

SUPREME COURT OF YUKON

Citation: *Gwich'in Development Corporation v. Alliance
Sonic Drilling Inc. et al.*, 2009 YKSC 19

Date: 20090316
S.C. No. 08-A0091
Registry: Whitehorse

Between:

GWICH'IN DEVELOPMENT CORPORATION

Plaintiff

And

ALLIANCE SONIC DRILLING INC. and KENNETH G. P. ROBERTS

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Tara V. Marchuk
Kenneth G.P. Roberts

Counsel for the Plaintiff
Representing himself and Alliance Sonic
Drilling Inc.

REASONS FOR JUDGMENT (Damages and Contempt of Court)

BACKGROUND

[1] This is an application by the Gwich'in Development Corporation ("GDC") for an assessment of damages against Alliance Sonic Drilling Inc. ("ASD") following the failure of ASD to comply with an order of this Court dated December 2, 2008 ordering specific performance of a Purchase Agreement dated March 4, 2008. The Reasons for Judgment are cited as *Gwich'in Development Corporation v. Alliance Sonic Drilling Inc. et al.*, 2008 YKSC 93. The assets were not delivered as ordered, by December 12, 2008. I therefore

give judgment to the GDC in the amount of \$332,504.78 plus prejudgment interest at 4.75%, and post judgment interest.

[2] The main purpose of this judgment is to address the contempt order, pursuant to Rule 59 of the *Rules of Court*, that GDC seeks against Kenneth G. P. Roberts, who is the president, sole director and shareholder of ASD. The basis for the contempt proceedings arises out of an interim order dated November 14, 2008.

FACTS

[3] With respect to the contempt of court application, Mr. Roberts obtained an adjournment of the Summary Trial application from November 14, 2008, to December 1, 2008, in order to retain counsel who had been identified and was willing to act. The adjournment was also granted on the explicit condition that he deliver the following assets to GDC:

1. 1 2004 Super Duty 350 Ford
2. 1 2003 Super Duty 350
3. 2 Quad 4 x 4
4. 1 Kubota Water Pump
5. 2 2007 Skidoo/Skimmer
6. 1 Trailtech 30' 20,000lb (Gooseneck) Trailer

[4] Mr. Roberts did not deliver the assets.

[5] The contempt application was filed on November 19, 2008, and served personally on Mr. Roberts on November 19, 2008. The application seeks an order for contempt punishable by a fine in the amount of \$1,000 for each day he remains in breach.

[6] In the hearing on November 14, 2008, Mr. Roberts identified the equipment listed above as being in Whitehorse and capable of being delivered to the GDC, although he indicated that two employees were holding the equipment “until this dispute is resolved”.

Mr. Roberts then made the following request:

THE DEFENDANT: “...Can I have that judgment order before I have time to put the assets into the location you want? ‘Cause like I said before there is... it’s informal liens on it.”

THE COURT: I see.

THE DEFENDANT: So that’ll help me.

THE COURT: No, I see. So you want a court order, is that what you’re saying?

THE DEFENDANT: Yes, please.”

[7] The court then waived the requirement for Mr. Roberts to sign the order on the understanding that he would pick it up from the lawyer for the plaintiff. To ensure that Mr. Roberts understood I stated:

THE COURT: “Okay? You can make an arrangement about him ... but you’re going to be obligated by the order, whether you pick it up or not. If you don’t get to her place to pick it up, you’re still going to be obligated to fulfill that order, or you’ll be in contempt of court.”

THE DEFENDANT: “Yes, Your Honour.”

[8] It was then made explicitly clear to Mr. Roberts that the Summary Trial would proceed on December 1, 2008, whether or not he was able to retain counsel.

[9] On December 1, 2008, Mr. Roberts appeared without counsel having failed to deliver the specific items to the GDC as ordered on November 14, 2008. After hearing

submissions on the contempt of court application from counsel for the GDC, I requested a copy of the November 14, 2008 transcript. I also adjourned the contempt application to December 15, 2008, to allow Mr. Roberts to purge his contempt. Mr. Roberts did not appear on December 15, 2008, so I am going to set out his December 1, 2008, unsworn statements in response to the contempt application:

THE DEFENDANT: "I'm happy that you're requesting that document that you're -- discussion, rushed or not rushed. Within that document I did state that I would intend to follow the order. I did not have intent to not follow the order. I do also request some e-mail correspondence that I sent to the plaintiff's lawyer in regards to the status. Do you want me to go into the status of why it did not transpire that evening?"

THE COURT: Well, I think -- I think you should so that your friend, at least, will know what case she's going to be facing on the 15th.

THE DEFENDANT: Correct. Within the e-mail I stated that because that day, it was within, I believe, four or five hours I was supposed to have it done, and I got a hold of the equipments in different locations, and within my e-mail I did state that the person that held the equipment was out of town working, and I left messages and whatnot. And within the document that we -- that we're trying to find to look at what my obligation was. I did state that, repeatedly, if there was liens on the property in question, so I was getting that clarified. And I believe it was a Friday that we were at court and the day after, obviously, was a weekend, and I'm still waiting to hear back from a liens check on all the mentioned equipment.

THE COURT: What -- yeah, I'm really confused about this lien issue, because there's no reason that the equipment can't be seized. If there's a lien, and it's subject to the lien, fine.

THE DEFENDANT: I understand that, and I went -- what I did was turn -- because I was rushing around, and it's also noted -- or I didn't note to anyone, but I will note I don't have means of transportation. So I was trying to get all this stuff done and trying to get a hold of the people, some being away at work in Alberta. So the timeline was really short. In regards to the lien, picking up the equipment, what's going to happen is -- why there was -- I haven't -- I don't have a document saying there is a lien on the equipment or the assets.

THE COURT: Right.

THE DEFENDANT: What I do have is intent to go to the labour boards. So that's something I have to do with these past employees as well, and that's why they're holding the equipment as well. And, to put on record, in regards to the two quads, it's being held in lien from the creditors who was doing work on it, and they weren't fully paid off yet.

THE COURT: Sorry, sorry. The quads are where?

THE DEFENDANT: The two quads?

THE COURT: Yeah.

THE DEFENDANT: They're basically -- they're not fully paid off yet, so I have to get documentation of that to prove to the Court. I do have another request, is more evidence on my intent of not to follow the order. The -- what I just talked about now is my true intention to follow the order, and I had no intent whatsoever not to follow the order, just the timelines and where things sit.

THE COURT: Well, let me put this to you: the application for contempt is -- is adjourned to December 15th. And would you add a transcript of this proceeding as well, in which you also, Ms. Marchuk -- just going to make a note of this -- and I only need -- I only need this piece, after 12:10, or after 12 o'clock, I would say. In other

words, the contempt application, that's all I'm concerned about in terms of the transcript. So it's where you stand up and proceed on the contempt. But I want to say to you -- oh, and then your -- the emails as well. Can you just put those in an affidavit from your --.

MS. MARCHUK: Yeah, of course.

THE COURT: You have an opportunity, and the -- I want to make it clear to you that this is serious, you could go to jail over it. If you know where things are, you can simply disclose that to Ms. Marchuk. Ms. Marchuk has the means to pick those things up -- her client does, not Ms. Marchuk -- so it's no excuse to say you don't have a vehicle to pick them up or anything like that.

THE DEFENDANT: Mm-hmm.

THE COURT: And you have the opportunity -- just tell them where it is and they'll go and pick it up, and you're -- you're free and clear; we don't have to continue with the contempt proceeding. So all the things you say, well, you know, you owe money to somebody or somebody's holding it and not going to the labour board or whatever; so what? Just put it all in as the court order said and then we can deal with all those issues.

THE DEFENDANT: I did not know that was an option."

[10] On December 15, 2008, Mr. Roberts did not appear. Counsel for the GDC orally submitted that the appropriate punishment for Mr. Roberts was incarceration. The filed application for a contempt order only seeks a fine as punishment. In a further written submission, counsel for GDC submits that a fine payable to GDC would be appropriate.

[11] The e-mails referred to by Mr. Roberts on December 1, 2008, were filed by counsel for GDC. Mr. Roberts stated on November 14, 2008:

I had to go and get the supply pump, (mayo road), the trucks and atv's and skidoos will be done on monday, as mentioned, have to deal with the collateral issue against wages, so monday I will contact you. I could not get ahold of my past two employees fast enough this afternoon, one went to haines, ak,. and one went to work in Alberta, his dad said it would be ok, with the order. I will give you an update on monday morning. Have a good weekend, and will talk with ya on monday morning.

[12] Again by e-mail on December 5, 2008, in response to the 4x4 quads, Mr. Roberts stated:

As mentioned in an earlier discussion alliance sonic drilling Inc., owes \$19k on these for we rented them and damaged them and had to make arrangements to buy, something that was not done yet, by the GDC.

[13] Mr. Roberts did not deliver any equipment as ordered by the court by November 14, 2008, or in the adjournment period to permit him to purge his contempt by December 15, 2008.

THE LAW OF CONTEMPT

[14] Rule 59 gives some guidance on contempt matters:

Power of court to punish

59 (2) The power of the court to punish contempt of court shall be exercised by imprisonment or by imposition of a fine or both.

Corporation in contempt

(3) An order against a corporation wilfully disobeyed may be enforced by one or more of the following:

(a) imposition of a fine upon the corporation;

(b) imprisonment of one or more directors or officers of the corporation;

(c) imposition of a fine upon one or more directors or officers of the corporation.

Special costs

(4) Instead of or in addition to making an order of imprisonment or imposing a fine, the court may order a person to give security for the person's good behaviour.

[15] An excellent summary of the law is found in *Transportation Lease Systems Inc. v. Viridi*, 2008 BCSC 369, by Burnyeat J.

[16] The principles governing a motion for contempt were summarized by Donald J.A. in *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551, as follows at para. 18:

1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable: *Glazer v. Union Contractors Ltd. and Thornton* (1960), 33 W.W.R. 145 (BCSC) at 151.
2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at 229.
3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction: *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.) at para. 13; see also *Berge v. Hughes Properties Ltd.* (1988), 24 B.C.L.R. (2d) 1 (C.A.) at p. 8, cited in *Hama v. Werbes* (2000), 76 B.C.L.R. (3d) 271 (C.A.) at para. 8 where the need for clarity and precision in the order to be enforced was discussed.

[17] The distinction between civil and criminal contempt is set out by McLachlin J. (as she then was) in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at pp. 931 and 933:

[49] It is my view that a clear distinction exists between civil and criminal contempt and that the law of criminal contempt is sufficiently certain to meet the requirements of fundamental justice. The distinction between civil and criminal contempt rests in the concept of public defiance that accompanies criminal contempt.

...

[51] These same courts found it necessary to distinguish between civil and criminal contempt. A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal. ...

...

[55] To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offences, however, the necessary *mens rea* may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt.

[18] In *Topgro Greenhouses Ltd. v. Houweling*, 2003 BCCA 355, at para. 6, the Court of Appeal stated:

To knowingly breach a court order is to commit a contempt of the court. All that is necessary to establish the contempt is proof of deliberate conduct that has the effect of contravening the order; an intent to bring the Court into disrepute or to interfere with the due course of justice or with the lawful process of the Court is not an essential element of civil contempt ...

[19] In terms of appropriate sentences, Green C.J., in *Health Care Corp. of St. John's v. Newfoundland and Labrador Assn. of Public and Private Employees* (2001), 102

A.C.W.S. (3d) 545 (S.C.) states a number of principles including the following at para. 2:

(5) ... Imprisonment is normally not an appropriate penalty for a civil contempt where there is no evidence of active public defiance (such as public declarations of contempt; obstructive picketing; and violence) and no repeated unrepentant acts of contempt;

...

(10) In ordering payment of a fine, the court may permit, by imposition of appropriate conditions, the contemnor to satisfy the fine in alternative ways, such as payment to a charity or the provision of free services to the persons harmed by the continuance of the contemptuous behaviour.

[20] This is not to say that imprisonment is never ordered for a civil contempt but that it usually requires an act of public defiance or repeated unrepentant acts of contempt. See *British Columbia (Health Employers Assn.) v. Facilities Subsector Bargaining Assn.*, 2004 BCSC 762.

[21] In *Telus Re: 11 Individuals found to be in Contempt*, 2006 BCSC 397, Burnyeat J. addressed the concept that fines “should go to benefit the people who have borne the brunt of this contempt.” That case dealt with a labour/management dispute and provided a helpful list of punishments imposed in both civil and criminal contempt situations. The sentences ranged from imprisonment to fines of \$50 to \$1,000.

[22] As to payment of fines to those who suffered the consequences of the contempt, Burnyeat J. states at para. 22:

In the case at bar, no useful purpose would be served to attempt to "heal the wounds" between the Plaintiffs and the contemptors by having part of the punishment serve as an attempt to redress any damages suffered by the Plaintiffs as a result of the actions of the contemptors. It would be singularly inappropriate for the Plaintiffs to be the recipient of any funds to be paid by the contemptors. I am of a similar view regarding whether funds should be paid to the Provincial Government as it is the Government which has been prepared to allow the Plaintiffs to bring alleged contemptors before the Court when Judges of this Court have stated the view on numerous occasions that it should be the Crown rather than a civil litigant who should be carrying the "prosecution" of alleged civil contemptors.

[23] There is also a considerable amount of authority for an award of court costs on a special costs basis: See *Union Pacific Capital Ltd. v. Piché*, 2005 BCCA 160.

DECISION

[24] The evidence is clear that Mr. Roberts breached the order of this Court to deliver certain equipment to the GDC. There was no difficulty understanding the court order and both it and the serious nature of a breach were clearly explained to him. He did raise the issue of “informal liens” on some of the equipment, but I do not give much weight to those comments, particularly when he requested the order. Mr. Roberts was well aware that even before the court order the equipment belonged to the GDC. I explained to him that the existence of the alleged “liens” did not prevent him from delivering the equipment to the GDC. I also explained to him that he could purge his contempt by simply disclosing the location of the equipment to the GDC.

[25] I find that the evidence establishes beyond a reasonable doubt that Mr. Roberts knew he was breaching a court order and this constitutes civil contempt. It did not include any element of public defiance or conduct that would constitute criminal contempt. Although the court action was dismissed against him personally, he is the sole person responsible for the conduct of ASD and can be held responsible pursuant to Rule 59(3)(c). As well, the court order of November 14, 2008 directed Mr. Roberts personally to deliver the equipment.

[26] The question of an appropriate sentence must be considered from the perspective of the parties involved. It is not appropriate to consider a sentence of incarceration as the notice to Mr. Roberts only referred to a fine.

[27] This is a private dispute between parties who knew each other well and have some history with a substantial loan that was unsecured until it became a significant amount and the assets were transferred to the GDC in satisfaction of the loan. It is doubtful that the assets will be recovered. When Mr. Roberts had the opportunity to make some amends by delivering a small amount of the equipment, he continued to frustrate the GDC and committed an act of civil contempt.

[28] The GDC is the party that has been frustrated and deprived of its property. In my view, a fine is the appropriate sanction. However, it is not appropriate to have a fine for contempt paid to a party. A breach of a court order is an offence against the authority of the court and the administration of justice. I therefore order Mr. Roberts to pay a fine of \$1,000 to the Territorial Treasurer.

[29] With respect to the court costs, the GDC has expended a considerable amount of legal costs, time and energy to pursue Mr. Roberts. It is only appropriate that they are awarded special costs in the form of 100% of the legal fees and disbursements incurred for the matters on November 14, December 1 and December 15, 2008. I also order that the requirement that Mr. Roberts approve the order is waived.

VEALE J.