IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

M.C.M. CONTRACTING LIMITED

Plaintiff

AND:

ATTORNEY GENERAL OF CANADA
and
FRED PREVITT

Defendants

Richard Buchan — For the Plaintiff

Gary Whittle — For the Defendants

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

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[1] HUDSON J. (Oral): This is an application pursuant to Rule 15(5)(a)(i), and the inherent jurisdiction of the Court, for an order that the plaintiff cease to be a party, that the Statement of Claim be struck out and the action dismissed. Rule 15(5) states:

> *Removing, adding or substituting party*
> (5)(a) At any stage of a proceeding, the court on application by any person may
> (i) order that a party, who is not or has ceased to be a proper or necessary party, cease to be a party,

[2] Mr. Buchan appears to argue for an adjournment of this application and states that he has no instruction relative to the application itself. I have heard the application for an adjournment and the response thereto, and I have also heard the main motion. I now come to give my decision on both the application to adjourn and the motion.

[3] The matter first came before the court on July 23, that is to say this particular application, and on the plaintiff's application or request, the matter was adjourned to this day. On the case being called, the plaintiff here today seeks a further adjournment. The facts are, that adjournment is a ten-week adjournment, out of necessity, because that is the estimated time to achieve the restoration of the company to the register, as will be seen as I dictate the facts.

[4] The facts are that the plaintiff corporation was incorporated in British Columbia in 1997 and registered in Yukon in 1999. Now, I stand to be corrected on these dates; I think I am correct, but I was in a bit of a rush. On the third day of November 2000, the company was dissolved for failure to file annual reports for two years, pursuant to the British Columbia *Company Act,* R.S.B.C. 1996, c.62. The Writ and Statement of Claim herein were filed on November 18, 2001, more than a year after the dissolution. Defence's appearances were filed, statements of defence have been filed and to this day, the dissolution of the plaintiff corporation continues.

[5] Dealing with the application to adjourn, the purpose of the application is to allow the plaintiff and its officers to successfully apply to restore the plaintiff to the

register under the B.C. *Company Act*. There are other purposes, such as acquiring new counsel, gaining information by way of disclosure from the defendants and generally, allowing new counsel to come up to speed.

[6] Plaintiff argues that the dissolution is an irregularity, a technical matter, which should not stand in the way of the continuation of the action. Counsel cites Rule 2(1) and also Rule 1(5). Rule 2(1) states:

> *Non-compliance with rules*
> 2(1) Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.

Rule 1(5) says:

> *Objects of rules*
> (5) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

[7] It is argued that since the limitation period relating to the cause of action described in the Writ of Summons and Statement of Claim has not passed, that there is no prejudice and except for the time delay, the adjournment of ten weeks, that is preferable to requiring that the plaintiff start over again after being restored. I am not sure that that preference exists.

[8] The plaintiff's submissions are to the effect that justice and the balance of convenience favour the granting of an adjournment and that there is nothing that,

(taking into account the circumstances that no limitation period has passed) that the circumstances do not earn a dismissal of the application to adjourn.

[9] The defendant applicant argues that the defendant has a strong case to argue, that the proceedings are a nullity, and points out that the dissolution must have come to the attention of the corporate plaintiff shortly after it occurred in 2000. Also, that the defendant counsel made opposing counsel, and through them the plaintiff, aware on approximately July 19th, 2002 that the claim of nullity would be made on July 23rd. On that date, a 14-day adjournment was granted, but nothing was done to attempt to, or to commence to restore the company until July 30, if then. I say if then because the asserted application bears no court stamps and the affidavit in support is dated after the date of the application, a circumstance which may be explainable but, under the circumstances, indicates a lack of attention to the importance of what they were about.

[10] The delay by the plaintiff, in my view, mitigates against the granting of an adjournment. The plaintiff became aware in May of this year that its counsel was applying to withdraw, but it is only on August 2nd that a Notice of Intention to Act in Person was filed. This inaction is the cause of further delay, indicating that the plaintiff is not diligent and has not been diligent in pressing this proceeding ahead or forward. But the position which is asserted, that the proceedings are a nullity, and the apparent strength of that position, to my mind, standing alone, justifies that the adjournment application be denied.

[11] Both counsel cite the case of *Brightman Capital Ventures Inc. v. J.P. Haynes & Associates Inc.,* 2001 CarswellOnt 365**.** This is a case of close similarity on its facts to the case at bar. An action was brought by a dissolved company. The Master indicated that he found the action to be a nullity, but the matter was adjourned for other reasons and on the return, the company had been restored. The Master nonetheless dismissed the action as a nullity. On appeal to the Superior Court of Justice, the order was reversed and the action continued, on the basis that it was significant and over-rode all, that the corporation had been restored before the Master actually made his judgment. Two very terse quotes were made by Justice Southey of the Superior Court of Justice. At paragraph 6:

> It is common ground that an action commenced on behalf of a corporation that has been dissolved is a nullity, unless the corporation has been revived before the action was commenced.

And later, at paragraph 14:

> If the Master had decided on August 31, 1999, that the action was a nullity, because the plaintiff was not in existence, his decision to dismiss the action would be unassailable.

[12] In that case, of course, he did not make the decision until after an adjournment, during which time the corporation was restored. That is not the case here.

[13] The plaintiff argues that this case supports his position that it is proper that there be an adjournment to facilitate the regularization of the plaintiff's legal status.

[14] The defendant argues that the case shows the strength of his position that his motion seeking a declaration of nullity, in essence, has strength and for that and other reasons, the adjournment should be refused.

[15] I find myself in agreement with defence counsel on that point as the application to adjourn is not supported on the facts, and my exercise of discretion must properly follow to decline the adjournment. The application to adjourn is refused.

[16] On the motion itself, counsel for the plaintiff not being involved, (it being unopposed) I am satisfied that the relief sought should be granted. The words of the judge in the *Brightman, supra,* case strongly support this conclusion. It is a trial court decision, but I find it persuasive.

[17] The case of *Coldwell v. Forster* (1978), 91 D.L.R. (3d) 217 (B.C.S.C.) (QL) is of interest. There the plaintiff public trustee had not perfected its appointment. In the result, the Court allowed the matter to proceed as the matter was an irregularity, the Court said. However, in giving judgment, Mr. Justice Andrews outlined the law as he saw it. This is in the Supreme Court of British Columbia. He said at page 221:

> The writ in the case at bar correctly named the parties and the cause of action, and was filed in good time. However, it incorrectly named the Public Trustee as guardian *ad litem* before the Public Trustee had had himself so appointed, and thus he lacked the proper capacity to issue the writ. The distinction between an error which results in nullifying a writ and one which is merely a curable irregularity, is a fine one to make. The distinction has been defined by Williston and

> Rolls in *The Law of Civil Procedure*, vol. 1, (1970)**,** p. 497, by stating that**:**
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> There are fundamental differences between a proceeding which is irregular and a proceeding which is a nullity. An irregularity is an error in the manner of taking a proceeding prescribed by the rules, or is a proceeding not in strict accordance with the prescribed form; a nullity is a proceeding which is altogether unwarranted and different from that which ought to have been taken, and affects a matter of substance.

[18] In the case of *Skrastins v. Kelowna (City)*, [1992] B.C.J. No. 525 (S.C.) (QL), the plaintiff's counsel had added some parties and discontinued against others, all others. The adding of parties was done without the support of a court order. This is not authorized by the Rules, which do provide for the adding of parties, pursuant to a court order. The plaintiff, having discontinued against all the other defendants, in the result there was no defendant left, if the added parties were not lawfully added. The issue there was whether further proceedings were therefore a nullity, there being no defendants, on the interpretation given by the defendants.

[19] Quoting the judgment of Madam Justice Boyd:

> I accept the defendants' submission that in the circumstances at hand, it is impossible to treat this nullity as an irregularity which may be cured.
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> An almost identical situation was considered by the Alberta Supreme Court in *Minneapolis Threshing Machine Company v. Clessen and Clessen* (1950), 2 W.W.R. 574*.* There the plaintiff had issued a statement of claim naming Len Clessen and Willard Clessen as defendants. Purporting to act pursuant to the Alberta Amendment Rule, the plaintiff amended the statement of claim by striking out the name of

> Willard Clessen and substituting that of George Clessen and making various changes to the body of the statement of claim. The Alberta Rules, like the B.C. Rules of Court, required an order to add parties. No order had ever been obtained. At p. 576, the Court Stated:
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> > I have been referred to no Alberta cases but the practice in this province, so far as I am aware, has been to require an order to amend by changing or adding parties. An amendment of this nature is not an irregularity which can be cured but a nullity. For the difference between an irregularity and a nullity see *Hoffen v. Crerar* (1899), 18 P.R. 473, at 479. A nullity cannot be waived by lapse of time, delay or acquiescence: *Appleby v. Turner* (1900), 19 P.R. 145, at foot of p. 148.

Nor can it be cured under a rule such as similar to Rule 15(5)(1)(a).

[20] Going on, the learned trial judge, dealing with the rules we have, states:

> I find that Rule 2(1) has no application in this case since the purported addition of these parties amounts to a nullity and not to a mere irregularity.
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> In *MacFoy v. United Africa Co. Ltd*. [1961] 3 All E.R. 1169 (P.C.), Lord Denning considered the application of the English "Non Compliance" Rule (Ord. 70, rr.1-4):
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> > This rule would appear at first sight to give the court a complete discretion in the matter. But it has been held that it only applies to proceedings which are voidable, not to proceedings which are a nullity: for those are automatically void and a person affected by them can apply to have them set aside *ex debito justitiae* in the inherent jurisdiction of the court without going under the rule; see *Anlaby*

> *v. Praetorius* (1888), 20 Q.B.D. 764 and *Craig v. Kanssen* [1943] 1 All E.R. 108; [1943] K.B. 256.
>
> The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that is was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is not need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

Further, the learned trial judge in this *Kelowna* case stated:

> Accordingly, I declare that the Writ of Summons filed February 8, 1989, whereby Suzuki, Ashimori and Davis were added as parties, be declared a nullity and be set aside so far as those parties are concerned. I further declare that all proceedings subsequent to the February 8, 1989 addition of Suzuki, Ashimori and Davis, so far as they relate to those parties, also be declared a nullity and set aside. The defendants' application is allowed...

[21] When one connects this case with the law cited in the *Coldwell* case and the *Brightman* case referred to on the adjournment application, it becomes clear, I believe, that the Writ and Statement of Claim here are a nullity. It is my finding that s. 228 of the Yukon *Act* and s. 296 of the B.C. *Act* do not provide relief to this position. I have also referred, and been referred, to the case of *Tejani v. Institute of*

Chartered Accountants (British Columbia) 2000 CarswellBC 368, which I find to be persuasive.

[22] Also I have been referred to the case of *Alberta Wilderness Assn. v. Canada (Minister of Fisheries & Oceans)* 1998 CarswellNat 748, and I find it supports the position of the plaintiffs here, it being a judgment of the Federal Court of Canada trial division.

[23] In all circumstances, the relief sought by the defendants is granted. The Writ and Statement of Claim are struck. The action is dismissed.

[24] With respect to costs, the issue of costs is reserved. I reserve to the defendants the right to argue costs within 14 days notice to anybody concerned, that they are claiming costs.

[25] MR. WHITTLE: My Lord, in your reasons that you stated that the case of *Wilderness* supported the plaintiff's position?

[26] THE COURT: I'm sorry, defendants.

[27] MR. WHITTLE: Thank you, My Lord.

[28] THE COURT: Thank you.

[29] MR. WHITTLE: My Lord, as there is no party now, could Your Lordship direct that the order be prepared by counsel for the defendants and that it need not be signed by any other party? There is no other person to sign it.

[30] THE COURT: That is not so with respect to the adjournment order.

[31] MR. WHITTLE: Mr. Buchan can sign that order?

[32] THE COURT: Well, yes, he was counsel on the adjournment application.

[33] MR. BUCHAN: Perhaps two separate orders, My Lord, one dealing strictly with the adjournment, the other dealing with the defendant's motion, and that way --

[34] THE COURT: That would be better and I waive -- there is no requirement to -- I waive it, whatever right, to the other side. It is going to get to him, anyhow.

[35] MR. BUCHAN: There is nobody appearing for the plaintiff on the main motion, so there wouldn't be any need for signature.

[36] THE COURT: Out of an abundance of caution, it is waived; if it is there, it is waived.

[37] MR. WHITTLE: Thank you, My Lord.

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HUDSON J.