COURT OF APPEAL OF YUKON

Citation: *InterOil Corporation v. Mulacek*,
2016 YKCA 13

Date: 20161019
Docket: 16-YU795

Between:

InterOil Corporation

Respondent
(Petitioner)

And

Phillippe E. Mulacek

Appellant
(Respondent)

And

Exxon Mobile Corporation

Respondent
(Respondent**)**

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

On appeal from: An order of the Supreme Court of Yukon, dated October 7, 2016
(*Re: InterOil Corporation*, 2016 YKSC 54, Whitehorse Docket 16-A0082).

Oral Reasons for Judgment

Counsel for the Appellant:	W.R. Berman M. Hannam
Counsel for the Respondent, InterOil Corporation:	T.A. Friedland M. Ouanounou G.A. Fekete
Counsel for the Respondent, Exxon Mobile Corporation	G.C. Howells M.P. Good
Place and Date of Hearing:	Vancouver, British Columbia October 19, 2016
Place and Date of Judgment:	Vancouver, British Columbia October 19, 2016

Summary:

Stay granted pending the hearing of an expedited appeal taken from an order made under the Yukon Business Corporations Act, approving an agreement whereby one company will acquire all of the shares of another company.

[1] **FRANKEL J.A.**: On October 7, 2016, Mr. Justice Veale of the Supreme Court of Yukon made an order pursuant to s. 195 of the *Business Corporations Act*, R.S.Y 2002, c. 20, approving an arrangement under which InterOil Corporation is to sell all of its issued and outstanding common shares to Exxon Mobile Corporation: 2016 YKSC 54. The value of that transaction is in the range of $2 billion. At a special meeting of InterOil's shareholders held on September 21, 2016, approximately 80% the shareholders who voted approved the transaction. InterOil is an oil and gas company with assets in Papua New Guinea.

[2] Philippe E. Mulacek is a founding shareholder of InterOil, which came into existence primarily to develop the oil and gas reserves in Papua New Guinea. Mr. Mulacek was responsible for discovering those reserves. He currently owns approximately 5.5% of InterOil's shares. At one time Mr. Mulacek was InterOil's chief executive officer.

[3] Mr. Mulacek opposes the approval of the arrangement. His position is that the transaction is fundamentally unfair to the shareholders. One of his reasons is that the transaction does not properly value the future potential of the reserves. In total, the holders of approximately 10% of InterOil's shares are dissenting.

[4] In his reasons for judgment, Mr. Justice Veale found that a Fairness Opinion InterOil obtained and provided to its shareholders was flawed in several respects. However, notwithstanding that finding, he concluded the arrangement between InterOil and Exxon was a fair and reasonable one and, as a result, approved it.

[5] Mr. Mulacek has appealed Mr. Justice Veale's order and seeks and expedited hearing of that appeal. He also seeks a stay of that order pending the appeal. This morning, I confirmed with the parties that the Court will hear the appeal on October 31, 2016. With the assistance and co-operation of counsel, I set an expedited filing

schedule. Another case had to be moved to make time for this matter to be heard on October 31st.

[6] I turn now to Mr. Mulacek's application for a stay which both InterOil and Exxon oppose. Their position is that Mr. Mulacek has not satisfied the requirements for a stay set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. They say Mr. Mulacek has failed to demonstrate that (a) there is a serious question to be tried; (b) he will suffer irreparable harm if a stay is not granted; and (c) the balance of convenience favours a stay.

[7] As matters now stand, in the absence of a stay InterOil and Exxon are free to complete the transaction. I was advised that before the transaction can be completed that step has to be approved by Exxon's senior management. However, I was also advised it is possible that the closing could take place this week. InterOil and Exxon are not prepared to undertake not to close before the appeal is heard.

[8] Another matter that bears on the stay application concerns the fact that Exxon usually declares a dividend at the end of October. Because the arrangement involves the shareholders of InterOil exchanging their InterOil shares for shares of Exxon, I was advised that if the transaction does not close before November 10, 2016, then InterOil shareholders will lose out on any dividend that is declared. The aggregate amount of the dividend payable to InterOil's shareholders is estimated at $18 million US.

[9] I turn now to the *RJR-MacDonald* factors.

[10] The threshold for determining whether there is a serious question to be tried is a low one. All that needs to be established is that the issues being raised on appeal are neither frivolous nor vexatious. In my view, it is enough for me to say that I consider Mr. Mulacek to have an arguable appeal.

[11] With respect to the absence of irreparable harm, InterOil and Exxon point to s. 193 of the *Business Corporations Act*. They say, correctly, that as a dissenting shareholder, if the transaction closes, then Mr. Mulacek will have a right to have the

fair value of his shares determined by a court. Put otherwise, they say he will not suffer any financial loss if the transaction closes before the appeal is determined.

[12] Mr. Mulacek's position is that he will suffer irreparable harm for which he cannot be compensated monetarily. He says without a stay he will be forced to give up the shares of the company he founded. He also says he will lose his "voice" with respect to the development of InterOil's assets.

[13] In the unique circumstances of this case, I am of the view that Mr. Mulacek will suffer non-monetary irreparable harm if the transaction closes before the appeal is heard. He has a right to have his disagreement with the arrangement determined by the courts. If the transaction closes before the appeal is heard, then the appeal will be rendered moot, and the Court may well choose not to hear it. Indeed, once the transaction completes InterOil and Exxon may have no interest in defending the judgment below. I note that in *Bolivar Gold Corp. v. Scion Capital* (February 21, 2006), Docket YU555 (Y.K.C.A., Chambers), Mr. Justice Mackenzie granted a stay pending the hearing of an expedited appeal brought by dissident shareholders from the approval of an arrangement similar to the one in the case at bar. The division that heard the appeal extended the stay until it gave judgment the following day: 2006 YKCA 1 at para. 4, 16 B.L.R. (4th) 10. Although there are factual differences between that case and the case at bar, I find Mr. Justice Mackenzie's reasoning germane.

[14] This brings me to the balance of convenience. InterOil and Exxon say that the balance of convenience lies in allowing them to complete the transaction as soon as they elect to do so. They also say that it is significant that Mr. Mulacek has not offered an undertaking to pay any damages that may result from the stay being granted.

[15] InterOil and Exxon say there is a risk something may occur that will upset the deal and that Mr. Mulacek should bear that risk. However, they make that submission in the most general of terms and cannot point to any particular risk factor.

[16] I do not consider that an undertaking with respect to damages would be appropriate in a case such as this. To require an undertaking from a dissenting shareholder seeking to exercise a right of appeal would, in many cases, make that right illusory. Put otherwise, requiring an undertaking would have a chilling effect on the exercise of that appeal right. It should not be forgotten that this appeal arises out of InterOil's application to have a court approve a transaction that will have a significant impact on its shareholders.

[17] The decisive question I have to answer on this application is what is a just and convenient result having regard to all of the relevant factors. The conclusion I have come to is that it is just and convenient to stay the order of Mr. Justice Veale pending the hearing of the appeal on October 31, 2016, and I so order. It will be for the division hearing the appeal to determine whether the stay should be extended.

[18] Costs of today will be costs in the appeal.

"The Honourable Mr. Justice Frankel"