

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *May et al. v. Circumpacific
Energy Corp. et al*, 2004 YKSC 2

Date: 20031218
Docket: S.C. 03-A0071
Registry: Whitehorse

Between:

WILLIAM MAY, PETER WEICHLER, BERT PETERS,
ROBERT SCHIESSER, DAN McCARTHUR
and DAVID SMIDDY

Petitioners

And:

CIRCUMPACIFIC ENERGY CORPORATION,
PHILIP FRANCIS KELSO, CHARLES E. ROSS,
MALCOLM FRASER, MICHAEL SILVER
and GRAHAM CHARLES REVELEIGH

Respondents

Before: Mr. Justice R. Veale

Appearances:

Brett Code (by phone) and Emily Hill

William Hopkins (by phone) and Grant Macdonald, Q.C.

For the Petitioners

For the Respondents

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): There is a petition before the court by William May et al. against Circumpacific Energy Corporation and others, which is essentially an oppression application under s. 243 of the *Business Corporations Act*,

R.S.Y. 2002, c. 9.

[2] In an order dated September 5, 2003, I gave Circumpacific Energy Corporation leave to file a statement of defence, but I did not convert the originating application into the trial of an action.

[3] The petitioners now bring a Notice of Motion essentially seeking two things. One, an order that there be an examination under oath of three parties, namely, Paul Leger, who resides in Ontario, as well as Joe Ball and Fred Buccini, who I understand reside in Alberta. Paul Leger was the corporate relationship manager of the Alberta Treasury Branch and was knowledgeable about the banking files between Circumpacific and the Alberta Treasury Branch. Mr. Buccini and Mr. Ball were former employees of Circumpacific.

[4] The second part of the application is for production of a number of documents relating to banking transactions of Circumpacific with its Alberta Treasury Branch banker. Circumpacific has agreed to produce the bank statements with the Alberta Treasury Branch for the months of May and June 2002. So that is no longer an issue. However, the petitioners still seek the files used by Mr. Leger in his supervision of Circumpacific and his administration of Circumpacific's loan file with the Alberta Treasury Branch, as well as all documents and memoranda relating to Alberta Treasury Branch and Circumpacific as set out in paragraph 3(c) of the Notice of Motion of the petitioners.

[5] It is now agreed by the parties that the application is proceeding on the basis of what is permissible with respect to an originating application in chambers. The date for that hearing is the first week in February 2004, and the application has

proceeded on the basis that the Court has powers set out under Rule 52(8) of the Rules of Court.

[6] Circumpacific originally raised an objection based on the fact that this is an originating application and not an action. That has now been dropped as a result of proceeding under Rule 52(8).

[7] The question with respect to the issue of the three witnesses being examined is whether or not the Court has the power to order their examination. I am satisfied that the *Yukon Interprovincial Subpoena Act*, R.S.Y. 2002, c. 126, only applies to matters brought before a court. In other words, that the definition of subpoena in that Act refers specifically to requiring a person within a province other than the province of the issuing court to attend as a witness before the issuing court. So that does not apply to this application as I agree that there is no power of the Court to compel the attendance of a witness for a pre-trial procedure, or I should say, a pre-hearing procedure, in this case. However, the petitioners also raise the fact that these three witnesses have attorned to the jurisdiction, basically, by taking the position that they are prepared to give evidence to the Court and they are not opposing the application of the petitioners, but they require a court order because of confidentiality issues that may arise through their previous employment positions.

[8] I am satisfied, on the evidence before me, that these three witnesses have, in effect, attorned to the jurisdiction and this Court, therefore, has the power to compel their attendance, should that be necessary. The evidence before me indicates that they will voluntarily be complying with the court order, in any event.

[9] I am therefore ordering that Paul Leger, Joe Ball and Fred Buccini be

examined on oath on matters relating to the petition and specifically to the Order of September 5, 2003. I should indicate that my reading of my Order of September 5, 2003 is that documents, banking documents, that arise between Circumpacific and Drillsearch and the Alberta Treasury Branch are relevant documents.

[10] The second part of the petitioners' application is for an order compelling the production of documents from the Alberta Treasury Branch under s. 3(a) and (c) of the Notice of Motion. The Alberta Treasury Branch has taken the position that they have not attorned to the jurisdiction of this court. I am going to order the production of the documents requested under Rule 52(8)(c), and the order relates to Circumpacific and documents that are in its possession or its control relating to the issues set out in my order of September 5, 2003.

[11] Is there anything further, counsel?

[12] MR. CODE: My Lord, it's Mr. Code. I'd like to have costs for the application.

[13] THE COURT: Do you have anything to say about that, or any other issue, Mr. Hopkins?

[14] MR. HOPKINS: My Lord, I would like the order stayed, if I could, for a period of two weeks.

[15] MR. CODE: My Lord, we are on February 2nd. I appreciate that Circumpacific really wants to delay this (indiscernible), but I think that we've already got one stay in place, one appeal in place, and I think we should be

proceeding to gather the evidence.

[16] MR. HOPKINS: My Lord, Mr. Code and I have talked about dates and I understand that we'd not be proceeding with these cross-examinations until into January anyway.

[17] MR. CODE: The document production, My Lord, should happen prior to the examinations.

[18] THE COURT: Mr. Hopkins, I cannot recall granting a stay relating to production of documents, The stay, as I understand it, was granted originally by Justice McIntyre, by, I believe, your request, at the initial application, and that was with respect to the order that the monitor review all these documents. Do I have that correct?

[19] MR. HOPKINS: That was with respect to the monitor, My Lord, that's correct.

[20] THE COURT: So tell me why --

[21] MR. HOPKINS: I'm concerned more, My Lord, with respect to the cross-examination of the witnesses, that that not take place until I've sought instructions on this.

[22] THE COURT: Well, I will give you a stay for now. It is December 18; so I will give you a stay until January the 8th.

[23] MR. CODE: My Lord, we had scheduled a cross-examination of Mr. May in Calgary, January 5th and 6th, and we had agreed that Mr. Leger would appear January 7th and 8th for this examination. Those dates have already been agreed amongst counsel. We all have our calendars clear.

[24] THE COURT: Sorry, I was not aware of that. I thought they were going to be at the end of January.

[25] MR. CODE: No, sir, the application, the hearing itself is February 2nd.

[26] THE COURT: Oh, right.

[27] MR. HOPKINS: Mr. Code is correct on that, My Lord, we talked about doing these additional witnesses, if the Court was inclined to grant the order, on the 7th and 8th.

[28] THE COURT: Say that again.

[29] MR. HOPKINS: Mr. Code is correct, we had agreed that, in the event that he was successful with his application, that the cross-examinations of these additional witnesses would take place on the 7th and 8th of January. So the stay needn't go that long.

[30] THE COURT: So the stay needs to go that long?

[31] MR. HOPKINS: No, your stay needn't go that long.

[32] THE COURT: Thank you. So we could -- I think it appropriate, given the time frame, that -- let me look at this.

[33] MR. CODE: My Lord, it's my view that there's no stay necessary, in that case. If there is an appeal and if it's successful, then the evidence won't be used, but I think in the interests of time and getting on with things, we should have the applications, we should have the production of documents, and if the Court of Appeal sees fit to reverse all of this, then none of it will be admissible. But until that happens we should be getting on.

[34] THE COURT: Yes, it appears to me -- I'm sorry, I was not, when I made my original statement that there should be a stay, I was not aware of the time frame that we are dealing with, and I think, in fairness, the matter has to proceed in February, and the applications -- or the examinations for the first week in January should proceed, as well. I think we are down to the -- did you have one more thing you wished to say, Mr. Hopkins.

[35] MR. HOPKINS: I was just going to say, My Lord, that my big concern would be that these dates for the other witnesses were changed so they were done sooner than January 7th or 8th. If we are not going to try to do them sooner, I don't need a stay on those witnesses.

[36] THE COURT: Thank you. Then I do not think I will make an order for a stay.

[37] MR. HOPKINS: Thank you, sir.

[38] MR. CODE: Could you , My Lord, please, one more thing -I'm sorry, I should have said this before - give a date for the deadline for production?

[39] THE COURT: Whose examination is it, Kelso or May, in January?

[40] MR. CODE: May's examination is the 5th and 6th of January. That's the cross-examination on the affidavit, and it's by Mr. Hopkins. The examination of Mr. Leger will happen immediately after that, and that will be an examination, presumably, by both Mr. HOPKINS and me.

[41] THE COURT: Right. Well, I will make an order that the -- sorry, you said January, what date?

[42] MR. CODE: Seventh and 8th, My Lord, for Mr. Leger.

[43] THE COURT: Well, I will make an order that the documents -- do you have anything to say on that, Mr. Hopkins, because my inclination is that they should be produced on December 31st.

[44] MR. HOPKINS: Well, to the extent that I'm able to produce them by then, My Lord. It only gives me, in essence -- well, it really gives me only a matter of a couple of days. I am planning on spending some time away from the office over December, and my clients will probably be as well. The documents Mr. Code is requesting are not required for him for any immediate purpose.

[45] THE COURT: What are you suggesting as a date?

[46] MR. HOPKINS: I would suggest they should be produced by the end of that first full week in January, the 9th of January.

[47] MR. CODE: But then we'd have to move the examination of Mr. Leger. I mean I'm fine with the 9th if the hearing was in March, but it's in February and Mr. Leger is going to be here on the 7th and 8th. He's the one who can give life to the documents, make them admissible; otherwise, they're not.

[48] MR. HOPKINS: Well, My Lord, going back to these documents for a minute. I mean I don't know what Mr. Code expects me to produce, but the bank is, I expect, not going to produce everything in their files. You know, we will produce everything in Circumpacific's files that relate to the bank's relationship in terms of three items which are set out in your order. But in terms of what the bank may likely give us, if we make a request from them to produce documents relating to these three issues, I don't know. They may not give us a lot of documents.

[49] MR. CODE: My Lord, on that, I have already spoken to counsel for ATB and she's already identified the file. This won't take more than a day. We're working cooperatively here. She is fearful of her confidentiality restrictions, but she said once that's done, this is a no-brainer.

[50] THE COURT: Well, I will make that January 5 as the production date, January 5, 2004.

[51] MR. HOPKINS: Going back to this point. Now she's identified these files, Mr. Code's indicated, but the order is not as against the Treasury Board, it's against Circumpacific. Circumpacific says, we (indiscernible)

those documents. Will she deliver them? And the answer to that, Mr. Code?

[52] MR. CODE: All I'm saying is that, the Notice of Motion is clearly designed to be restrictive, not to interfere with ATB's business. It's to supply Mr. Leger with the documents that he needs to give evidence, as they're documents created by him. They're easily identifiable and very easily producible.

[53] MR. HOPKINS: I understand that, but we have an order directed to Circumpacific to produce documents in its discretionary control relating to these three issues, and it's not as against the bank. Now, if Circumpacific requests those documents from the bank, will they give them to us.?

[54] MR. CODE: I assume they will. I think they're documents under your possession.

[55] MR. HOPKINS: I will make that request, but right now I'm a bit cautious in terms of what we will get from them. Certainly, I'm not going to try to stand in the way of that production, but they may be looking for an order directed to the Treasury Branch, not to Circumpacific, to go make those requests. We'll have to deal with that, if we have to deal with it. I raise it now as a concern.

[56] THE COURT: Okay, thank you, counsel.

[57] MR. CODE: Thank you, My Lord.

[58] MR. HOPKINS: Thank you, My Lord.

[59] MR. CODE: Can I have my costs, sir.

[60] THE COURT: I'm sorry, yes, you can.

[61] MR. CODE: Thank you very much.

[62] THE COURT: We are adjourned.

VEALE J.