavit contains commercially sensitive financial information that is confidential to the appellant's business.

[25] Unlike the application for a stay of execution, there is no express jurisdiction in a judge of this Court to make a sealing order. In British Columbia, the authority to seal all or part of the record derives from s. 30 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, which confers jurisdiction on a single justice to make orders incidental to the appeal and to make interim orders to prevent prejudice to any person: *Dempsey v. Pagefreezer Software Inc.*, 2023 BCCA 179 at para. 23 (Chambers); *R. v. Klos*, 2022 BCCA 105 at para. 6 (Chambers). There is no analogous provision in the *Yukon Court of Appeal Act*.

[26] In *Angerer v. Cuthbert*, 2018 YKCA 1 (Chambers), I expressed doubt as to the jurisdiction of a single judge of this Court to make an order requiring security for costs in light of the absence of any statutory authority similar to that contained in the *B.C. Act*. I have similar doubts concerning my jurisdiction to make a sealing order. My concern is that the powers granted in s. 1 of the *Yukon Act* are granted to the Court, not to individual justices of the Court. Section 13, which does confer power on a single judge to issue a stay of execution, appears to be a conspicuous exception.

[27] However, in *Whitehorse (City) v. Darragh*, 2008 YKCA 19 (Chambers), Frankel J.A. concluded that as a result of the combined effect of the *Yukon Act* and the *B.C. Act* in effect prior to 1971, a single judge of this Court has the same jurisdiction to make orders to prevent prejudice to any person as a justice of the B.C.

Court when a division of the Court of Appeal of Yukon is not sitting: at paras. 15–16. As no party is objecting to the sealing order, and *Darragh* provides a jurisdictional basis for making the order, I am prepared to assume jurisdiction to make the order sought.

[28] Court proceedings are presumptively open to the public: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 37. To obtain a sealing order limiting public access to court documents, an applicant must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Sherman Estate, at para. 38.

[29] The important public interest that can support a sealing order includes an important commercial interest, provided the interest is one which can be expressed in terms of a public interest in confidentiality: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 55. The general commercial interest of preserving confidential information is an important interest because of its public character: *Sherman Estate* at para. 41.

[30] In this case, the appellant has provided confidential financial information in the affidavit of Mr. Gonder filed in support of the stay application. Norcope states this information is intended to demonstrate that the business is a going concern, and that if made public, it would provide competitors insight into the manner in which Norcope prices and bids jobs and tenders. It attests that in the relatively small construction industry of Yukon, this would cause it significant commercial harm.

[31] There is a public interest in permitting appellants to demonstrate their financial means when making a stay application, without exposing their confidential financial information to the general public. The financial information contained in the affidavit is not and will not be part of the appeal record.

[32] The affidavit indicates that the information has been treated at all relevant times as confidential, the applicant's commercial interests could reasonably be harmed by its disclosure, and it has been accumulated with a reasonable expectation that it will be kept confidential, all criteria sufficient to support a protective order: *Dempsey* at para. 25.

[33] I am satisfied that the benefits of the sealing order outweigh its negative effects. The affidavit of Mr. Gonder will be sealed, subject to one qualification. If any issue arises as to the identification of the Unencumbered Pieces referred to in the affidavit, Yukon may refer to the affidavit to the extent necessary to resolve the question.

“The Honourable Mr. Justice Hunter”