Citation: *40419 Yukon Inc. v. 365334 Alberta Limited,* 2017 YKSM 8

Date: 20171201
Docket: 16-S0037
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before His Honour Judge Walker

40419 YUKON INC.

Plaintiff

v.

365334 ALBERTA LIMITED doing business as A1 CATS

Defendant

Appearances:
Raymond Brosseuk — Appearing on behalf of Plaintiff
Mark E. Wallace — Counsel for Defendant

REASONS FOR JUDGMENT

[1] The plaintiff, 40419 Yukon Inc. (**"419**") is the owner of mining claims on Maisy May Creek located some distance from Dawson City in the Yukon Territory. The president of **419** is Raymond Brosseuk who I am satisfied was duly authorized to act on behalf of **419** throughout these matters.

[2] The defendant, 365334 Alberta Limited ("**A1 Cats**") is in the business of renting large equipment used in the mining industry. Ross Edenoste is the sole owner of **A1 Cats** who I am satisfied was duly authorized to act on behalf of **A1 Cats** throughout these matters.

[3] **419** entered into rental agreements with **A1 Cats** in July 2014 to rent a 1990 D10 Cat ("D10") and a 1993 D400 rock truck ("rock truck"). Exhibit 2 consists of a cover letter addressed to **419** and dated July 16, 2014, giving brief details of the rental

agreements attached and is signed by Mr. Edenoste and Mr. Brosseuk. The rental agreements are then attached. Both are dated July 16, 2014 and set out the rental terms (Exhibit 2).

[4] While the cover letter and rental agreements are dated July 16, it would appear they were prepared and then signed by Mr. Edenoste on behalf of **A1 Cats** on July 17, 2014 and forwarded to **419** together with invoice number 405648 (Exhibit 1).

[5] The cover letter and rental agreements were signed by Mr. Brosseuk on behalf of **419** on July 22, 2014.

[6] The invoice number 405648 (Exhibit 1) accurately summarizes (but for an obvious error in reference to $165/month) and is consistent with the terms of both rental agreements and the covering letter.

[7] At that time the total due was $36,500 for the D10 and $21,500 for the rock truck for a total of $58,000 plus GST of $2,900 for a total of $60,900. The $36,500 includes $33,000 as payment for one month's rent, $2,500 as a trucking deposit and $1,000 for one month's insurance.

[8] Within a few days, **419** deposited $36,500 for the D10 rental and undertook to forward the balance due for the rock truck in the next week.

[9] At no time did **419** forward the balance due under invoice number 405648 (Exhibit 1). Initially, because Mr. Brosseuk was travelling and later when it was determined that the D10 was not operable.

[10] Despite the existence of a separate rental agreement for each piece of equipment, I find they were in fact linked, both by the cover letter, the invoice and importantly, by the significant fact that in **419's** operations on its mining claim, the rock truck was not useable without an operating D10 capable of operating in proper working order fit for its intended purpose. Mr. Edenoste in his evidence endorsed this approach by referring to **419** having rented a 'spread of equipment'.

[11] The Court heard testimony from the two company principals, Mr. Brosseuk and Mr. Edenoste. Despite the passage of nearly three years in time, I found both witnesses were credible in their evidence, although fundamentally at odds on their interpretation of the events that unfolded.

[12] The Exhibits at trial, introduced by consent were as follows:

- Exhibit 1 – Invoice 405648;
- Exhibit 2 – July 16, 2014 cover letter with D10 and D400 Rental Agreements attached;
- Exhibit 3 – 16 pages of emails between the parties;
- Exhibit 4 – Rental Agreements with 106391 Holdings Ltd.;
- Exhibit 5 – Documents in regard to the service work on the D10 performed in June 2014, by Total Crawler Services Ltd.;
- Exhibit 6 – Description of work and invoices for repair work on the D10, dated October 15, 2014; by Total Crawler Services Ltd.;
- Exhibit 7 – Invoice number 405683.

[13] The plaintiff claims the D10 was not operable and it should receive a complete refund of the amounts paid for the D10 in July 2014, and given the linkage between the

two pieces of equipment, it owes no rental for the rock truck.

[14] The defendant claims that, despite the D10 not operating, in fact it was used for 68 hours and it should be entitled to retain an amount from the deposit rent at a daily rate converted to hours as set out in the contracts, and furthermore, it is entitled to offset against any remaining rental deposit, the rental of the rock truck in the full amount or an amount for the 61 hours of use together with some other incidental expenses.

[15] On August 11, the rock truck left **A1 Cats'** yard in Dawson City and arrived at the mine site. On August 13, the D10 was picked up from the **A1 Cats'** yard and delivered to a location some distance from the mine site. After some delay, the D10 was 'walked' into the mine site arriving on August 22. On August 24, Mr. Brosseuk emailed Mr. Edenoste to inform him the D10 is not capable of operating properly. Over the next few days there were a number of emails between the parties attempting to troubleshoot the problems with the D10. While both Mr. Brosseuk and Mr. Edenoste were not at the mine site, Mr. Brosseuk relied on his employees, and within a few days Mr. Edenoste sent a mechanic from Total Crawler Services Ltd. ("Total Crawler") to investigate. Total Crawler is in the business of servicing and repairing the **A1 Cats'** equipment. It had carried out extensive work on the D10 in June 2014. On August 28, Mr. Brosseuk wrote Mr. Edenoste:

> August 28 - Northern Placer Technology to **A1 Cats**
>
> > Bad News, the mechanic from Total Crawler says 1st gear is shot and it will take 10 to 14 days to repair which is to (sic) late for us to keep mining this year.
> >
> > Do you have another cat close by to replace this one? If not,

then I will start looking for one around Dawson.

If I can find one asap, then please credit $22,575 of the $36,500 I paid on the cat towards the rock truck rental and I will keep going till the end of the season, if I can't find another cat then I will return the rock truck too for a full credit on everything and we will try again next year.

Thanks

Ray

August 28 – **A1 Cats** to Northern Placer Technology

I have no other cats for rent. Please return both THE 10N TO TOTAL CRAWLERS YARD, THE 400D TO WHERE YOU PICKED IT UP. THE TRUCK IS NOT FOR RENT WITH THE OPTIONS THAT YOU MENTIONED. WHEN THEY ARE RETURNED YOU WILL BE CREDITED.

August 28 - Northern Placer Technology to **A1 Cats**

Looks like I found another cat I can rent for a month, should know for sure by Sunday and will let you know.

Are you ok with us slowly walking the D10 out to the place where the truck can pick it up and bring it into Dawson, my guys feel confident that 2nd and 3rd gear are working ok and that there should be no additional harm to the transmission.

Thanks

Ray

August 29 – **A1 Cats** to Northern Placer Technology

Yes it is fine to walk it in 2nd gear, do not walk it in 3rd gear. Thanks ross

August 29 – **A1 Cats** to Northern Placer Technology

Just a note so there is no confusion, rent is been charged as the rental agreement reads, the 400D truck has rent charged from the time it leaves Dawson City till it is returned regardless of circumstances.

August 29 - Northern Placer Technology to **A1 Cats**

ok

August 29 - Northern Placer Technology to **A1 Cats**

I was hoping that because of the problems with the cat which is a direct cause for us to not being able to use the rock truck yet that you will allow us to put the 200 hrs on the rock truck starting from this coming Monday.

Once the cat has been returned I will be out over 6000 just in trucking costs and lots of man hours.

It would also be nice if you have me a break on the rock truck rate to ease the pain of all this, I was thinking 20,000 for the month instead?

I will give you a call in a bit to talk about it more on the phone.

Thanks

Ray

August 29 - Northern Placer Technology to **A1 Cats**

I just want to confirm by email now that the cat is leaving my mine site today and that there will no charge as you stated on the phone (sic).

Also that the rock truck is leaving my mine site today too and that I will only be charged $642.85 per day or $90 per hour which ever is greater.

Sorry that it turned out like this and I understand the frustration this has caused you but I hope there is no hard feeing between us.

Mining is a small community and I feel we all need to try and get along as best as possible.

Again thanks for dealing with the Cat issue the way you did.

Ray

August 29 - Northern Placer Technology to **A1 Cats**

> Update, the rock truck arrived in your yard in Dawson last night and the D10 is slowly making its way up to the place where VanEvery can pick it up.
>
> Thanks
>
> Ray

[16] I am satisfied the email correspondence from 'Northern Placer Technology' was in fact from **419** and /or Mr. Brosseuk on its behalf.

[17] The rental agreement for the D10 contains the following clause: "Rent is charged from the time the D10N leaves A1 Cat's (sic) yard until the time the Cat is returned to A1 Cats yard in Dawson City, Yukon, **regardless of circumstances** (emphasis added)." A similar clause is contained in the rental agreement for the rock truck including the term "**regardless of circumstances**".

[18] It would appear from the testimony of the parties and the emails set out above, that until September 1, they were working together toward a solution. **A1 Cats** was taking responsibility for the defects in the D10, and did not claim that it had been improperly operated by **419,** or that **419**'s employees had harmed it. This position was reiterated by Mr. Edenoste in his evidence at trial, thus retracting a portion of its Reply to **419**'s claim. It was Mr. Brosseuk's testimony that the 68 hours the machine was used was necessary to get it to the mine site and some incidental use while its difficulties were being assessed. Due to road conditions, it was not possible to deliver the D10 by trailer to the mine site. Instead, it was dropped off and then 'walked' into the site. The term 'walked' refers to the D10 reaching the site under its own power likely in a higher

gear than 1st gear. For that reason, its inability to perform its intended job was not apparent until it was put into operation a day later. It is also apparent the rock truck was used for 61 hours. Mr. Brosseuk likewise claims that these hours were necessary to get the truck to and from the mine site, and it was never used for mining purposes as it could not be. His evidence on these points was not effectively challenged on cross-examination and not credibly contradicted by the defendant's evidence.

[19] It is my interpretation of the agreements, and of the emails, that the term '**regardless of circumstances'**, did not contemplate that rent would be due when the D10 was unfit for its intended purpose. To conclude otherwise would be manifestly unfair, and essentially unduly enrich **A1 Cats**.

[20] What is clear from the evidence is that **419,** from August 28, when it was known that the D10 was inoperable, attempted to find a replacement machine capable of performing the intended work. There then ensued a discussion between the parties as to the rent due for the rock truck. Here the parties diverge in their positions. **A1 Cats** takes the position that **419** was still liable for the rock truck rental and from the emails **419** would appear to have acknowledged that. However that agreement was, in my mind, predicated on **419** finding another machine. If it had, it would pay rent on the rock truck as originally set out in the agreements, from the time it had left the **A1 Cats'** yard in Dawson City. However in its email at 9:19 AM on August 28, **A1 Cats** instructed **419** that the rock truck would not be for rent and it was to be returned.

[21] There was however another participant involved; 106391 Holdings Ltd. ("**391")**.This company, under the apparent direction of Herb Switzer, entered into rental

agreements with **A1 Cats** for two pieces of equipment, a D9 bulldozer, and an excavator. These rental agreements (Exhibit 4) were identical in form with the agreements between **419** and **A1 Cats** and were prepared and signed in July 2014. **391** was to mine on claim 46, also owned by **419** and located in Maisy May Creek. The relationship between **391** and **419** was not made clear at trial but from the evidence and documents presented, I can conclude as follows:

a. Switzer engaged a crew and began operations on Claim 46 using the equipment rented by **391**.

b. The rent for the D9 was paid by Mr. Brosseuk and deposited to **A1 Cats** at the same time as he had deposited the rent on the D10.

c. Apart from Mr. Brosseuk having paid the rent on the D9, the two operations seemed to operate separately one from the other.

d. In the first week of September, Mr. Edenoste relates that, Mr. Switzer called to announce he was without funds and had left or was leaving the mining claim, thus abandoning the D9, the excavator, and an additional piece of equipment, a water pump.

e. It appears there may have been a period of time before or after Mr. Switzer announced his departure that his employees carried on the operation to process the available material and so get their wages.

f. There was a connection between **419** and **391**, in the mind of Mr. Edenoste, whether real or not, that created distrust in continuing to deal with **419** and Mr. Brosseuk.

[22] Mr. Brosseuk testified that he arrived at the mine on August 29, to find that Switzer had left, and the D9 was still there and, in his mind, potentially available for use on his mine. Clearly there were telephone conversations between Mr. Brosseuk and Mr. Edenoste over the next few days during which Mr. Brosseuk asked to use the D9, and in turn Mr. Edenoste was adamant that he would not rent it to him. It appears from Mr. Edenoste's evidence that he had had enough and did not wish to continue a relationship

with **419**. In hindsight, it is likely that if **419** had been able to use the D9, it would have had some mining success, and the rock truck could have been used. However **A1 Cats** was understandably upset; **419** had only paid rent on one piece of equipment, the D10, the trucking company which was to return the D10 to Dawson City had expressed some concerns about being paid, Herb Switzer **(391)** had left the area with apparently bills unpaid, and I conclude **A1 Cats** cannot be faulted for not agreeing to rent the D9 to **419**. To further complicate the deteriorating relationship between **419** and **A1 Cats**, the D10 had been parked some distance from the mine and available for pick up on September 1. However, it appears the trucking company was not called to pick it up, or alternatively, would not pick it up in the condition it was in. For transportation, mud and debris must be removed from both the D10 and its blade, and the D10 and blade would be transported separately. **419** did not do this, as it was obligated to do under the terms of the rental agreement. When Mr. Edenoste arrived in the area on September 3, he had expected the D10 to be in Dawson City. On enquiring of the trucking company, he was informed the company was concerned about payment and that the equipment was covered in mud and so not transportable. Eventually **A1 Cats** cleaned the equipment and arranged for its delivery to Dawson City.

[23] The D10 arrived in Dawson City on or about September 12. Although part of the original amounts paid included a $2,500 amount for trucking, the actual trucking costs were in fact paid separately by **419** in the amount of $2,478.

[24] **A1 Cats** claims that the delay in having the D10 returned should count against any rental refund as it lost the opportunity to rent the equipment to another client. I can find no evidence to support that position. There was no evidence of another renter

available, no evidence to challenge Mr. Brosseuk's email of August 28 that a 10-14 day delay would lose their mining season for the year, and significantly no evidence that the repairs could have been carried out within that window of time, if the D10 had been returned as expected by early September. Furthermore the eventual repairs to the D10 were not invoiced until October 15, 2014.

[25] For the reasons above, I have concluded the amounts ($36,500) paid to **A1 Cats** by **419** in July 2014 for the rental of the D10 should be repaid.

[26] However, with respect to the rock truck, I conclude that the failure to have the use of the rock truck was legitimately included within the term '**regardless of circumstances'** and **419** should be responsible for rent at the hourly rate of $90/hour for the 61 hours. **419** has not established, to my satisfaction, that it should be exempt from that responsibility. By its email at 9:19 AM on August 28, 2014, instructing **419** to return the rock truck, **A1 Cats** effectively terminated the agreement but for 419's obligation to return the rock truck, the expense of which would be necessarily included with in the 61 hours used by it. In addition **419** must pay for the insurance, fuel, and service and cleaning as provided in the rental agreement.

[27] **419** has made no claim for the loss of its mining season. I find that that loss was as a result of **A1 Cats** renting a faulty D10 to **419**. It is correct that the rental agreement includes the following clause: "It is the renter's responsibility to return the D10N back to A1 Cats yard **regardless of circumstances** (emphasis added) once rental is completed." Consistent with my interpretation of the obligation to pay rent under the rental agreement, in my mind the term "**regardless of the circumstances**" would not

include the failure of the machine to be operable. There must be some consequence to **A1 Cats** having provided useless equipment. In fairness **419** should absorb the transportation costs to the site in August; however it is **A1 Cats** who should pay for its return and **419** is entitled to have returned the trucking deposit of $2,500, a portion of the amounts paid in July 2014. I will allow **A1 Cats**' claim for the cleaning of the tracks and the removal and cleaning of the blade for the D10 and the trucking of the blade to Dawson City. I accept the figures provided my Mr. Edenoste in this regard on behalf of **A1 Cats**.

[28] On all of the evidence before me, I find that **419** is entitled to the return of the deposit money paid for the D10 bulldozer in the amount of $36,500, less some rent for the rock truck and other incidental amounts as follows:

Original rental amount, including insurance and trucking.		$36,500.00
Less:		
removal of blade and shovel tracks	(300.00)	
hauling of blade	(1,750.00)	
pilot car	(630.00)	
Rock truck rental 61 hours at $90/hr	(5,490.00)	
insurance on rock truck	(1,000.00)	
fuel for the rock truck	(524.65)	
service and cleaning of rock truck	(400.00)	
Subtotal:	(10,094.65)	
+GST (5%):	(504.73)	
	(10,599.38)	($10,599.38)
TOTAL:		**$25,900.62**

[29] Given **419** limits its claim to the limit provided for under the *Small Claims Court Act*, RSY 2002, c.204 (the "*Act*") , it is entitled to judgment for $25,000, together with preparation fees in the amount of $500 as provided in s. 57 of the *Regulations.*

Counterclaim

[30] **A1 Cats,** in turn, counterclaims against **419** for the use of the equipment (D9 bulldozer and excavator) originally rented to **391** under the direction of Herb Switzer.

[31] This claim is for the use of the D9 excavator from September 1 to September 8, 2014, together with an amount for unjust enrichment to claims PC41 and PC46 for the use of equipment, damages to equipment and fuel.

[32] I find there is no evidence as to the so-called unjust enrichment, no evidence of damages, and it appears the equipment was, in fact, fuelled by **419** prior to its departure from the claim. That the equipment was used from September 1 to September 6 was just conjecture on the part of **A1 Cats.** I do find, however, that it was used by **419** during the two-day period, September 7 to September 8, 2014. The evidence is clear that on both days Mr. Brosseuk directed his employees to use the equipment to reclaim the ground disturbed upon the land. While in his mind he may have done so in the hopes of persuading Mr. Edenoste to permit the continued rental of the equipment rented by **391,** Mr. Edenoste would not agree. I accept the evidence of both parties that this work was carried out for a period of 12 hours ending at about 11 AM on September 8, and **A1 Cats** should receive payment in accordance with the hourly amounts contained in the rental agreements between **A1 Cats** and **391**. I have no evidence before me with respect to how much the fuel used, and replaced by **419**, should be apportioned

between the parties. Given **419's** insistence on using equipment it had no rights to; there will be no reduction for the fuel supplied. **A1 Cats** will be successful on its counterclaim as follows:

D9 rental 12 hours@ $115.00:	$1,380.00
Excavator rental 12 hours @ $90.00:	1,080.00
	$2460.00
+ GST (5%)	123.00
TOTAL:	**$2,583.00**

[33] In addition **A1 Cats** is entitled to a Counsel Fee pursuant to Section 59 (1)(a)(i) in the amount of $250.00.

WALKER T.C.J.