IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Alford* v. *Government of Yukon, et al.*, 2006 YKSC 29

Date: 20060411
Docket No.: S.C. No. 05-A0042
Registry: Whitehorse

Between:

DOMINIC ALFORD

Petitioner

And

GOVERNMENT OF YUKON as represented by the Public Service Commission and VINCENT L. READY, ARBITRATOR

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

Timothy S. Preston, Q.C.	Counsel for the petitioner
Peter A. Csiszar and Zeb Brown	Counsel for the respondent Government of Yukon

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the respondent Government of Yukon ("Government") for a stay of proceedings, or alternatively an adjournment, of a hearing on the within petition currently scheduled for April 12, 2006, which is less than a week away. The petition arises from the petitioner's termination of employment with the Government in 2003. It was originally scheduled to be heard on September 21, 2005, but the Government made a preliminary application challenging the petitioner's standing. It was agreed between counsel that the standing issue would be argued on September 21st and the merits of

the petition would be argued later, depending upon my ruling on this preliminary issue. That ruling was issued December 21, 2005 (2005 YKSC 74). The Government has appealed that ruling and expects the appeal will proceed the week of May 29, 2006.

ISSUES

[2] Issues in this application are as follows:

1. Whether there would be irreparable harm to the Government if the stay is not granted;
2. Whether the balance of convenience favours the imposition of a stay, that is whether the Government will suffer more harm if the stay is not granted than the petitioner will suffer if the stay is granted; and
3. Whether there is any other justifiable reason for adjourning the hearing of the petition until the appeal on the issue of standing is heard.

ANALYSIS

[3] The parties have largely agreed that the test on an application for a stay of proceedings pending an appeal is as follows:

a) Is there a serious question to be tried on the appeal?

b) Will the applicant suffer irreparable harm if the stay is refused?

c) Where does the balance of convenience lie?[1]

[4] As to whether there is a serious question under appeal, the notice of appeal filed by the Government on the question of standing does not set out the grounds of appeal. The threshold here is relatively low. Essentially, the standard is whether the appeal could possibly succeed. Although the petitioner, in his written outline on this application,

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[1] *MacKinnon* v. *National Money Mart Co.*, 2004 BCCA 137; *Dawson (City)* v. *TSL Contractors Ltd.*, 2002 BCCA 707

purported to argue whether there was a serious question to be tried on the appeal, he did not do so at the hearing of this application. Of course, I was the chambers judge who made the decision which is appealed from. Notwithstanding that fact, both parties readily conceded that I have jurisdiction on this application for a stay. Thus, I take it from all the circumstances, including my awareness of the complexity of the issue, that the petitioner does not seriously question whether there is a genuine question of standing under appeal. Accordingly, I find that the first part of the test is satisfied.

[5] As to whether the Government will suffer irreparable harm if the stay is refused, the Government's counsel submitted that if the hearing of the petition proceeds as scheduled prior to the appeal, and there is a finding in favour of the petitioner, "this may convolute the substantive and procedural issues". Further, the Government argued that it would "suffer fiscal prejudice in having to defend the petition on the merits," when that hearing may be rendered unnecessary if the appeal is successful. I challenged the Government's counsel on how the issues on the appeal may be "convoluted" by a finding on the merits in the favour of the petitioner. I understood him to say that the Government's preference is to argue the question of standing separate and apart from the other issues arising from the petition.

[6] While I appreciate that the issue of standing is an important one for the Government and that it has far reaching implications beyond this particular case, I remain unpersuaded that the Government would be seriously prejudiced if it is not allowed to argue the standing appeal separate and apart from any other issues that may arise from a hearing on the merits on the petition. In other words, if the petition is heard prior to the appeal and a decision is made in favour of the petitioner, it would be open to

the Government to appeal that decision and it is conceivable that such an appeal could be combined with the existing standing appeal, so that all issues appealed by the Government could be argued at one appeal hearing. It is certainly not uncommon for the Court of Appeal to have to deal with more than one issue in a given appeal and I am sure that the standing issue could be dealt with separately as an initial ground of appeal, without any undue complication or convolution of any additional substantive issues.

[7] The Government also made reference to the potential problem arising from multiple proceedings and inconsistent findings, relying generally upon the *Dawson (City)* case, cited above. Once again, I fail to see how those concerns specifically apply to this case. It is true that if the petitioner is successful on the hearing on the petition, a subsequent finding against the petitioner on the standing issue under appeal would render a decision on the petition moot. But that is not the same situation as the one of concern in the *Dawson (City)* case, where there was risk of inconsistency between findings in an arbitration and a parallel action in the Yukon Supreme Court. In the case at bar, the petition proceeding and the appeal proceeding are not parallel. In any event, as was noted by Veale J. in the chambers decision leading to the appeal in the *Dawson (City)* case, at para. 9, it is generally recognized that multiplicity of proceedings is a strong, but not a decisive, ground in refusing a stay of proceedings.

[8] I give little or no weight to the Government's submissions on the costs it will incur if it has to argue the petition first, and perhaps unnecessarily. The Government presumably has already done a significant amount of preparation for arguing the merits of the petition, as it was apparently ready to do so in September 2005, before raising the preliminary question of standing. Further, as we are less than a week away from the

scheduled hearing date of April 12, 2006, I expect the Government has already committed time and resources in preparation for the same.

[9] In short, I am not persuaded that the Government will suffer irreparable harm if the stay is refused.

[10] As for the balance of convenience, the petitioner strenuously submits that he should be entitled to his “day in court” to argue the petition, which in turn seeks the relief of an adjudication on the merits of his termination from the Government’s employment. He is currently unemployed and claims to be in financial difficulty. While his evidence in support of that difficulty is lacking in some respects, and while the delay in hearing the petition contemplated by the Government would admittedly be of relatively short duration (the Government committed to being prepared to argue the petition within a very few weeks of hearing the appeal, if it is unsuccessful) in comparison with the overall time periods since the cause of action arose, I would expect very little, if any prejudice to the Government to proceed with the hearing of the petition prior to the hearing of the appeal. I acknowledge the Government’s argument that, even if the petition is argued prior to the appeal, the petitioner will have to await the outcome of the appeal in any event before the matter would potentially proceed to an adjudication on the merits. While that is an important factor for me to consider, it does not tip the balance in favour of the Government.

[11] It may be helpful to compare the potential scenarios which could arise if the hearing on the petition proceeds as scheduled, in comparison with the scenarios which could follow a stay of proceeding.

[12] If the petition is heard as scheduled and the petitioner loses, then that is the end of the matter as far as the petitioner is concerned. The Government has indicated that it would likely continue to argue the appeal on the question of standing because of the precedential value that such an appeal would have for other cases. However, the petitioner says he would take no part in such an appeal, as it would only be of academic interest to him.

[13] If the petition is heard as scheduled and the petitioner wins, then the Government could appeal that decision together with, or separate from, the appeal on the issue of standing. If the petitioner is successful on those appeals, then he would presumably proceed to an adjudication of his termination on the merits. Proceeding in that fashion could result in as many as four additional hearings for the petitioner: the petition hearing, the standing appeal, the merits appeal and the adjudication. However, if the appeal combined the standing and merits issues, which would be logical and therefore likely, the maximum number of potential further hearings would be reduced to three.

[14] On the other hand, if the petition is stayed pending the appeal on standing, and if the Government is successful on that appeal, then that is the end of the matter. However, if the petitioner is successful on that appeal, then he would have to proceed with the hearing of the petition. Once again, if he is successful on the petition, the Government could appeal and if the petitioner was successful at that stage, he would only then proceed to his adjudication on the merits. This latter scenario could also give rise to as many as four additional hearings for the petitioner: the standing appeal, the petition hearing, the merits appeal and the adjudication.

[15] Thus, I conclude that the petitioner will suffer less prejudice if the petition is heard as scheduled. That scenario potentially gives rise to a minimum of one further hearing and a maximum of three, assuming the appeal combines the standing and merits issues. The scenario of hearing the standing appeal first potentially gives rise to a maximum of four additional hearings. The petitioner is also far less able to fund such protracted litigation than the Government.

[16] On balance, I conclude that the petitioner will suffer more harm if the stay is granted than the Government would suffer if it is not. Consequently, I find that the Government has not satisfied me with respect to the second and third aspect of the three-part test for a stay of proceeding pending appeal.

[17] In the alternative, the Government invited me to exercise my discretion and adjourn the petition until after the appeal is heard. There is no question that I have the inherent jurisdiction to do so, as well as specific powers under the applicable *Rules of Court*. However, the petitioner argued that where the reason for applying for an adjournment is a pending appeal, the proper procedure is to apply for a stay pending the determination of the appeal, as the filing of the appeal does not operate as a stay. In support of that proposition the petitioner referred to the case of *Quintette Coal Ltd.* v. *Nippon Steel Corp.*, [1990] B.C.J. No. 2278 (B.C.C.A.). That was an application by the respondent in an appeal for an adjournment. The appellants were purchasers of coal from the respondent. The appeal concerned a price arbitration and there had been a number of interlocutory proceedings. The respondent sought leave to the Supreme Court of Canada on one of the interim rulings and argued that the appellants' appeal would be rendered academic by the proceedings in the Supreme Court.

[18] Taggart J.A., said, at p. 3 of the Quicklaw report:

> Counsel for the [appellant] purchasers submits no adjournment should be granted. He makes the point that in the usual course of an appellate procedure, if the appellant seeks to avoid the effects of a judgment under appeal an application for a stay of proceedings may be sought. Orders are commonly made granting stays but on conditions that are designed to protect the rights of the respondent under the trial judgment which he holds. …

Taggart J.A. implicitly accepted that argument, as he decided that, in the circumstances of the case, the adjournment should be refused.

[19] In any event, even if I were to consider the application for an adjournment as an alternative to the stay application, I would still have to exercise my discretion judicially in accordance with established legal principles. In other words, I could not grant the adjournment without a valid and substantial reason. It is trite to say that adjournments are commonly granted in circumstances where parties or their counsel experience scheduling problems, witnesses are temporarily unavailable, or more time is needed to procure evidence or prepare arguments. None of those reasons are applicable in this case. The reason for the adjournment advanced by the Government is the same reason advanced in support of its application for a stay. Thus, the test for whether an adjournment should be granted on this application is exactly the same as that for granting a stay. As I have already found that the Government has fallen short in meeting the test for a stay, I am similarly unable to grant an adjournment.

[20] I also find support for my conclusions here in the stated object of the *Rules of Court*, at Rule 1(5), which is “to secure the just, speedy and inexpensive determination of every proceeding on its merits.”

CONCLUSION

[21] In the result, the petition will be heard as scheduled on April 12, 2006, and the Government's application set out in its notice of motion filed March 15, 2006, is dismissed. Costs may be spoken to at that hearing.

GOWER J.