

COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *May v. Circumpacific Energy Corp.*,
2004 YKCA 5

Date: 20040315
Docket: YU512

Between:

**William May, Peter Weichler, Bert Peters,
Robert Schiesser, Dan McCarthur and David Smiddy**

Respondents
(Petitioners)

And

Circumpacific Energy Corporation

Appellant
(Respondent)

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Low

W.G. Hopkins Counsel for the Appellant

W.E.B. Code Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
March 8, 2004

Place and Date of Judgment: Vancouver, British Columbia
March 15, 2004

Written Reasons of the Court

Reasons for Judgment of the Court:

[1] This is an appeal from the decision of a chambers judge, made December 18, 2003, ordering that three individuals who are not parties to this proceeding, and who reside in Alberta and Ontario, "shall be examined on oath on matters related to the Petition, filed August 13, 2003, pursuant to Rule 52(8)" of the *Rules of Court*.

[2] At the conclusion of the hearing, this Court allowed the appeal and set aside the order with written reasons to follow.

[3] These are our reasons.

[4] By way of brief background, Circumpacific Energy Corporation ("Circumpacific") is a publicly-traded company listed on the TSX Venture Exchange. It carries on the business of petroleum and natural gas exploration in British Columbia, Alberta and Saskatchewan. Trading in the shares of Circumpacific was halted by the Exchange on January 24, 2003, and suspended on March 20, 2003.

[5] The respondents (petitioners in the proceedings) hold two per cent of the shares of Circumpacific. They filed a petition in the Supreme Court of the Yukon Territory on August 13, 2003 setting out the facts they allege would establish a case of oppression and would entitle them to relief under the

Business Corporations Act, R.S.Y. 2002, c. 20, including the right to commence a derivative action. The hearing of that petition, as amended, is currently set for April 19, 2004.

[6] On December 4, 2003, the respondents applied for an order seeking, amongst other things, to examine under oath three individuals who are not parties to the proceeding and who have not filed any material in the proceeding. Two of those individuals, Mr. Buccini and Mr. Ball, were former employees of Circumpacific and reside in Alberta. The third individual, Mr. Leger, was the corporate relations manager of the Alberta Treasury Branch, and is said to be knowledgeable about the banking relationship between Circumpacific and the Alberta Treasury Branch at the relevant times. Mr. Leger resides in Ontario.

[7] In January 2004, Mr. Leger was examined pursuant to the order, but on the basis that his evidence would not be used by the respondents in the event the appeal was successful.

[8] Counsel for Circumpacific submitted that the court had no jurisdiction to make the order under Rule 52(8) and that, in any event, the order should not have been made where there was no means of enforcing it if it were disobeyed.

[9] The chambers judge noted that the witnesses had indicated that they were willing to give evidence if compelled to do so by order, but that they were not prepared to provide evidence voluntarily because of confidentiality concerns between themselves and Circumpacific. In the result, the chambers judge found that the witnesses had attorned to the jurisdiction by expressing a willingness to give evidence under order, and he made the order on that basis. At para. 8 of his reasons, he stated:

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.

[10] During the course of his submissions, counsel for the respondents acknowledged that, in the event one or more of the witnesses chose not to comply with the order, the court had no means to enforce the order against them. Counsel for the respondents also acknowledged that he had been unable to find any authorities which refer to witnesses (as opposed to parties) attorning to the jurisdiction of the court, and he did not seek to uphold the decision on the basis of attornment. He submitted, however, that the order could be

upheld as a proper exercise of the court's discretion under Rule 52(8) in the circumstances, which include the necessity of the evidence to the respondents' case, and the likelihood that the witnesses will comply with the order, thereby rendering the issue of enforceability academic.

[11] In our view, it is not necessary to discuss whether such an order was available under Rule 52(8) since it is clear that the order made could not be enforced against these witnesses, who reside outside the jurisdiction, in any event. The witnesses' apparent willingness to comply with an order on the condition that it protected them against claims by Circumpacific for breach of confidentiality did not justify the making of the order, which is incapable of enforcement in the event of non-compliance. In that regard, see, for example, the decision of this Court in **United Services Fund (Trustee of) v. Richardson Greenshields of Canada Ltd.** (1988), 23 B.C.L.R. (2d) 1.

[12] For these reasons, we allowed the appeal and set aside the order under appeal. It was necessary to resolve the issues raised expeditiously because of the rapidly approaching hearing date.

"The Honourable Madam Justice Prowse"

"The Honourable Mr. Justice Mackenzie"

"The Honourable Mr. Justice Low"