

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *May et al. v. Circumpacific Energy Corp. et al*, 2004 YKSC 10

Date: 20040120
Docket: S.C. 03-A0071
Registry: Whitehorse

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

Before: Mr. Justice R. Veale

Appearances:

Brett Code (by phone)

For the Petitioners

Grant Macdonald, Q.C.

For the Respondents

David Bishop (by phone)

For the Respondents Charles Ross and Malcolm Fraser

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): This is a petition seeking an oppression remedy under s. 243 of the *Business Corporations Act*, R.S.Y. 2002, c. 9. It was commenced in June of 2003 and I ordered that the matter proceed expeditiously, with the assistance of case management, in September of 2003. Section 250 of the *Business*

Corporations Act, supra, permits these matters to proceed by way of summary application. The matter has been set for hearing for the week of February 2-6 of 2004.

[2] There has been extensive cross-examination on affidavits and orders for the production of documents throughout the proceeding. Indeed, production of documents and cross-examination continues next week and virtually to the eve of trial. The present applications are brought by both the petitioners and the respondents and I will deal with them one at a time.

[3] The petitioners seek to amend the petition to expand and to clarify the remedies they are seeking. While this is helpful both to the court and to the respondents, it is opposed, as I understand it, by the respondents, only to the extent that the respondents seek an adjournment for time to properly respond. I should add that Circumpacific is represented by Mr. Hopkins, who also represented the individual respondent directors; however, two of the directors have retained Mr. Bishop as independent counsel, who appears at this application. Mr. Bishop expects to be retained by the other directors in due course.

[4] I have some concerns with respect to the extent of the amendments in the sense that they seek remedies against a number of associated companies of Mr. Kelso, as well as including the right to claim damages, in this summary proceeding, against the individual respondent directors. However, Mr. Code, on behalf of the petitioners, agrees that he only seeks the right to bring a derivative action rather than the damage claim itself in these proceedings.

[5] I am therefore ordering that the petitioners shall have the right to amend its petition both as to the facts alleged and the remedies sought, except that paragraphs 9 and 10 shall be sub-paragraphs (c) and (d), respectively, of paragraph 8, which

seeks the authorization to commence derivative proceedings. I note in passing that Drillsearch and other entities are now brought into the remedies sought and I am ordering that to the extent that Drillsearch and other entities are controlled by Messrs. Kelso, Ross, Fraser, Silver and Reveleigh, they can be served by delivery of the amended petition to Mr. Hopkins and Mr. Bishop. Unrelated entities, however, must be served in the usual manner should the petitioners wish to have the remedies applied to them at the hearing of this matter. The petitioners have 14 days to file the amended petition.

[6] The respondents seek to have the petition converted to a trial, with full rights to examination for discovery, pursuant to Rule 52(11)(d). I am reluctant to do that for these reasons. One, I have already dismissed a similar application. Two, the petitioners have a right to a summary proceeding and I am not prepared to exercise my discretion to order a trial on the eve of the hearing. Three, the solicitor for the petitioners maintains that the matter can be adequately heard by affidavit and documentary evidence and the petitioners will suffer the consequence if that turns out to be otherwise. Four, the hearing judge retains the discretion to require *vive voce* evidence. I am also relying on the reasons of Mr. Justice Hood in the *Buckley v. B.C.T.F.* decision (1992) 70 B.C.L.R. (2d) 210 at page 213 as favourably quoted in *Gaylor v. Galiano Trading Co.*, [1996] B.C.J. No. 2004.

[7] The respondents also seek an adjournment of the hearing date of February 2 in order to respond to the amended remedies sought. It is my view that one week is insufficient time to hear all the matters raised in the amended petition. It would be quite unsatisfactory to proceed to a one-week hearing only to require further delays. Although I do not have a great deal of sympathy for the independent directors, the adjournment will give Mr. Bishop time to prepare. It will also give Mr. Code an opportunity to review the additional documentation being produced at this late date

by Mr. Kelso and the Alberta Treasury Branch. I am going to grant an adjournment not because the petitioner needs it, but rather to ensure that all matters can be heard at one sitting, particularly when the cross-examinations and document production are taking place at the last minute, through no fault of the petitioner.

[8] I am, therefore, ordering that the hearing be adjourned to April 19 through April 30, 2004.

[9] Mr. Code, you were seeking an examination of Mr. Fraser and Mr. Ross on January 26 and 27. Given my order that this matter be adjourned, do you still seek that application?

[10] MR. CODE: No, My Lord. Mr. Bishop and I have discussed this and we agree that should your ruling be that this matter be adjourned to April, that we would discuss dates that are convenient to the witnesses and counsel.

[11] THE COURT: Thank you. Mr. Macdonald has withdrawn the application to serve a counterclaim during this application. Any submission with respect to costs? Mr. Code.

[12] MR. CODE: Well, My Lord, we've spent a lot of time preparing for this application. I think that in substance we've been successful and I would like costs awarded on two bases. I think that one of the reasons that we're here and we're having so much difficulty is due to the conduct of the respondents. I would like a cost award simply because I think we've been substantially successful here today, but also because I think that, as I said during my submissions, I would really appreciate it if Your Lordship would demonstrate that there are consequences to missing deadlines and that kind of thing, that we really need to make this next deadline; so that there should be a cost award that sends that message, sir.

[13] THE COURT: Thank you. Mr. Macdonald or Mr. Bishop.

[14] MR. MACDONALD: My Lord, I would simply submit that the costs should be in the cause.

[15] THE COURT: Mr. Bishop.

[16] MR. BISHOP: My Lord, I'm not -- I assume that my friend Mr. Code made his submissions with a view to recovering costs against the company and not against the individual directors. If I'm mistaken on that, and I don't think I am, I've got some submissions, but perhaps we can get clarification from Mr. Code so I don't carry on and bore everyone unnecessarily.

[17] THE COURT: Mr. Code.

[18] MR. CODE: I'm certainly not seeking them against those people personally; I consider them still part of the company. Costs have been awarded previously in the last application. This issue didn't arise; I didn't put my mind to it. I have been assuming, without knowing, that this litigation is being conducted primarily by the company and that the cost award would be paid by the company. That being said, I'm happy to have costs paid by the company.

[19] THE COURT: Thank you. I am satisfied that the petitioners have had substantial success in these applications. I am going to make an order that the costs of the petitioners be paid by the respondent, Circumpacific Energy Corporation, in any event of the cause.

[20] Are there any further loose ends?

[21] MR. CODE: Sir, I think that you dealt with service of the non-parties. I'm not sure that you've dealt with my application regarding service of the

independent directors. Not the independent directors, but the individual directors, and I'd like the same order, that service on counsel, Mr. Hopkins and Mr. Bishop, is effective service on them.

[22] THE COURT: So ordered.

[23] MR. CODE: Thank you.

[24] THE COURT: Anything else, Mr. Macdonald?

[25] MR. MACDONALD: My Lord, just one matter, the application concerning examination for discovery, was Your Lordship going to deal with that application?

[26] THE COURT: Oh, the four people -

[27] MR. MACDONALD: The examination of the petitioners that Mr. Code had indicated we had the right to do so, and now we have time to do.

[28] THE COURT: Yes, my understanding is that counsel can agree to do that, because I thought it had been previously ordered, Mr. Macdonald. Has it been previously ordered, as far as you're concerned?

[29] MR. MACDONALD: No, My Lord, it had not been previously ordered as far as I was concerned. There had been a previous order for cross-examination of deponents upon their affidavits. These individuals had not filed affidavits so now we're seeking the right to conduct purely an examination for discovery, which Mr. Code had indicated we had the right to do.

[30] THE COURT: Well, I guess you are seeking it on all five, at the moment, then.

[31] MR. MACDONALD: Yes, My Lord.

[32] THE COURT: Yes. Mr. Code, any comments?

[33] MR. CODE: I don't have any objection to those people being examined. They're petitioners after all and if they have evidence that's relevant, it should be before the court. I'm not sure how examination for discovery evidence gets before the court but we'll discuss how that works and if we have some difficulty we'll get back to you, but at the present moment, I'm not trying to hide any of these people. I'm glad to have them examined. I haven't seen the need to put forward affidavit evidence, because I think I've got it covered, but to the extent the respondents want to know what they have to say, I think they're entitled to know that. So I think we can proceed as though we're doing examinations for discovery and then we'll have to discuss how that evidence gets in.

[34] THE COURT: Mr. Macdonald, do you have anything to say on that proposal? I mean obviously they should proceed, but not being limited to the affidavit material in the court already. It's somewhat unusual to give examination for discovery, but on the other hand, there are no affidavits before the court.

[35] MR. MACDONALD: Right. I'm sorry, My Lord, I didn't necessarily follow what Mr. Code was saying. I thought he was agreeing that we could conduct examination for discovery of the petitioners.

[36] THE COURT: He is.

[37] MR. MACDONALD: And the issue is how we get the evidence in at a later date, which, I agree, that will be an issue, how do we get it in at a later date.

[38] THE COURT: Well, I don't think there's any issue about getting it

in; you will have a transcript.

[39] MR. MACDONALD: Yes, that's what I thought too, My Lord.

[40] THE COURT: Okay, you will have your order, Mr. Macdonald.

[41] MR. MACDONALD: And the last loose end then, My Lord, would be I perceive there'll be a need to file an amended statement of defence consequent upon the amended petition.

[42] THE COURT: You should do that within 14 days following the delivery of the amended petition.

[43] MR. MACDONALD: Thank you, My Lord.

[44] MR. CODE: I guess if service is being ordered, as well, My Lord, notices of appearance should be filed as well, so we close that off.

[45] THE COURT: Well, appearances on behalf of all the respondents, you mean?

[46] MR. CODE: Yes, sir.

[47] THE COURT: Well, I would expect that to happen, because if we come before this court and there's no appearances, then counsel may not be proceeding, or at least continuing in their defence.

[48] MR. CODE: Okay. I think that's just from my point of view, My Lord, thank you very much.

[49] THE COURT: Thank you.

[50] MR. CODE: Thank you, sir.

[51] THE COURT: Thank you. We can adjourn then.

(Proceedings adjourned)

VEALE J.