Date: 20030819
Docket No.: S.C. 03-A0071
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

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

John James — For the Petitioners

William G. Hopkyns — For the Respondents
Grant Macdonald, Q.C. — Agent for the Respondents

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

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[1] MCINTYRE J. (Oral): The petitioners in this matter comprise two percent of the shareholders in a company called Circumpacific Energy Corporation ("Circumpacific"), a Yukon corporation which carries on business of exploring for and developing petroleum and natural gas properties in British Columbia, Alberta and Saskatchewan. I understand that Circumpacific has a Calgary office.

[2] Circumpacific is a publicly traded company and its trading was halted by the TSX Venture Exchange on January 24, 2003. That is trading was halted and it was suspended from March 20th of 2003 and trading remains suspended pending a TSX review of Circumpacific's affairs. As well, I understand, the Alberta Securities Commission has been reviewing what the situation is with respect to Circumpacific.

[3] The petitioners say that under the *Business Corporations Act,* R.S.Y. 2002, c. 20, that they have established a case of oppression on the basis of a number of financial and other transactions between Circumpacific and Drillsearch Energy (Canada) Ltd., a wholly owned subsidiary of Drillsearch Energy Limited, an Australian company owned by Philip Kelso who also controls Circumpacific.

[4] The petitioners rely on, amongst other provisions, s. 243 of the *Business Corporations Act* of the Yukon, which gives broad powers to the court in respect of oppression, unfairly prejudicial activity or unfair disregard to the interests of a security holder, creditor, director or officer. Without limiting the generality of the foregoing, it provides many remedies in subsection 3. The petitioners also say that they will suffer irreparable harm if Drillsearch Energy Limited and its affiliates are in a position to strip the assets of Circumpacific Energy and suggest that the balance of convenience favours the granting of interim relief on the basis that there will be no harm to Circumpacific Energy and the status quo will be preserved.

[5] In particular, the petitioners seek:

1. The appointment of a monitor to review and report all corporate transactions of Circumpacific;
2. That the monitor be granted, continued, and unrestricted access to any an all of the books, securities, records, documents and accounts of

Circumpacific;

3. A prohibition on Circumpacific:
    a) granting further mortgages, charges or other security, or further encumbering, pledging or selling any of its assets, except for petroleum, natural gas, and similar hydrocarbons substances produced in the normal course of operations as an oil and gas producing company;
    b) becoming a guarantor, surety or agree to indemnify or otherwise becoming liable in any manner with respect to any person or entity, and;
    c) granting credit, except to customers of the Company for goods or services actually supplied and except on terms ordinarily granted by it in the usual course of business.
4. A stay of any proceeding which might taken by Drillsearch Energy Limited, or Drillsearch Energy (Canada) Ltd. and Philip Kelso with respect to any security agreement involving or relating to the property assets or business of Circumpacific in favour of Drillsearch Energy Limited or Drillsearch Energy (Canada) Ltd.

[6] The petitioners refer to specific acts, primarily on the basis of the affidavits of William May, who was employed by Circumpacific Energy. These acts can be broken into three areas.

[7] First are allegations of diversion of a corporate opportunity in relation to what is called the Talbot Lake property. According to Mr. May, the initial opportunity for purchase of this property was really Circumpacific's and what later happened is that it ended up owing a very expensive 50 percent investment in the Talbot Lake property

when it could have originally purchased the property itself for substantially less. So the allegation is that Drillsearch ended up with the Talbot Lake property and ended up charging Circumpacific for an investment in the property which was rightfully Circumpacific's.

[8] The second group of allegations relate to diversion of funds. First the diversion of $1,283,000 raised by Yorkton Securities, October the 5th of 2000, which monies are said to have been sent to Australia to the direction of Drillsearch, the Australian company, at the direction of Mr. Kelso. The second part of that diversion claim relates to the diversion of $600,000 in funds borrowed from the Alberta Treasury Branch, that is to say, drawn down on Circumpacific's line of credit with Alberta Treasury Branches, which monies went to Drillsearch, again, at the direction of Philip Kelso.

[9] The third area relates to a non-brokered private placement and the allegations are that there are phony invoices in respect to the involvement of two companies called Fresh-In Investment Limited and Jordac Investments Ltd. Mr. May, in particular, says that no services were ever provided by them, yet shares were issued to them and paid for on the basis of the invoices provided.

[10] The petitioners go on to say that there are really no adequate responses to the allegations of fact made. In particular, although Mr. Ross and, indeed, Mr. Kelso talk about repayment of funds, this repayment has occurred some two years later and the question really is: What was the reason for the diversion of funds in the first place?

[11] I might say it is also noted by counsel on behalf of the respondents, that Mr. Kelso lives in Australia; that the affidavit that he filed was filed actually today, and as

he, himself, states in his affidavit he has not had the opportunity of reviewing all of the documents that Mr. May attaches to his affidavits to make full response.

[12] On behalf of the respondents it is said that it would be wrong to grant any interim injunctive relief at this time. An interim injunction at this time in respect of a publicly traded company, even if it is not trading right at the moment, could cause irreparable harm. There is no evidence whatsoever as to the assets of May and the other petitioners and, indeed, it is said that and pointed out that there is no undertaking in damages given by them to answer for any damages to the corporation should the injunction be later determined not to have been properly granted.

[13] It is also pointed out that there are many disputed facts, and that this matter can be heard at the end of October, on a one or two day hearing, where the issues will be fully aired on the basis of complete affidavits and what I assume would be extensive cross-examination on the affidavits. In addition, the respondents, the respondent, I should say, since it is only Circumpacific who is responding, the respondent Circumpacific also says that granting a monitor is unprecedented and, indeed, there is monitoring taking place as a result of the participation of the Alberta Securities Commission and the TSX Venture Exchange.

[14] Most compelling on behalf of the respondent is the suggestion that Drillsearch is now in a position where it has advanced funds to Circumpacific. Even if there are arguably bad deeds that have occurred in the past, which is not conceded but denied, there is no reason to believe in the future that it would be advantageous in any way shape or form for Drillsearch or Mr. Kelso to strip the assets of Circumpacific.

[15] In addition, an argument is made as to good faith on the part of the petitioners.

[16] In my view, it is not appropriate to grant an injunction at this time. I am not satisfied on the basis of either the two-pronged test that is set out in *British Columbia (Attorney General) v. Gitanmaax Band*, [1986], B.C.J. No. 1395, or on the basis of *American Cyanamid Company v. Ethicon Limited*, [1975] A.C. 396 (H.L.), that there is the possibility of irreparable harm to the petitioners at this time.

[17] In particular in relation to the governing law, I have not been told whether the Yukon Supreme Court prefers *American Cyanamid, supra*, or the *British Columbia* test, but as Madam Justice McLachlin, points out at paragraphs 45 and 46 of the *Gitanmaax* case*, supra,* the practical effect of the two approaches is the same. And indeed that point is made as well by Harvey J. in *Wingdam Joint Venture v. Tonto Mining*, [1992] B.C.J. No. 309, at page 3, where he has referred to another well known B.C. authority, *British Columbia (Attorney General) v. Wale et al*, [1986] B.C.J. No. 1395 and *American Cyanamid, supra*. He says that the test is really what is just and equitable in all of the circumstances.

[18] I am not persuaded that the petitioners have proved that they will suffer irreparable harm if there is no injunction granted until the time of the hearing. There are really two aspects to the relief that is sought by the petitioners. One of them is injunctive relief, which I deny. The other is the aspect of a monitor.

[19] Now, Mr. Hopkyns, has pointed out to me that he is not aware of authority in relation to the granting of a monitor. Mr. James has pointed out, although he did not bring his authorities with him, there is Alberta authority for that proposition found in the Westfair Foods case, a decision of Madam Justice Perperny, and for which I do not have a cite.

[20] In my view, the *Business Corporations Act* provides a broad range of potential remedies to me. I find that and hold that, even though I do not find the prospect of irreparable harm to be present, that the facts alleged with respect to the Talbot Lake property, the question of the diversion of funds raised by Yorkton Securities, and the drawing down on the line of credit, and indeed the question of the non-brokered private placement funds give rise to a need for monitoring.

[21] I am hopeful that this matter will be heard in late October, but I am not so sure that I can be as optimistic as counsel, who I am sure will do their best to have this matter heard in the near future, but there will be extensive cross-examination on affidavits. I am heartened by the representation, or I should say advice as opposed to representation, by the advice that Mr. Kelso will be in Alberta in the near future on another matter, and thus presumably will be available for the purposes of cross-examination on affidavits.

[22] As I say, the facts that have been alleged taken in conjunction with the affidavit evidence, including the repayments which I have already commented on, do not really satisfy me that there is an adequate explanation for events that in the absence of full exploration of the facts give rise to real concerns about the way Drillsearch and Mr. Kelso have been dealing with Circumpacific.

[23] Therefore, I am going to agree to the appointment of a monitor to review and report all corporate transactions to the court and to the petitioners, and that the monitor be granted continued and non-restricted access to any and all of the books, records, documents, and accounts of Circumpacific Energy.

[24] One of the observations made by the respondent is that Richter, Allan and Richter Inc., is not someone that is known and there is no indication that it is prepared to act or return to jurisdiction of the court.

[25] Now I appreciate that often receivers who are going to be appointed will consent to such an appointment. I have to say that although I am sitting as a deputy judge in the Yukon Territory, I am a judge of Alberta, and I am aware of the company and I am aware that it is often involved in matters of receivership and bankruptcy. I assume it being put forward that it is prepared to act. If it is not prepared to act, then, presumably the petitioners will put forward the name of someone else of a reputable firm who can act.

[26] In taking into account the facts and arguments that have been made to counsel, I also consider the question of interference with an ongoing company. In my view, an injunction would be amongst other things obtrusive and intrusive. I do not consider, on the facts, that the appointment of a monitor will be obtrusive and intrusive.

[27] During the course of argument, counsel on behalf of the petitioners answered my question with respect to who is going to pay. Indeed, Mr. James has indicated that his clients are prepared to, should the court require it, fund the costs of a monitor. Because we do not have a complete record yet, that is to say, Mr. Kelso has reserved the right to comment on documents that he has not yet had the opportunity to see, despite the fact that Mr. May's affidavit was filed in June 2003, I consider it appropriate that the petitioners put their money where their mouth is, to use a colloquialism; and actually pay for the monitor. I do that because it could well be that at the end of the day, that what I consider to be and I use this for the

purposes only of this judgment, for what might be considered to be questionable activities; it may well be at the end of the day, that in the light of proper examination of all of the facts and circumstances, Mr. Kelso and Drillsearch will be able to demonstrate that there should be no concerns about what happened in the past.

[28] That being so, I do not consider that Circumpacific or anyone else should bear the cost of the monitor, now. Equally, should at the end of the day, Mr. May and the other petitioners demonstrate that their concerns so adamantly put in their affidavits are justified, then indeed, presumably they will be looking for payment toward the monitor funds that they have expended.

[29] Those conclude my reasons. Thank you very much counsel for your submissions. Is there anything else Madam Clerk? No. Okay.

[30] MR. HOPKYNS: I wonder if I might ask you to stay the order of the appointment of a monitor for 14 days?

[31] THE COURT: So that you can appeal?

[32] MR. HOPKYNS: Yes, My Lord.

[33] THE COURT: Do you have any objection to that Mr. James?

[34] MR. JAMES: Well, my view is, that a stay may not be inappropriate, but 14 days causes me some concern. My concern is that there are events ongoing. There is an audit going on at the present time and that seven days

should be sufficient if my friend wishes to appeal and get a further order of the Court of Appeal staying further.

[35] THE COURT: All right. Let me just say that I have got some sympathy with the proposition that with a client in Australia, it may take a bit more time. Mr. Hopkyns I am going to ask you to in a sense, put your money where your mouth is, if you will forgive my phrase. During the course of the argument it was pointed out to me, well why would Drillsearch or anyone do anything in the circumstances, yet at the same time, as Mr. James has pointed out, you have taken a position, look do not grant an injunction, it will cause real harm.

[36] My question to you is whether there should not be some sort of condition, even though I have not granted an injunction, on the stay, that is that no steps be taken out of the ordinary in the usual course of business, or whatever wording might be appropriate as a condition of granting a 14 day stay.

[37] MR. HOPKYNS: My Lord, I do not believe that is appropriate because the court has decided that it is not an appropriate matter for an injunction. The concern I have with the wording of the monitor is the petitioners get unfettered right of discovery in a matter brought by way of an originating application. In a publicly traded company, to have unrestricted access to all books, securities, records, documents, accounts, contracts, deeds, papers, records and information of any kind, could grind this company to a halt just by Richter and Company showing up tomorrow with a demand for every record, document that this company has.

[38] This company would immediately find itself in breach of a court order. I am happy -- I can tell the court to recommend that my client provide reasonable documents on reasonable conditions to the petitioners, but to have the unfettered

right to go to the company and have access to all of their records, it is akin to an Anton Pillar Order. I submit that this can be used as an instrument, not trying to deprive the petitioners of right to certain information, but as minority shareholders the company prescribes what rights minority shareholders have to information. This goes much, much beyond what any minority shareholder has.

[39] This is an application brought by way of a petition, an originating application under the rules under which there are rules to rights of discovery. By granting a monitor, we immediately go beyond all rights of disclosure which are normally available in a petition-like proceeding beyond what rights of disclosure parties are even entitled to under on a trial with the parties, at least, entitled to sort of put together records, documents, relevant to the proceeding.

[40] This, basically, entitles Richter to show up tomorrow morning at Circumpacific's office and to demand every single document that they have got, and it they do not give them immediately to be back here before the court on a contempt order. I just see this being used as an instrument of oppression. I mean, I am not trying to be evasive, but that is a real concern. That a monitor on top of the Securities TSX exchange investigations and also the Commission, it just is something that the company really does not have the resources to deal with. I mean to provide all of this information in the timeframe that Richter, in its uncontrolled discretion decides, I mean, I will undertake to get on with the appeal as quickly as possible. I may have to retain other counsel to assist me, because I have other matters to deal with, but I do need the time, My Lord, to appeal the order on the monitor.

[41] THE COURT: Thank you. Anything further Mr. James.

[42] MR. JAMES: No. Thank you, My Lord.

[43] THE COURT: All right. You will have a 14 day stay in order to allow you time to appeal. Is an appeal an automatic stay? Or do you have to apply for a stay?

[44] MR. MACDONALD: Under our rules, I am confident, we have to apply for a stay.

[45] THE COURT: Thank you. Thank you counsel.

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MCINTYRE J.