SUPREME COURT OF YUKON

Citation: *Conklin Estate* v. *Sailer,* 2011 YKSC 18

Date: 20110214
Docket: 10-A0107
Registry: Whitehorse

BETWEEN:

THE ESTATE OF THE LATE JIMMY CECIL CONKLIN, DECEASED, AND JAMES O'HEARN

PLAINTIFFS

AND:

ART SAILER

DEFENDANT

Before: Mr. Justice L.F. Gower

Appearances:

André Roothman — Counsel for the Plaintiffs
Kyle Carruthers — Counsel for the Defendant

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application for an interim injunction by the plaintiffs, being the Estate of the Late Jimmy Conklin, and the purported executor of that estate, Mr. James O'Hearn. The defendant is Mr. Art Sailer. Specifically, there is a dispute about whether a certain lease of mining claims, which was entered into between Mr. Sailer and Mr. Conklin in 2009, has enured to the benefit of the estate generally and specifically to Mr. O'Hearn as an alleged sole beneficiary of that estate.

[2] There were some communications between Mr. O'Hearn and Mr. Sailer, I gather, in late 2009 after Mr. Conklin's death. The nature of those communications and

arrangements regarding what was to be done with the mining claims under the lease is in dispute. However, there was, according to Mr. O'Hearn, a further conversation with Mr. Sailer on May 8, 2010, where Mr. O'Hearn alleges that he was told by Mr. Sailer that the lease had died with Mr. Conklin, who is Mr. O'Hearn's step-father. The conversation allegedly continued with Mr. Sailer saying that it was not his problem that both of Mr. O'Hearn's parents had died, and he further allegedly stated to Mr. O'Hearn that he, Mr. Sailer, was in the mining business and not in the leasing business. Mr. O'Hearn also alleges in his third affidavit that, at that time, Mr. Sailer also said to him, "Why would I lease that ground to you. It is richer than the ground that I am working on."

[3] The result of those conversations has been that Mr. Sailer has effectively prevented Mr. O'Hearn from mining the leases this past 2010 mining season. It is further alleged that Mr. Sailer has been in touch with the Yukon Mining Recorder's Office, the Yukon Territory Water Board, and what is known as the YESAB office, indicating that he disputes Mr. O'Hearn's status as the legal representative of the estate and certainly as the sole beneficiary of the estate. In particular, with respect to the water licence issue, he objects to any assignment of the water licence from Mr. Conklin into the name of Mr. O'Hearn personally.

[4] There are further allegations, some of which are in dispute, that Mr. Sailer was in touch with some of the creditors of Mr. Conklin in relation to the mining claims and, in particular, MacKenzie Petroleum. Mr. Sailer's explanation for that is that he was concerned that one or more creditors might file mining lien claims against the mining claims and that this would have an adverse impact on his interest as the owner of the claims.

[5] I digress by indicating that it is undisputed that Mr. Sailer is the owner of the claims and that he leased the claims to Mr. Conklin for a period of three years, pursuant to a lease dated August 2009. Paragraph 2 of that lease indicates that:

> "Prior to the expiry of this agreement a more comprehensive detailed agreement will be drawn up which will be given for a period of two (2) years - upon expiry it will become renewable and negotiable."

Paragraph 10 states:

> "This agreement shall not be assigned without the written consent of the Lessor."

And finally, paragraph 19 states:

> "This Agreement shall enure to the benefit of and be binding upon the personal representatives, successors and assigns of the said parties respectively, wherever the context admits of such construction."

It is alleged by Mr. O'Hearn and it is undisputed, as I understand it, that the lease was prepared by Mr. Sailer, or under his instructions. Therefore, the general rule of *contra proferentem* will likely apply when this matter is fully litigated.

[6] As a result of Mr. O'Hearn being prevented from mining the leases this past mining season, he filed an action seeking to remedy the situation. This is an interim application for an injunction to prevent Mr. Sailer from entering on the mining claims, until such time as this Court has pronounced on the legal effect of the lease. Secondly, Mr. O'Hearn seeks to prevent Mr. Sailer, either personally or by any agent, employee or other person, from committing any further act of interference with the relationship between the plaintiffs and the Water Board, YESAB, MacKenzie Petroleum, or any

other agency or supplier to the plaintiffs, until such time as this Court has pronounced on the legal effect of the lease.

[7] With respect to the second aspect of the notice of application, I made an interim interim order on January 5, 2011, granting the plaintiffs that remedy, although it continues to be opposed by Mr. Sailer on this application for an interim injunction.

[8] The law on such applications is not significantly in dispute. The leading case on interim injunctions is *RJR -- MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311. That case adopted a three-stage test for courts to apply. At the first stage, the applicant must demonstrate that there is a serious question to be tried. However, the Supreme Court noted that the threshold at that stage is a low one and that this part of the test must be settled on the basis of common sense and an extremely limited review of the case on the merits. The second stage of the three-part test requires the applicant to convince the Court, on a balance of probabilities, that he will suffer irreparable harm if the relief is not granted. The third stage of the test requires an assessment of the balance of inconvenience.

[9] There is no real dispute on the first branch of the test. The question of whether Mr. O'Hearn has the authority to effectively step into the shoes of Mr. Conklin under the lease, either as personal representative of the estate or as the sole beneficiary, or both, appears to be a genuinely serious one. I note that what is relied upon in that regard by Mr. O'Hearn includes his application to the Superior Court for the State of Alaska for letters of administration appointing him to act as the personal representative of the estate, as well as a subsequent successful application by Mr. O'Hearn to have those

orders resealed in this jurisdiction. The will document, or the alleged will, is in fact titled a Power of Attorney, and it states that:

> "I, Jimmy C. Conklin, being of sound mind and body, do hereby give James E. O'hearn presently residing at, 50445 Takoda St. #8, Kenai, AK, 99611, power of attorney over all of my estate and personal property to be distributed as he sees fit at the time of my death. [Et cetera]"

[10] I am advised that Ms. Delores Krise, Mr. Conklin's sister and one of the potential beneficiaries, disputed the proving of the Power of Attorney as Mr. Conklin's last will and testament; that there was a hearing; that evidence was put before the Superior Court of Alaska; and that Ms. Krise was given an opportunity to testify. At the end of the day, the Alaskan Court made orders giving Mr. O'Hearn authority to act as the personal representative of the estate and granting him letters of administration.

[11] The question which obviously arises, then, is whether Mr. O'Hearn, with that authority, can step into Mr. Conklin's shoes under the lease and mine the property for the balance of the term of the lease. I am satisfied that this is a serious question to be tried and, based on a preliminary assessment of the case, that the applicant has met his onus on the first stage of the three-part test.

[12] With respect to the issue of irreparable harm, one of the examples given in *RJR -- Macdonald* is that this can include instances where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. That is not necessarily the case here, because if the leases are not mined, then what gold there is, will stay in the ground. But, I do take judicial notice of the current economic

environment, and the fact that the price of gold has been higher in the last year than it has ever been historically - in the range of $1,300 to $1,400 an ounce.

[13] There is little evidence as to what the specific value of the claims is in terms of the amount of gold that might be mined out of them. I have some evidence that the claims were purchased by Mr. Sailer for $160,000, and I think there are ten in number. The evidence of Mr. O'Hearn in his first affidavit touches on that point, and he says:

> "... based upon the 2009 production, which is a reliable indicator for future production, I expected to be mining the same amount of gold during the 2010 mining season. Based upon the current gold price of around $1,300 USD per ounce that would have resulted in an approximate gross income from gold sales of between $650,000 USD and $1,040,000 USD."

Of course, those numbers are highly speculative, but they do indicate that there could be significant damages at the end of the day.

[14] Now, Mr. Sailer's response is that the damages, if there are damages, are compensable by payment of money and that Mr. Sailer is "good" for that, in terms of being a secure litigant, by virtue of the fact that he remains the legal owner of the ten mining claims. I have a couple of concerns about that response. First, is the extent to which the mining claims standing alone, and not as a mined entity, can be taken as security is up in the air. Second, if the injunction is not granted, one of the possibilities is that the term of the lease will expire before the matter is finally litigated. In that event, Mr. O'Hearn will lose his opportunity to profit, which could be in the range of several hundred thousand dollars, if not over a million dollars. If he then turns to enforce his judgment against Mr. Sailer, how is he to do that? Is he to seize the mining claims and then seek to sell them? And if so, what would be the value of the mining claims as

unmined assets? If the purchase price that Mr. Sailer paid of $160,000 is any indication, then the damages could significantly exceed the face (sale) value of the mining claims.

[15] In my considered opinion, on a balance of probabilities at this stage, Mr. O'Hearn and the estate, or both, could suffer irreparable harm if the interim injunction is not granted. Here I mean harm of a nature incapable of being quantified in monetary terms, or which cannot be cured, usually because one party cannot collect damages from the other, to use the language from *RJR -- MacDonald.*

[16] The third aspect of the three-part test is the balance of inconvenience and requires the Court to determine which of the two parties will suffer the greater harm from the granting or the refusal of an interim injunction, pending a decision on the merits of the case. *RJR -- MacDonald* indicates that the factors to be considered at this stage are numerous and vary with each individual case. One of the factors that can be considered arises from an earlier case, *Canadian Broadcasting Corporation* v. *CKPG Television Ltd., et al.,* 1992 CanLII 560 (B.C.C.A.). That case asked the question:

> "...which of the parties has acted to alter the balance of their relationship and so affect the status quo;"

That seems an appropriate factor to take into account in this case. I agree with the submissions of Mr. Roothman, on behalf of Mr. O'Hearn, that his client has, on the face of it, done everything that he needed to do in order to legitimately step into the shoes of Mr. Conklin under the lease. He took steps to have the will document proven (on notice) in the Alaskan courts, and that was followed by taking timely steps to have the Alaskan orders resealed in the Yukon as an order of this Court. He then attempted to have the water licence and other related mining authorities transferred appropriately so that he

could begin mining in the 2010 season, only to learn at that stage that Mr. Sailer was objecting.

[17] Mr. Sailer, on the other hand, has taken all of his actions, short of defending Mr. O'Hearn's claim in the within action, extra-judicially. He has made it very clear, based on the unopposed allegations of Mr. O'Hearn, that he has no intention of authorizing Mr. O'Hearn to continue operating under the lease and will do everything in his power to prevent that from happening. As I said, the lease is of a limited lifespan. There may only be one further mining season after the 2011 summer season. It may be that there is an argument to make that paragraph 2 of the lease allows for a further renewal, but given Mr. Sailer's stated position on the record thus far, one would not expect him to be a willing participant in the negotiation of a further "detailed agreement" to extend the term of the lease.

[18] So, in all of the circumstances, it would seem that the longer things are delayed, the more the situation works to Mr. Sailer's advantage and, in that sense, I find that the balance of inconvenience favours Mr. O'Hearn. It is he who will suffer the greater harm if the interim injunction is refused.

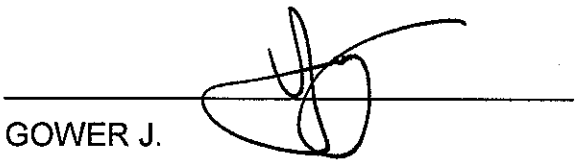
[19] I also see no reason not to continue the interim interim injunction with respect to the issue of Mr. Sailer being enjoined from acts of interference with bodies such as the Water Board, YESAB, and MacKenzie Petroleum. There was a specific request by Mr. Sailer's counsel at this hearing for further directions as to what might constitute acts of interference. My response is to simply state that an act of interference would be any act of Mr. Sailer, either personally or through any agent, employee, or other person at his

direction, which would adversely affect the ability of Mr. O'Hearn to continue mining on the claims under the lease.

[20] To the extent that Mr. Sailer may feel that he needs to be in contact with some of these bodies to obtain evidence to continue with this litigation, then I would suggest that, if counsel are unable to agree, the matter could be dealt with by way of case management on short notice.

[21] Finally, for clarity, I am also ordering that Mr. Sailer be enjoined personally, as well as by any agent, employee, or other person, from entering on the mining claims listed in the lease, as set out in paragraph 1 of the notice of application.

[22] I agree with Mr. Sailer's counsel that it would not be appropriate to consider costs at this interim stage, and therefore I order that costs shall be in the cause.



GOWER J.