Inukshuk v. 413152 et al, 2002 YKSC 26

Date: 20020430
Docket: S.C. No. 01-A0083
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

Inukshuk Resources Inc.

Petitioner

AND:

413152 B.C. Ltd. (formerly Transwest Dynequip Ltd.), HCI Canada Inc. (formerly Stanchem Inc.), Finning International Inc., BXL Bulk Explosives Ltd., Explosives Ltd., Yukon Explosives Ltd., Lomak North Corp., Svedala Industries Canada Inc., ICG Propane, a division of Superior Propane Inc., Kal Tire Distributors Ltd., Petro-Canada, Van Waters & Rogers Ltd., P&H MinePro Services Canada (formerly Harnishfeger Corporation of Canada Ltd.), AltaSteel Ltd., Moly-Cop Canada, Electric Motor Services Ltd., The Electrical Shop Ltd., Bearing Supply, Hydraulic Technologies Inc. (formerly Coast Valve Industries Ltd.), Southwest Mining, Jacobs Industries Ltd., Wajax Industries Ltd., Alaska Marine Lines Inc., B.C. Bearing Engineers Ltd., Norcast, a division of Tritech Precision Inc., North 60 Petro Ltd., Advanced Drilling Ltd., Bennett & Emmott (1986) Ltd., Bennett & Emmott Machinery Co. Ltd., Bennett & Emmott Unit Rig Ltd., Cando International Food Consultants, Golden Hill Ventures Ltd., MacMillan Mining Contractors Ltd., Vortex Mining Inc., Great Northern Oil Inc., Norcan Leasing, MBEDZH / Norcan Services Ltd., Pacific Dena Transport, Northern Metallic Sales, Access Mining Consultants Ltd., Ketza Construction Corp., Dynamic Industrial Services (Yukon) Ltd., Yukon Energy Corporation, Government of the Yukon, Her Majesty the Queen in Right of Canada as represented by the Department of Indian Affairs and Northern Development

Respondents

MEMORANDUM OF RULING OF
MR. JUSTICE HUDSON

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[1] Before me is an application for an order for security for costs under s. 254 of the *Business Corporations Act*, R.S.Y. 1986, c. 15.

[2] These proceedings have been commenced by petition and are of an unusual nature. They deal with the assets of an insolvent company, Anvil Range Mining Corporation.

[3] The mining lien claimants ("MLC's"), the respondents in these proceedings, who brought themselves within the *Miners Lien Act*, R.S.Y. 1986, c. 116, brought action on August 6, 1998 for a declaration of lien in the amount of their respective claims. On November 22, 1999 judgment was proclaimed regarding all their claims, as requested. This judgment was entered March 2000.

[4] Proceedings were commenced in Ontario under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-25 in the commercial list of the Superior Court of Justice of Ontario. The proceedings in Yukon regarding the miner's liens were authorized by that court. Ultimately the lien claimants, some secured creditors and the various governments presented a plan of arrangement to the interim receiver. This resulted in an arrangement being proposed, involving the value of the assets being shared among the above-mentioned parties. There was no distribution to, or share appropriated to the unsecured creditors.

[5] There was an appeal to the Ontario Court in which the "Cumberland Group" participated. The petitioner is the assignee of the Cumberland Group, or some of the members of the Cumberland Group. That Appeal Court supported the receiver's plan of arrangement, notwithstanding participation by some creditors, including the Cumberland Group, to derail the proposed plan.

[6] Mr. Justice Farley of the Ontario Superior Court of Justice, found the position of the Cumberland Group wanting. The interim receiver's plan was approved.

[7] A further appeal was made to the Ontario Court of Appeal by Cumberland Group (and including this petitioner). This appeal has been heard but no decision has yet been pronounced.

[8] The petitioner herein claims to be the assignee of many unsecured creditors of Anvil Range Mining Corporation through Cumberland Group, but has declined or refused to provide proof of these arrangements with Cumberland or with the original creditors. This makes it difficult to describe with accuracy the relationship and rights which bring these parties to court on these matters.

[9] In addition, the petitioner has declined to indicate what assets it has that might be available should costs be awarded against it, except for a submission in the hearing of this application that they hold several millions of dollars of debts due from Anvil Range Mining Corporation. This on the surface would appear to be an audacious claim since, on the evidence, the assets of Anvil Range Mining Corporation have been valued at approximately $20 million and the claims of secured creditors, without considering the MLC's, exceed $25 million.

[10] If the MLC's are included, the so-called secured claims would be over $50 million and the amount of the assets available would continue to be less than $20 million.

[11] The petitioner's claim for relief is for:

a) A declaration that the *Miners Lien Act,* 1986 is inapplicable to federal Crown land in accordance with ss. 17(1) and 18 of the *Yukon* Act, ss. 91(1A) and 92 of the *Constitution Act,* 1867 and Rules 10 and 5(22) of the *Rules of Court;*

b) A declaration that the liens held by the Respondent Lien Holders are invalid;

c) An Order that the Respondents pay the Petitioner's costs of the application; and

d) Such further relief as counsel may advise and this Honourable Court permits.

[12] After the petition was served, the court agreed, at the request of all parties, to a pre-trial conference on January 11, 2002. This was thought to be necessary in order to make the court aware of the nature of the proceedings and to begin case management. All parties were represented at the pre-trial conference, with Mr. Leitch speaking for the MLC's and Mr. Lokan for the petitioner.

[13] At this pre-trial conference, counsel described the relief being sought, the way the matter could proceed and the time estimates for hearing. Mr. Leitch, on behalf of all respondents, detailed some preliminary points that were to be argued.

[14] The MLC's, Yukon Energy Corporation, and the governments supporting them, had moved for various relief as follows, *inter alia*:

1. An order that the petitioner applies to add Anvil Range Mining Corporation as a party to these proceedings and also add Cominco Co. Ltd. as a party.

2. That the matter be heard as a trial with all pre-trial proceedings including discoveries and an adjournment of the hearing of the petition until such time as these preliminary proceedings can be done.

3. An order for security for costs.

4. A stay of proceedings (which has been granted).

5. Dismissal of these proceedings for lack of standing.

6. Dismissal of these proceedings because of the finding in this court in the mining lien claims being judgment in *rem,* which thereby created an estoppel.

7. Dismissal by reason of the doctrine of *res judicata*.

8. Dismissal of the petition as an abuse of process.

9. Dismissal as the issues brought are moot.

10. Special costs.

These were detailed at the January 11, 2002 pre-trial conference. They were discussed and times were fixed for the hearing of the preliminary matters and for the hearing of the petition. The hearing of the preliminary matters was scheduled for April 15, 16 and 17, 2002. It was the position of the petitioner that these matters should proceed notwithstanding the outstanding appeal in the Ontario Court of Appeal, which respondents' counsel argued had a direct bearing on these proceedings.

[15] Deadlines were set for the filing of motions and responses, authorities and briefs. Mr. Leitch was to draw an order with respect to the matters determined, but no such order has yet been filed.

[16] On April 9, 2002, the petitioner communicated by fax with the trial coordinator of this court indicating a change of position. They indicated that they now felt that the result of the proceeding before the Ontario Court of Appeal would "change the legal landscape". For that reason, they argued the hearing of the preliminary matters should be stayed pending the outcome of the Ontario appeal. At a conference held on April 11,

2002, all parties agreed that the hearing of the preliminary motions, with some exceptions, would be stayed or adjourned generally.

[17] In the result, the court directed that:

1. Two immaterial items were to be heard, in addition to the claim for security for costs. These were directed to be heard on April 15, 2002 at 11:00 a.m.

2. No other interlocutory proceedings, or indeed, other proceedings in this matter would take place without leave of the court, pending the determination of the Ontario Court of Appeal matter.

3. The petitioner shall be responsible for costs thrown away regarding today's proceeding, the proceedings of January 11, 2002 and preparing for the April 15, 2002 hearing. These costs, after assessment, to be payable forthwith on Scale 3.

[18] I do not know if any formal order has been entered with respect to this order at present.

[19] The MLC's and Yukon Energy Corporation each separately seek an order for security for costs in the amount of $50,000, as follows:

> An Order requiring Inukshuk to post security for costs for the Applicants in the sum of $50,000.00 or such other amount as may seem just to this Honourable Court with liberty to the Applicants to apply to this Honourable Court to seek an increase of this amount as this proceeding progresses.

[20] On April 15, 2002, this matter came on for hearing on the issue of security for costs. All parties were represented. Mr. Leitch, again, took the lead. Mr. Landry appeared by telephone and spoke on behalf of his client, Yukon Energy Corporation. Mr. Buchan appeared in person and led the argument on behalf of the petitioner.

[21] It was argued that these proceedings are potentially complicated and time consuming matters, particularly in terms of preparation.

[22] It was argued that the hearing would take three to four days if all issues proceed to a final determination point. I am inclined to agree with this proposition.

[23] The affidavits filed are lengthy and, including exhibits, one of them exceeds 672 pages. There are extensive Books of Authorities to be copied, such books to-date being well over 200 pages. Considering the number of counsel involved, the costs for photocopying alone will be considerable. On the other hand, several of the forms of relief sought by motion involve a dismissal of the proceedings. If any one of these were granted, the length of the proceedings would be substantially reduced.

[24] The respondents have referred to three cases in support of their application for security for costs. Also cited is s. 254 of the Yukon *Business Corporations Act, supra.* This section reads:

> In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit.

[25] The case of *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.,* [1993] B.C.J. No. 507 (C.A.) (QL) deals with essentially the same facts. The court there considered the purpose of an order for security for costs. At para. 15, Proudfoot J.A., for the court, stated:

> In *Island Research & Development Corp. v. The Boeing Co.,* [1991] B.C.J. No. 12 (3 January 1991), Vancouver C902161 (B.C.S.C.), Spencer J. said (at p. 3):
>
> > The purpose of security for costs is to protect a defendant from the likelihood that in the event of its success it will be unable to recover its costs from the plaintiff. The plaintiff is not to be permitted a free ride on an unlikely claim at the defendant's expense. The factors to be considered in achieving a just balance between the defendant's right to protection and the plaintiff's right to advance a potential claim for adjudication include the chance of the claim's success, the anticipated level of cost in conducting the action and the prospect of the plaintiffs ever having assets from which to pay the defendants' costs if the claim fails.

[26] And further at para. 16:

> The making of an order under s. 229 of the *Company Act* is discretionary. However, once the applicant for security has shown that the plaintiff will not be able to pay costs should the claim fail, security is generally ordered unless the court is satisfied that there is no arguable defence.

[27] In keeping with the factors discussed above, I am satisfied that the respondents here have made it appear that the petitioner will not be able to pay the costs. I am also satisfied, for the purpose of this application, that there are arguable defences.

[28] Another case relied on by the respondents is *Kropp (c.o.b. Canadian Resort Development Corp.) v. Swaneset Bay Golf Course Ltd.*, [1997] B.C.J. No. 593 (C.A.) (QL). At para. 14, Finch J.A. (as he then was) stated that this concept contained in s. 254 dates back to the *English Companies Act, 1862,* stating:

> The wording of the section has altered very little in the subsequent 135 years.

[29] *Pearson v. Naydler*, [1977] 3 All E.R. 531 (Ch D) states as follows:

> The basic rule that a natural person who sues will not be ordered to give security for costs, however poor he is, is ancient and well-established. … `the general rule is that poverty is no bar to a litigant'. …
>
> In the case of a limited company, there is no basic rule conferring immunity from any liability to give security for costs. The basic rule is the opposite …

[30] In the *Kropp, supra,* case, the court also cites *Keary Development v. Tarmac Construction,* [1995] 3 All E.R. 534 (Eng. C.A.). The principles engaged in the application of a section such as s. 254 are detailed as follows:

> 1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
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> 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
>
> 3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;

4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;

5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and

7. The lateness of the application for security is a circumstance which can properly be taken into account.

[31] These principles were applied by the British Columbia Court of Appeal in *Kropp, supra,* and were adopted in the case of *Joe Quatum Realty Ltd. v. Blenk*, [1998] B.C.J. No. 1728 (S.C.) (QL).

[32] In construing s. 254, it is interesting to note that the equivalent section in British Columbia in 1948 read, “if it appears by credible testimony”. By 1993 the section read, “and it appears”. This clearly indicates legislative intent to eliminate a need to have the decision based on credible testimony. Instead, if “it appears” or that the plaintiff corporation will be unable to pay the defendant’s costs, then a case for security for costs will be made out.

[33] The history of the Yukon legislation is similar. The equivalent of s. 254 in 1978, s. 319(1) read, “if it appears by credible testimony”. The same section now reads as indicated above, “if it appears”.

[34] I take it that this change in wording can only serve to reduce the standard of proof required to one of appearance only, not proven appearance. I take the phrase “all relevant circumstances” to reinforce the view that the standard of proof is a low one.

[35] Dealing with the first principle outlined above, the court has complete discretion in deciding whether or not to order security for costs.

[36] The petitioner submits that the claim for security must fail because the respondents have failed to show that the petitioner will be unable to pay the respondents’ costs pursuant to s. 254 of the *Business Corporation Act, supra*.

[37] The evidence provided by the respondents is not overwhelming on this point. It consists of:

a) A certificate showing that Inukshuk has no entries in the Personal Properties Security Registry of Ontario. This is of minimum weight.

b) The petitioner delayed paying costs assessed against it in the Ontario Superior Court of Justice until, apparently, the last minute.

c) In spite of requests for information and the obvious relevance of this information in these proceedings, the petitioner has declined to provide anything by way of a list of assets or, indeed, any reference to exigible assets.

d) The petitioner’s counsel, in responding to the respondents’ submission, put forward the unsecured debt of Anvil Range Mining Corporation, which

> it asserts it holds as evidence of assets. This submission is made notwithstanding that even if successful in this matter, others view the value of these receivables as nil because the secured indebtedness of Anvil Range is exceeded by two and one-half times the asset value, without including the miners lien claims.
>
> Such matters would, of course, remain to be proven at the hearing of petition, but for the purposes of this application they are capable of providing “an appearance”.

[38] Having regard to all the circumstances which I find to be relevant, I find that it appears that the petitioner would be unable to pay any successful respondents’ costs.

[39] I have observed principles number 2, 3, 4 and 5 from the *Keary Development, supra,* case while considering this application. I have given careful consideration to the apparent merits of the matter without, in any way, closing my mind to arguments that could be made on behalf of the petitioner. This lead me to a conclusion that the proceedings raise a novel but significant constitutional or jurisdictional issue and also that the preliminary motions raise arguable points, some of which could succeed in bringing the proceedings to a conclusion. I find no indication that the respondents seek security to stifle a legitimate claim. There is, however, some possible substance to the assertion that the proceedings may, depending on ones interpretation of the material, be placing unfair pressure on the respondents.

[40] Applying these principles to this application I find that pursuant to s. 254 of the *Business Corporations Act, supra*, I should grant the respondents motion for security for costs.

[41] Section 254 provides for security for costs “on any terms it [the court] thinks fit”.

[42] There are, therefore, two questions remaining.

1. In what amount should security for costs be ordered?

2. On what terms should the security be furnished?

[43] As to the amount, the British Columbia Court of Appeal in *Fat Mel’s Restaurant Ltd., supra,* refers to the case of *Hawaiian Airlines v. Chartermasters, Inc.* (1985), 50 O.R. (2d) 575 (S.C.). Master Sandler stated:

> I therefore feel free to adopt, and do adopt as more sensible and preferable, the principle laid down by the English Court of Appeal, in *Procon*, at p. 376 as follows:
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> > … the principle is this: the security should be such as the court thinks in all the circumstances of the case is just. If security is sought, as it often is, at a very early stage in the proceedings, the court ordering security will be faced with a situation in which a solicitor or his clerk has made an estimate of the costs likely in the future to be incurred; and probably the costs already incurred, or paid, will be a very small fraction of the security that the applicant is seeking. At that stage one of the features of the future of the action which is relevant is the possibility that the action may be settled, perhaps quite soon. In such a situation it may well be sensible to make an arbitrary discount of costs estimated as the probable future costs, but whether one-third is likely in

> any given case to be a sensible discount, and whether any discount at all should be made, will depend on the view of the court on consideration of all the circumstances.

[44] I have not been provided with any draft bill of anticipated costs, but there are tables to assist, some evidence and submissions to enable me to set a figure that is appropriate in all the circumstances.

[45] In exercising my discretion in this matter, I have considered the possibility of an order for special costs, the various scales upon which costs could be ordered if special costs are not ordered, the likely level of disbursements in view of the obvious volume of photocopying that must be done, the time involved in dealing with affidavits and authorities and their reproduction for the proceedings, and the breadth of arguments that may be brought to bear on both sides of the issues arising on the claim and, more important at this time, the issues arising on the motions filed by the MLC's.

[46] Because of the motions filed, some of which are motions for dismissal on specific grounds, I am ordering security for costs up to and including the completion of the preliminary motions following the stay of proceedings therein.

[47] I therefore order that on the application of the MLC's that the sum of $30,000 be furnished as security for costs. In the case of the application of Yukon Energy Corporation Ltd. that the petitioner furnishes security for costs in the sum of $15,000. This security may be by deposit in an interest bearing account to be paid out only on an order of the court, or by deposit of an irrevocable letter of credit, appropriately endorsed to constitute security for these respondents' costs.

[48] Since the matter is complicated by the fact that an adjournment has already been ordered until the Ontario Court of Appeal has pronounced its decision, and because the court has already ordered that the petitioner pay the costs thrown away forthwith, the term of this order shall be that the security shall be furnished before May 22, 2002 or seven days after the Ontario Court of Appeal decision is pronounced, whichever is the earlier.

[49] In any event, no steps may be taken in this action until the security is furnished, and thereafter no steps may be taken until the ruling of the Ontario Court of Appeal is pronounced. The respondents may, however, if no security is furnished by May 22, 2002, apply to the court for dismissal of these proceedings on the grounds set out in any motion for dismissal filed herein.

[50] Because one of the preliminary motions deals with the conversion of this petition to proceedings more in line with the Writ and Statement of Claim, thereby giving rise to more costs with respect to preliminary matters such as discovery, and for other reasons, the respondents/applicants here are entitled upon conclusion of all the preliminary motions to bring application for an increase in the security for costs with respect to further proceedings.

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Hudson J.

Counsel for the Petitioner	Mr. Brian Crane, Q.C. and Mr. Andrew K. Lokan
Counsel for certain lien claimants	Mr. Murray J. Leitch and Mr. John Phelps
Counsel for Yukon Energy Corporation	Mr. P. John Landry
Counsel for certain lien claimants	Mr. Keith Parkkari
Counsel for Northern Metallic Sales	Mr. Gary W. Whittle
Counsel for the Federal Government	Mr. Mark Radke
Counsel for the Government of Yukon	Ms. Penelope Gawn