

SUPREME COURT OF YUKON

Citation: *45325 Yukon Inc. v Kiselbach*,
2016 YKSC 46

Date: 20160902
S.C. No. 16-A0039
Registry: Whitehorse

Between:

45325 YUKON INC.

PETITIONER

And

CRAIG KISELBACH

RESPONDENT

Before Mr. Justice L.F. Gower

Appearances:
Gary W. Whittle
Richard R.E. DeFillipi

Counsel for the petitioner
Counsel for the respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for an interim injunction by the respondent, Craig Kiselbach (“Kiselbach”). The petitioner, 45325 Yukon Inc., is commonly referred to by the parties as Yukon Stone Outfitters (“Yukon Stone”). The president and majority shareholder of Yukon Stone is Aaron Florian (“Florian”), a resident of the United States of America. In these reasons, when I refer to acts or omissions by Florian, I do so in the context of him acting or omitting to act on behalf of Yukon Stone. Kiselbach is the principal of a company he controls, C.S.H. Outfitting Ltd. (“CSH”). The dispute between the parties is over the enforceability of a declaration of trust relating to a Yukon hunting concession area, alleged breaches of contract, and alleged violations of the *Business Corporations*

Act, R.S.Y. 2002, c. 20, as amended. Kiselbach, a Canadian citizen and resident of British Columbia, is the outfitter operating the concession on behalf of Yukon Stone. The parties have agreed that these issues should proceed to trial. In the meantime, Kiselbach seeks an interim injunction preventing Florian and Yukon Stone from interfering with his operation of the concession for the current hunting season.

BACKGROUND

[2] On June 2, 2012, Florian, Kiselbach and CSH entered into an agreement (the “services agreement”) whereby Kiselbach assumed the position of outfitter for Yukon hunting Concession #15. Pursuant to ss. 38(3) and (4) of the *Wildlife Act*, R.S.Y. 2002, c. 229, as amended, (the “*Act*”) in order for both Kiselbach and Yukon Stone to contract to provide guides for big game hunting, it became necessary for Kiselbach to become a director of Yukon Stone, which was done under the services agreement. The services agreement also provided for the fees to be paid to CSH, an annual performance incentive for which CSH would be eligible, and eventual equity participation by Kiselbach and/or CSH in Yukon Stone, beginning in 2013. Finally, the services agreement required Kiselbach to sign a trust declaration indicating that he would hold Concession #15 in trust for Yukon Stone, which Kiselbach did on June 11, 2012. The enforceability of that trust declaration is presently one of the central issues in this litigation.

[3] Pursuant to s. 50(1) of the *Act*, the Minister may only issue an outfitting concession to an individual who is a Canadian citizen (or permanent resident) and ordinarily resides in Canada. Kiselbach meets these qualifications, but Florian does not.

[4] The services agreement specified Kiselbach’s responsibilities as follows:

Scope of Services: I expect that this role will be largely a full time position with activities throughout the year including but not limited to management of all aspects of hunting and fishing operations (including horse care, hiring and managing crew, flying, guiding is necessary, infrastructure maintenance and improvement, and many more), attendance at shows to represent the business and book trips, response to inquiries throughout the year, Winter predator hunts and management, management of relations with Government Agencies, First Nations, Outfitters Association as well as expense management, some amount of book keeping and financial planning/management. In this role you will be expected to uphold and observe all the provisions of the Wildlife Act. (my bolding and underlining)

[5] Kiselbach operated Concession #15 as the outfitter under the *Act* for the hunting seasons in each of the years from 2012 to and including the present year. I am advised that the hunting season runs from August 1 to October 31 each year, but that historically Kiselbach and Yukon Stone have usually finished the season by or about the end of the first week in October each year.

[6] Financial statements provided by Yukon Stone indicate that outfitting revenue has increased in each year from 2013 through to and including 2015. Emails between Florian and Kiselbach further suggest that Florian was pleased with Kiselbach's performance in this regard.

[7] For the current hunting season, the evidence is that Yukon Stone is committed to approximately 25 big game hunts with estimated revenue of approximately \$700,000 US. The season has been underway since August 1 and is scheduled to continue until October 7, 2016.

[8] Despite his apparent success with operating hunting Concession #15, Kiselbach became increasingly dissatisfied with Florian and Yukon Stone, alleging that Florian failed to live up to certain obligations in the services agreement, in particular the lack of

opportunity to pursue equity participation in Yukon Stone. This ultimately resulted in Kiselbach making an offer, on January 30, 2016, to buy out Florian's interest in Yukon Stone. Florian declined the offer and, on April 25, 2016, requested that Kiselbach surrender Concession #15 pursuant to the trust declaration, in order that it could be reissued to a new outfitter of Florian's choosing, Gregory Spenner.

[9] Kiselbach retained counsel to oppose this action and to pursue his own claims alleging breach of contract and violations of the *Business Corporations Act* by Florian. Ultimately, he seeks to dissolve and liquidate Yukon Stone, and recover his claims through a sale of the company's shares.

[10] On June 7, 2016, Yukon Stone filed a petition seeking an order that Kiselbach surrender Concession #15 pursuant to the trust declaration. Kiselbach's counsel responded with: (1) an application to have the petition and the anticipated counterclaim converted into a trial, pursuant to Rule 50(12)(d); and (2) this application for an interim injunction.

[11] When the matter came before me on August 24 and 25, 2016, Yukon Stone's counsel indicated that his client was consenting to the petition being converted into a trial. Tracking the language in Kiselbach's notice of application, Yukon Stone will file a statement of claim within 14 days of the date the consent order is filed, and Kiselbach and CSH will have a further 21 days to file their defence and counterclaim.

[12] As a result of this change of affairs, the hearing on August 24 and 25 was limited solely to the issue of the interim injunction.

ISSUES

[13] There is no dispute that the leading case for interlocutory and interim injunctions is *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 S.C.R. 311. It sets out the three part test for interim injunction relief, at para. 43:

- 1) there must be a serious question to be tried;
- 2) the applicant must suffer irreparable harm if the application were to be refused; and
- 3) the balance of convenience/inconvenience must be considered, which involves an assessment of which of the parties will suffer greater harm from the granting or refusal of the injunction, pending a decision on the merits of the case.

RJR-MacDonald has been applied by this Court in *S.M. (Guardian ad litem of) v. Porter Creek Secondary School*, 2007 YKSC 50; and *Duke Ventures Ltd. v. Seafoot*, 2015 YKSC 14.

ANALYSIS

1) ***Is there a serious question to be tried?***

[14] Kiselbach's counsel raises a number of challenges to the validity of the trust declaration.

[15] First, he submits that Concession #15 is not capable of being trust property because it is not, pursuant to s. 76 of the *Act*, transferable or assignable by the outfitter. Rather, only the Minister may transfer a concession by terminating the concession and issuing a new concession to the transferee pursuant to s. 78 of the *Act*. In this regard, counsel relies upon *Halsbury's Laws of England*, 4th Ed. Vol. 48, (Butterworths: London

1995), p. 252, which states that one of the essentials of creating a trust is that the property is capable of being the subject of the trust, in the sense that it must be property “which a person can, at law or in equity, transfer or assign”.

[16] Second, Kiselbach’s counsel submits that it is not possible to create a trust of future acquired property. In this regard, he points to the language of the trust declaration itself which indicates that when Kiselbach signed it, on June 11, 2012, he was not yet the holder of Concession #15 (paras. 1 and 4). Further, according to the text *Equity and Trusts*, 7th Ed. (New York: Routledge, 2013), by Alastair Hudson, at p. 242:

Where a promise is made under a covenant to the effect that the settlor will settle property which is to be acquired in the future, there will not be a valid trust. A valid trust will only be created if the settlor owned property rights in the trust property at the time of purporting to declare the trust...(my emphasis)

[17] Thirdly, Kiselbach’s counsel submits that in order to create a valid trust, there must be a “transfer” of the beneficial interest in the trust property to the beneficiary of the trust, while the trustee continues to hold the legal interest in the property. In this regard, he again points to the language of the trust declaration itself which defeats this requirement:

6. Nothing in this Trust Declaration is intended, nor shall it be construed, as operating as a transfer nor an assignment of the Outfitting Concession or any part thereof, to any person...

[18] Yukon Stone’s counsel failed to deal with these arguments head on, but rather pointed to the fact that, in para. 2 of the trust declaration, Kiselbach declared before a notary public on June 11, 2012, that “a permit” had already been issued to him and Yukon Stone pursuant to s. 38 of the *Act*. This is the permit which allows the outfitter

and Yukon Stone to enter into contracts with hunters to provide guides. However, Yukon Stone's counsel submitted that this cannot be true if the permit was issued at the same time as the outfitter's operating certificate, which was issued on July 20, 2012.

Therefore, Yukon Stone's counsel submitted that Kiselbach made a fraudulent misrepresentation when he declared that he already had the permit on June 11, 2012.

[19] I confess I have difficulty with this argument, particularly when the evidence suggests that the trust declaration itself was prepared under Florian's instructions, and therefore the doctrine of *contra proferentum* would apply to the interpretation of any ambiguities. Further, the suggestion that there was fraud by Kiselbach does not in any way validate the trust.

[20] With respect to the breach of contract claim, Kiselbach's counsel alleges that the services agreement entitled either Kiselbach or CSH to acquire 1% of Yukon Stone on an annual basis commencing in 2013 until a total of 10% is accumulated. Further, the agreement states that either Kiselbach or CSH is entitled to purchase an additional 5% of the original purchase price for Concession #15, providing the purchase is completed prior to July 1, 2017. Yukon Stone's counsel failed to respond to these allegations.

[21] Finally, Kiselbach's counsel alleges that Florian, as a director of Yukon Stone, acted in a manner that was either oppressive, unfairly prejudicial or with unfair disregard to Kiselbach's interests as a beneficial shareholder of Yukon Stone. Examples of this conduct cited by counsel are: (1) Florian failing to provide annual financial statements to Kiselbach; (2) Florian purporting to add his wife, Anne Florian, as a director of Yukon Stone on May 13, 2016 without Kiselbach's consent; and (3) Florian and his wife purporting to pass a director's resolution requiring Kiselbach to surrender Concession

#15 to Yukon Stone, in order that it could be reissued to Gregory Spenner, the replacement outfitter proposed by Yukon Stone. Once again, Yukon Stone's counsel failed to address these allegations, other than to suggest that in order to make such a claim, Kiselbach must file a petition of his own, which he has not yet done.

[22] This last point echoes the main one raised by Yukon Stone's counsel on the "serious question" issue. That is, that there is no question as yet before this Court, let alone a serious one, because Kiselbach has no "claim" presently before this Court. I fail to understand the logic of this submission. It seems to me that it is implicit in the consent of Yukon Stone to having this matter converted into a trial, that Yukon Stone recognizes that Kiselbach has raised arguable defences to the enforceability of the trust declaration, as well as claims of his own in his affidavit material in support of his two applications. Therefore, it is untenable for Yukon Stone to now take the position that Kiselbach has no claim before this Court, simply because he has not yet filed his counterclaim.

[23] In the result on this issue, I am satisfied that Kiselbach has raised a number of serious questions to be tried.

2) *Will Kiselbach suffer irreparable harm if the injunction is not granted?*

[24] Here, Kiselbach's counsel points to the fact that, pursuant to s. 38(7) of the *Act*, Kiselbach, as the outfitter, is "personally liable" for any contravention of the *Act* by Yukon Stone. In this regard, he refers to the evidence that, from time to time, Florian has accompanied guides and hunters in the field during the hunting season for questionable purposes. While this evidence is disputed by Florian for the most part, much of his

evidence in that regard is contained in his affidavit #5, which was only filed on August 22, 2016, and which Kiselbach's counsel did not see until August 23. Accordingly, the evidence has yet to be challenged and responded to by Kiselbach. Having said that, there was at least one occasion in 2012 where Florian acknowledges, at para. 10 of his affidavit #5, that he was accompanying a licensed non-resident hunter and the hunter's wife on a sheep hunt along with a licensed guide. The actions admitted to by Florian in that affidavit arguably could constitute an attempt to assist the non-resident hunter in hunting a big game animal. That could constitute a violation of s. 42(1) of the *Act*, which states as follows:

42(1) Except under the authority of a guide licence, a person shall not

(a) accompany any person in the field for compensation, reward, or gain, whether received or promised, to assist the person in hunting any big game animal; or

(b) accompany a non-resident in the field to assist the non-resident in hunting any big game animal.

I pause here to simply observe that while Florian may not have received direct compensation or reward on this occasion, it is arguable that he received indirect compensation through the fees paid by the hunter to Yukon Stone.

[25] Kiselbach's counsel further observes that Kiselbach, as the outfitter, is obliged to strictly comply with numerous provisions in the *Act*. And further, that a failure to do so could result in his outfitter's operating certificate being cancelled or suspended if "in the opinion of the Minister" the operations of the outfitting concession are not being conducted in compliance with the *Act* [s. 57(1)], or if the Minister is "of the opinion" that it is necessary to do so for the conservation of wildlife or because it is in the public

interest [s. 79(1)]. Kiselbach's counsel emphasizes here that these provisions do not require a trial of the issue or even a hearing or investigation. Rather, it is simply a matter of ministerial discretion.

[26] Obviously, the risk of such a revocation or suspension is that neither Kiselbach nor Yukon Stone would be able to fulfil their obligations to their remaining hunter clients for the balance of the 2016 hunting season. That, in turn may require the refunding of several thousand dollars in deposits. Further, Kiselbach personally risks being charged with offences under the *Act*, which could cause long-term damage to his reputation as an outfitter and which may not be compensable in monetary terms. Such consequences could cause irreparable harm to both Kiselbach personally and Yukon Stone, a company in which Kiselbach may ultimately be found to be a beneficial shareholder.

[27] I am advised by counsel that the fees paid by the hunter clients for the 2016 hunting season have all been deposited in a bank account controlled by Florian and/or Yukon Stone in the United States. Further, as I indicated at the outset, Florian is a U.S. resident. Accordingly, while some of the potential harm to Kiselbach and Yukon Stone may be compensable in damages, it may nevertheless be very difficult for Kiselbach to enforce any damages he may be awarded, given these circumstances.

[28] In the result on this point, I am satisfied that Kiselbach has established that he may suffer irreparable harm if the interim injunction is not granted pending a trial of the issues stated above.

3) *Balance of convenience*

[29] The issue here is which of the parties would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits. It is important to

note here that Kiselbach only seeks an interim injunction until the end of the current hunting season, i.e. until October 7, 2016, which is just some five weeks away. Further, there does not seem to be any significant dispute that Kiselbach has operated Concession #15 in a satisfactory manner over the previous four years, and that the income to Yukon Stone has steadily increased. Florian deposed in his affidavit #5, which I repeat remains unchallenged at this point, that Kiselbach has committed a number of violations under the *Act* which have resulted in tickets and fines being issued. However, none of that was apparently of concern to Florian during his negotiations with Kiselbach in early 2016 about the surrender of Concession #15 or the attempted buyout by Kiselbach. Indeed, the evidence is to the contrary that Florian appeared to be quite pleased with Kiselbach's performance until Kiselbach ultimately refused to surrender the concession and legal action got underway.

[30] Further, as stated above, if there are violations of the *Wildlife Act* by Florian in his individual capacity, or in his capacity as a director of Yukon Stone, it is Kiselbach who risks personally liability for those violations, not Florian.

[31] In the result on this point, Kiselbach has satisfied me that he would suffer the greater harm if Florian is not enjoined from interfering with Kiselbach's operation of Concession #15 for the relatively short remainder of the 2016 hunting season.

CONCLUSION

[32] I grant Kiselbach an interim injunction. However, I conclude that I cannot do so in precisely the language suggested by his counsel in the notice of application. Counsel specifically wanted me to enjoin and restrain Aaron Florian, Anne Florian, Gregory Spenner and Kurt Spenner (Gregory's son). The Spenners are not parties to the action

as it presently stands and I find that I am without jurisdiction to impose any orders against them. The Florians are also technically not parties to the action, although they are directors of Yukon Stone and I am satisfied that I can enjoin them in that capacity.

[33] Accordingly, I order that 45325 Yukon Inc., carrying on business as Yukon Stone, whether by itself or by or through its directors, Aaron Florian and or Anne Florian, or howsoever, except through Craig Kiselbach, be restrained and enjoined from:

- a) offering to provide, agreeing to provide or providing a guide to any person to hunt for a big game animal within Concession #15;
- b) offering to accompany, agreeing to accompany, or accompanying any person on a hunt for big game animal within Concession #15;
- c) offering to accompany, agreeing to accompany, or accompanying any person on a hunt for a big game animal within Concession #15, whether for compensation, reward, or gain, whether received or promised, or otherwise;
- d) offering to employ, agreeing to employ or employing any person, whether as a guide or otherwise;
- e) offering to exercise, agree to exercise or exercising any of the rights or responsibilities vested in Kiselbach, as an outfitter under the *Act* in relation to Concession #15;
- f) offering to exercise, agreeing to exercise or exercising any of the rights or responsibilities vested in a guide under the *Act* in relation to Concession #15;

- g) attempting to direct, manage or interfere, agreeing to direct, manage or interfere, or directing, managing or interfering with the outfitting and guiding business and operations of Yukon Stone, except by or through Kiselbach, such outfitting and guiding business and operations to include:
- i. the management of all aspects of the outfitting and guiding business and operations (including horse care, hiring and managing of guides and crews, flying and infrastructure maintenance and improvement) of Yukon Stone;
 - ii. the attendance at shows to represent the business and operations of Yukon Stone;
 - iii. the scheduling and booking of all hunts for big game animals by Yukon Stone within Concession #15;
 - iv. responding to all inquiries made of Yukon Stone concerning the outfitting and guiding business and operations of Yukon Stone;
 - v. the management of relations between Yukon Stone and all governmental agencies, First Nations, and the Yukon Outfitters Association; and
 - vi. the receipt of all revenues and income and the payment of all debts and expenses arising from or related to the outfitting and guiding business and operations of Yukon Stone;

until and including October 7, 2016, or until further order of this Court.

[34] I further order that Yukon Stone, whether itself or by or through Aaron Florian and Anne Florian, as directors, shall restore Kiselbach as an authorized signatory,

acting alone, to the bank accounts of Yukon Stone, including the account maintained by Yukon Stone at Scotiabank (the Bank of Nova Scotia) in Whitehorse, Yukon.

[35] I further order that Yukon Stone, whether itself or by or through Aaron Florian and Anne Florian, as directors, transfer all funds deposited as fees from hunters for the 2016 hunting season in any US bank account maintained for that purpose by Florian and/or Yukon Stone to Yukon Stone's account at Scotiabank (the Bank of Nova Scotia) in Whitehorse, Yukon.

[36] I further order that Kiselbach shall:

- a) within 45 days of the date of the end of the 2016 hunting season for Concession #15; or
- b) no later than November 30, 2016,

whichever occurs first, produce to Yukon Stone and file with this Court an account of:

- I. all receipts, revenues and income paid to or earned by Yukon Stone arising from or related to its outfitting and guiding business and operations from the date of this order to the date of the account; and
- II. all costs, expenses, debts and liabilities paid to or incurred by Yukon Stone arising from or related to its outfitting and guiding business and operations; from the date of this order to the date of the account.

[37] Finally, I order that Mr. Kiselbach shall have his costs for this application, but they will be in the cause.

GOWER J.