# SUPREME COURT OF YUKON

Citation: *1371737 Alberta Ltd. et al*. v. *37768 Yukon Inc. et al.*, 2010 YKSC 17

Date: 20100423
S.C. No. 08-A0135
Registry: Whitehorse

Between:

**1371737 ALBERTA LTD. (formerly 36822 Yukon Inc.) and BRADEN BENNETT**

Petitioners

And

**37768 YUKON INC. and CRYSTAL BIRMINGHAM**

Respondents

Before: Mr. Justice L.F. Gower

Appearances:

James Tucker — Counsel for the Petitioners
Debbie Hoffman — Counsel for the Respondents

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] This is an application under Rule 60(32) of the *Rules of Court* for a review of an assessment of costs by a deputy clerk of this Court. The original action arose as a shareholders' dispute between the petitioners, as minority shareholders, and the respondents, who carry on business as the Roadhouse Inn. To their credit, the parties settled the matter by way of a consent order dated July 16, 2009, in which the corporate respondent (the "Corporation") purchased all the shares of the petitioners for the sum of

$2,941.00 per share. The order further specified that the petitioners would have their costs, to be assessed.

[2] Counsel for the parties appeared before the deputy clerk for the assessment of costs hearing on August 21, 2009. The deputy clerk issued her written reasons on September 18, 2009, which disallowed a disbursement incurred by the petitioners to have the shares in the Corporation valued by Mr. Pramen Prasad, who is both a chartered accountant and a certified management accountant. That disbursement was in the total amount of $6,550.00. The petitioners are applying to have that disallowance reversed.

**ISSUE**

[3] The issue is whether the disbursement was either necessary or proper at the time it was incurred and, if so, whether the amount of the disbursement was reasonable.

**THE LAW**

It may be helpful to set out the relevant Rules. The subrule on which this application specifically turns is Rule 60(4), which states:

> "In addition to determining the fees that are to be allowed on an assessment under subrule (1) or (3), the clerk must
> (a) determine which expenses and disbursements have been necessarily or properly incurred in the conduct of the proceeding, and
> (b) allow a reasonable amount for those expenses and disbursements." (my emphasis).

[4] Further, Rule 60(32) states:

> "A party who is dissatisfied with a decision of the clerk on an assessment may, within 14 days after the clerk has certified the costs, apply to the court for a review of the assessment, and the court may make an order as it thinks just."

[5] The standard of review on such applications is that a judge should not override the clerk on an assessment except on a matter of principle. The hearing is not a fresh (*de novo)* hearing and no new evidence may be received. The clerk's assessment should not be interfered with unless his or her decision was clearly wrong. Thus, my role in this appeal is limited: see *Narvaez* v. *Zhang*, 2010 BCSC 78, at paras. 25, 27 and 71; and *Sylvan Industries Ltd.* v. *Fairview Sheet Metal Works Ltd.*, [1994] B.C.J. No. 3331 (B.C.C.A.).

[6] The standard for the assessment by the clerk under Rule 60(4) is much more discretionary. The initial burden of proof clearly rests on the party submitting the bill for taxation to establish affirmatively that the disbursement was necessary or proper and that it was reasonable in amount: see *Swyers* v. *Drenth*, [1995] B.C.J. No. 2184 (BCSC) at para. 18.

[7] In *Van Daele* v. *Van Daele*, [1983] B.C.J. No. 1482, the British Columbia Court of Appeal held, at para. 11, that the test under the precursor to the current Rule 57(4) was:

> "…whether at the time the disbursement was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or as a result of excessive caution or excessive zeal, judged by the situation at the time… "

However, it must be remembered that the language used by the Court of Appeal in that case was linked specifically to the wording of Rule 57(4) as it then was, as set out below:

> "Disbursement and expenses
>
> (4) On a taxation, the registrar shall allow necessary or proper disbursements and expenses but, except as against the party who incurred them, disbursements or expenses shall not be allowed which appear to the registrar to have

> been incurred or increased through extravagance, negligence or mistake, or by payment of unjustified charges or expenses." (my emphasis)

Nevertheless, that part of the test in *Van Daele* which requires the clerk to assess the necessity or propriety and the reasonableness of the disbursement *at the time it was incurred* continues to be applicable.

[8] In *Holzapfel* v. *Matheusik et al.* (1987), 14 B.C.L.R. (2d.) 135 (B.C.C.A.), MacDonald J.A., for the Court adopted the following passage from the judgment of Legg J. (as he then was) in *Bell* v. *Fantin* (1981), 32 B.C.L.R. 322, at para. 23:

> "I consider that Rule 57(4) entitles the Registrar to exercise a wide discretion to disallow disbursements in whole or in part where the disbursements appear to him to have been incurred or increased through extravagance, negligence or mistake or by payment of unjustified charges or expenses. The Registrar must consider all the circumstances of each case and determine whether the disbursements were reasonably incurred and were justified. He must be careful to balance his duty to disallow expenses incurred due to negligence or mistake, or which are extravagant, with his duty to recognize that a carefully prepared case requires that counsel use care in the choice of expert witnesses and examine all sources of information and possible evidence which may be of advantage to his client."

[9] In *Narayan (Guardian at litem)* v. *Djurickovic*, 2004 BCSC 341, R.D. Wilson J., at paras. 16 and 17, accepted the following additional principles as governing the exercise of the discretion in these types of assessments:

> "Necessary means indispensable to the conduct of the proceeding. Proper means not necessary, but nevertheless reasonably taken or incurred for the purpose of the proceeding: see *Bowers* v. *White* (1977), 2 B.C.L.R. 355 (B.C.S.C.).
>
> The costs of expert reports prepared but not relied upon are recoverable if the costs were reasonably incurred in contemplation of, or in preparation for, litigation; *Wong* v. *Cullion*, [1994] B.C.J. No. 1182 (B.C.S.C.); *Forsythe* v.

> *Strader* (1987), 17 B.C.L.R. (2d) 124 (B.C.C.A.); *Clark* v. *Magdanz*, [1994] B.C.J. No. 3243 (B.C.S.C.)"

**ANALYSIS**

[10] In her reasons, the deputy clerk referred to the petitioners' arguments in support of the disbursement at para. 6:

> "The Petitioner submitted this report was required to determine the value to be used assigned to the shares in 37768 Yukon Inc. ("the Corporation"). The person retained to prepare the report was the only one that was able to prepare the report, as he was familiar with the business. The Petitioners further submitted that there was a concern raised by the Respondents about the valuator being in position of conflict and that the parties should hire a joint valuator they could both agree on. There was some correspondence between counsel without a final agreement as to who would prepare a valuation report so the Petitioners went forward with their valuator. The Petitioners submit that this was their only recourse to advance the action."

[11] At para. 7 of her reasons, the deputy clerk set out the respondents arguments against allowing the disbursement:

> "Counsel for the Respondents raised two main issues with the report prepared by the Petitioner's valuator. Firstly, the valuator hired by the Petitioners was in a position of conflict as he was the personal/business accountant for the Petitioners and would thereby not be subjective [I believe she meant to say objective] when preparing the report. Secondly, the valuator was not an accredited business valuator and could not provide [an objective] report of the value of the company shares. The Respondents further submitted that upon their review of the Petitioners valuator's report they found the shares were inflated and did not reflect an accurate valuation of the company."

[12] The alleged conflict of interest was initially raised by the respondents' counsel in her letter to the petitioners' counsel dated August 11, 2008:

> "I write further to your letter of August 8, 2008. In your letter, you suggested that the Corporation accountant perform an evaluation on the Corporation. I understand that the

> accountant for the Corporation is also Mr. Bennett's accountant, and therefore we believe the accountant would be in a conflict of interest in providing an evaluation of the Corporation."

[13] At para. 9 of her reasons, the deputy clerk correctly stated that what she had to determine was whether or not the Petitioners' valuation report was a reasonable and necessary disbursement. She also went on to find that the two arguments raised by the respondents, namely conflict of interest and the qualifications of the petitioners' valuator, were side issues and she could not answer them. Specifically, she said she could not "speculate at this time as to whether or not a trial judge would or would not admit these reports in evidence." In my view, the deputy clerk was also correct in declining to speculate whether or not the Petitioners' valuation report would have been admissible had this matter gone to trial.

[14] With respect, the argument by the respondents' counsel seems to be based upon the assumption that the alleged conflict of interest would inevitably have resulted in the valuation being ruled inadmissible. I do not agree that would necessarily be the case.

[15] In some respects, the theoretical admissibility of the petitioners' valuation report might well have depended on the facts found by the trial judge. As Mr. Prasad had been the Corporation's accountant for some time, it is understandable why the petitioners would want to use him to do a valuation of the Corporation's shares, regardless of whether he was also retained personally by the petitioner, Braden Bennett. It is not inconceivable that a trial judge might nevertheless have admitted the petitioners' valuation report on the basis that any adjudged lack of objectivity, due to the accountant's divided loyalties, might simply go to the weight of the report.

[16] Similarly, with respect to the respondents' argument that Mr. Prasad was not an accredited business valuator, in my view that would not necessarily have lead to a conclusion by the trial judge that the petitioners' valuation report was inadmissible. Mr. Prasad has the designations "CA" and "CMA" after his name and signature at the end of the petitioners' valuation report. There was no dispute that these designations mean he was qualified as a chartered accountant and a certified management accountant. Once again, whether Mr. Prasad's qualifications to value the shares of the Corporation might have been determined to fall short of those of an accredited business valuator could well have been seen by a trial judge as an issue of weight versus admissibility.

[17] Therefore, I repeat that the deputy clerk was correct, in my view, in refusing to speculate whether the petitioners' valuation report would have been admissible at trial.

[18] However, that is not the end of the matter. The deputy clerk went on to make particular note of the fact that the specific share valuation in the consent order of July 16, 2009, was a figure from the valuation done by the respondents' accredited valuator. Then, the deputy clerk looked at the relative usefulness of the petitioners' valuation report in facilitating the eventual settlement. In particular, at paras. 10 and 11 of her written reasons, she said as follows:

> "In this case, counsel for the Petitioners did not disclose or assert the usefulness of his valuation report in reaching the consent. The Respondents valuation's report set out the amount reflected in the consent order and I concluded that the Respondents' report was used to settle the litigation.
>
> Further, there is no evidence before me as to what weight or reliance was placed on the Petitioners valuator's report for me to conclude that the Petitioners valuation's report sped up or influenced the outcome of the litigation. (my emphasis)

[19] Unfortunately, this is where the deputy clerk erred in principle. It was clearly wrong of her to focus on whether the petitioners' valuation report was useful in procuring the eventual settlement. It was also wrong of her to focus on the fact that there was no evidence before her as to "what weight or reliance" was placed on the Petitioners' report, and that she therefore could not determine whether the report "sped up or influenced the outcome of the litigation". Rather, pursuant to the test in *Van Daele*, cited above, she should have asked herself whether the disbursement was necessary or proper and reasonable in amount *at the time it was incurred*, and *not* at or about the point of settlement.

[20] Further, given the nature of this shareholders' dispute, it is uncontentious that the parties expected they would have to obtain and provide evidence regarding the valuation of the Corporation's shares in order to achieve a resolution, whether by trial or settlement. While the deputy clerk had a duty to consider whether the petitioners' disbursement was reasonably incurred and justified, she was also required to balance that determination with her duty to recognize that a carefully prepared case requires counsel to examine all sources of information and possible evidence which may be of advantage to his client. Although the petitioners' counsel had clearly been put on notice by the respondents' counsel that using Mr. Prasad as the petitioners' valuator would risk later arguments about the admissibility or weight of his report, the petitioners' counsel was not bound to agree with the respondent's position in that regard. As the petitioners' counsel emphasized, his clients were free to retain an expert of their choice, regardless of whether the respondents' counsel felt that choice to be imprudent.

[21] At the hearing before me, the respondents' counsel questioned the extent to which the specific invoices which the petitioners attached to the draft bill of costs

correctly related to the within action. I was also advised that the same arguments were raised at the assessment before the deputy clerk. However, as the deputy clerk did not address the accuracy or relevance of the invoices in her written reasons, I conclude that any irregularities in that regard did not constitute a sufficient reason, in her mind, to find that the disbursement was unnecessary, improper or unreasonable in amount. Therefore, as this review of her assessment is not a fresh hearing and I do not wish to interfere with the deputy clerk's apparent assessment of the invoices, I decline to make any further finding in that regard.

[22] Other than the points raised by the respondents' counsel about irregularities with the petitioners' invoices, I did not understand her to be challenging the reasonableness of the amount of those invoices. Nor did I understand those arguments to have been raised before the deputy clerk. In other words, the quantum of the disbursement was apparently not an issue in the initial assessment, and it has not been raised as an issue on this review. Given that this is not a fresh hearing, it would be inappropriate for me to make any determination on whether the total amount of the disbursement is reasonable, and I decline to do so. Rather, I assume that the absence of any reference to the amount of the disbursement by the deputy clerk, in her written reasons, indicates that she did not conclude the amount to be unreasonable. Conversely, she must be taken to have found the amount of the disbursement to be reasonable.

[23] Under Rule 60(32), on a review of a clerk's assessment of costs, "the court may make an order as it thinks just". In my view, the disbursement may not have been necessary, in the sense of being indispensable to the conduct of the proceeding, given that the petitioners had the option of splitting the cost of the respondents' certified business valuator. However, the petitioners were entitled to engage the services of the

expert of their choice. In that respect, I conclude that the disbursement was “properly incurred”, in that it was for the justifiable purpose of obtaining the essential information on the valuation of the Corporation’s shares from what they thought was the best source; namely the Corporation’s accountant, Mr. Prasad.

**CONCLUSION**

[24] In the result, I grant the petitioners’ application, set aside the decision of the deputy clerk to disallow the subject disbursement, and direct that the certificate of costs be amended to include the disbursement in the amount of $6,550.

**COSTS OF THIS APPLICATION**

[25] The only remaining question is the costs to be awarded on this review application. Under Rule 60(9), the costs of a proceeding shall follow the event, unless the court otherwise orders. Both counsel had an opportunity make submissions on costs at the hearing before me. The respondents’ counsel filed an affidavit containing copies of emails exchanged between counsel prior to the initial costs assessment. The petitioners’ counsel clearly felt it was appropriate to have that assessment before the deputy clerk. The respondents’ counsel suggested that the parties go directly to a judge for the initial assessment, presumably under the authority of Rule 60(7). The rationale provided by the respondents’ counsel was that, if either party was dissatisfied with the deputy clerk’s assessment, then there was the possibility of a further review under Rule 60(32). Therefore, it would be more expeditious and less costly to have a single hearing before a judge, which would be a final hearing, rather than risk two hearings. The petitioners’ counsel rejected this suggestion. In his email to the respondents’ counsel, his reasoning seemed to be that the deputy clerk was more than capable of dealing with what was expected to be a relatively uncomplicated costs assessment. However, his

email failed to address the question of a potential appeal to a judge from that assessment.

[26] When I pressed the petitioners' counsel why he did not simply agree to go directly to a judge, given the risk of an appeal, he responded that the concern presupposed that either side would in fact appeal the deputy clerk's decision. Perhaps I failed to understand the rationale of the petitioners' counsel in this regard. However, I remain unpersuaded that it was reasonable to insist that the matter go to the deputy clerk for the initial assessment, when there was an obvious dispute about the justifiability of the relatively large disbursement paid to the petitioners' accountant, and the consequent risk of a subsequent appeal to a judge under Rule 60(32). The question was not whether the deputy clerk was capable of doing the initial assessment, but rather whether it would be mutually beneficial to both sides to have a single hearing which finally determined the matter, at considerably less cost to the litigants. In my view, the answer to that question was inescapably yes.

[27] Accordingly, although it is rare to deny costs to a successful party, this is an unusual situation in which I conclude it would be in the interests of justice to order that each side bear their own costs.

Gower J.