

CANADA / JUDGMENT

## Dhaliwal v. Bonterra Resources Inc.

2019 BCCA 255

COURT

British Columbia Court of Appeal

DECIDED

28 June 2019

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2019 BCCA 255 Dhaliwal v. Bonterra Resources Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Dhaliwal v. Bonterra Resources Inc.,

2019 BCCA 255

Date: 20190628

Docket: CA46188

Between:

Navjit Dhaliwal and Richard Dale Ginn

Appellants

(Plaintiffs)

And

Bonterra Resources Inc.

Respondent

(Defendant)

Corrected Judgment: The cover page of the judgment was corrected on  
July 19, 2019.

Before:

The Honourable Madam Justice Fisher

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated June 20, 2019 (Dhaliwal v. Bonterra Resources Inc., Vancouver Docket S194602).

Oral Reasons for Judgment

Counsel for the Appellants:

S.J. Marescaux

Counsel for the Respondent:

K.A. Reilly

D.R. Shouldice

Place and Date of Hearing:

Vancouver, British Columbia

June 28, 2019

Place and Date of Judgment:

Vancouver, British Columbia

June 28, 2019

Summary:

The appellants, former directors and officers of the respondent, resigned from their positions and signed a mutual release providing for payments of \$1,092,000, to be payable in either cash or shares. When the respondent did not pay, the appellants commenced an action and obtained a garnishing order ex parte. The respondent had the garnishing order set aside and the appellants appeal that order, seeking a stay pending the determination of the appeal. Held: application granted on condition that the appeal be expedited. There is merit in the appeal and the balance of convenience favours the appellants.

[1] FISHER J.A.: The appellants, Navjit Dhaliwal and Richard Dale Ginn, are former directors and officers of the respondent, Bonterra Resources Inc. (Bonterra). In February 2019, each resigned from his position and signed a mutual release that provided for a payment of \$1,092,000 that could be taken in cash or shares. Bonterra did not pay them. Upon filing notices of civil claim, the appellants obtained a garnishing order before judgment ex parte. After the money had been paid into court, Bonterra successfully applied for the garnishing order to be set aside. The appellants have filed a notice of appeal of that order and now seek a stay pending their appeal.

[2] The mutual releases provided as follows:

3. Individual Release

For and in consideration of (i) the payment, in cash (within five business days of Bonterra completing a financing) or common shares of Bonterra or a combination thereof, as may be mutually agreed by the parties, in the amount of \$792,000, (ii) the payment, in cash (within five business days of Bonterra completing a financing) or common shares of Bonterra or a combination thereof, as may be mutually agreed by the parties, in the amount of \$300,000, and (iii) the right of the Director to exercise any outstanding stock options of Bonterra for a period of twelve months from the Effective Date the Director does hereby release, remise and forever discharge the Bonterra Group from any and all manner of actions both in law and equity which the Director ever had or now has

[Emphasis added.]

- [3] Mr. Dhaliwal requested that the amount be paid to him in cash. Mr. Ginn communicated to Bonterra that he would accept \$792,000 in cash and \$300,000 in shares.
- [4] Bonterra completed the financing referred to in the releases on March 18, 2019. However, it has not paid anything to the appellants.
- [5] In April 2019, the appellants filed a notice of civil claim in which they each seek judgment in the amount of \$1,092,000 and, alternatively, damages against Bonterra for its failure to pay those amounts. They also filed affidavits in support of a prejudgment garnishing order, which was granted ex parte by the deputy district registrar on April 12, 2019.
- [6] The appellants served the garnishing order on the respondent on April 25, 2019. The next day, the garnishee, TD Canada Trust, debited \$2,184,000 from Bonterra's bank account and paid the funds into court.
- [7] On June 20, 2019, the respondent applied for the garnishing order to be set aside. The chambers judge granted the application.
- [8] The judge recognized that the prejudgment garnishing order had been made pursuant to s. 3(2) of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78, and that s. 5 of that Act empowered her to set aside the garnishing order if it was just in all the circumstances to do so. She also recognized that the garnishing order may be set aside where the claim is unliquidated, referring to the test in *Standard Oil Co. of British Columbia Ltd. v. Wood*, [1984] B.C.J. No. 40 (S.C.) at para. 17:

If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'.

- [9] The judge set aside the garnishing order both because the claim was unliquidated and because it was just in all the circumstances to do so.

- [10] First, she found that the action was not a claim for a liquidated sum because the mutual release allowed for the plaintiffs to take their payment by way of either cash or shares in a manner to be agreed by the parties. She held that the manner of payment, about which there had been no agreement, materially impacted the sum of funds that will ultimately be collected should the plaintiffs succeed.
- [11] Second, the judge found that it was just to set aside the garnishing order. She accepted that there was sufficient merit in both the plaintiffs' case and Bonterra's defences, but considered that the garnishment of over \$2,000,000 would likely cause hardship to Bonterra and there was no evidence to support the plaintiffs' competing concern that there was any risk of a dry judgment.

Stay pending appeal

- [12] The test for a stay pending appeal is straightforward and well-settled:

The three stage test enunciated in *Metropolitan Stores (M.T.S.) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 and re-affirmed in *RJR - MacDonald* has frequently been interpreted as requiring an applicant to show the following:

- (1) that there is some merit to the appeal in the sense that there is a serious question to be determined;
- (2) that irreparable harm would be occasioned to the applicant if the stay was refused;
- (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

(*B.C. (Milk Marketing Board) v. Grisnich* (1996), 70 B.C.A.C. 142 (C.A.) at para. 7 (in Chambers)).

- [13] Where the appellant seeks to stay a discretionary order, the merit test takes into account the deference that a division would give to such an order on appeal. The applicant must present an arguable case that the judge erred in principle, ignored or misapplied a relevant factor, or was clearly wrong so as to amount to a serious injustice: *British Columbia (Director of Civil Forfeiture) v. Day*, 2019 BCCA 160 at paras. 10-11 (in Chambers).

## Analysis

### Merit

- [14] The order under appeal is clearly a discretionary order. In addition to the requirement of a liquidated sum, the factors that are to be taken into account in determining whether it is just to set aside a garnishment include the relative strength of the parties' cases, determined in a preliminary way; whether the defendant is suffering undue hardship, and whether the order is necessary: see *Sequoia Mergers & Acquisitions Corp. v. CAMACC Systems Inc.*, 2015 BCSC 2197; *Key Insurance Services Partnership v. T. Clarke Insurance Services Ltd.*, 2010 BCSC 1857.

- [15] The appellants submit that the chambers judge erred in setting aside the garnishing order on the basis that the claim was not for a liquidated amount, and in finding it just in all the circumstances to set aside the order on the basis that Bonterra's position had merit, without considering it in conjunction with the strength of their claim, and on the basis of hardship to Bonterra.
- [16] The respondent submits that there is little merit in the appeal due to the interlocutory, discretionary nature of the decision, which is entitled to deference.
- [17] In my view, the appeal has merit. I have concerns about the judge's conclusion that the claim was not for a liquidated amount. The mutual releases specify a liquidated amount, and whether that amount is taken in cash or the equivalent value in shares requires no more than mere calculation.
- [18] With respect to the judge's conclusion that it was just in all the circumstances to set aside the garnishing order, the judge considered the merits of both sides in a very cursory manner, without weighing their relative merits. The only evidence before her about undue hardship was an affidavit of the chief financial officer of Bonterra that provided no financial information about the company, other than a confirmation that it had brokered a private placement for gross proceeds of \$36,741,096. Her conclusion that the garnishment would likely cause Bonterra undue hardship does not appear to be supported by the evidence.

### **Irreparable harm**

- [19] The appellants submit that they should be entitled to the security that prejudgment garnishment brings because they meet the statutory test and it would work an injustice for that security to be lost. They say that "based on the lack of evidence provided" by Bonterra, they face a real possibility of not being able to recover their judgment.
- [20] The respondent submits that it is not sufficient for the appellants to say that it would be unjust to lose the security obtained by the garnishment, and they have provided no evidence that they will suffer irreparable harm if a stay is not granted. The respondent says that the appellants are not at risk of a dry judgment given the evidence of Bonterra's non-liquid assets.
- [21] It is only at this stage that Bonterra has provided evidence about its financial circumstances. As to its current situation, the evidence of the chief financial officer is as follows:
13. At the end of June 2019, Bonterra will have approximately \$5,000,000 in cash, as well as approximately \$4,000,000 due to creditors in current payables.

14. At this time, Bonterra forecasts monthly expenses in the amount of approximately \$2 million for each of July and August 2019. These monthly expenses consist largely of exploration expenses at Bonterra's mining sites and cannot be reduced without incurring significant liabilities as a result of contractual obligations, including obligations tied to flow-through shares, and costs associated with de-mobilization and re-mobilization costs at each mining site.
15. The foregoing monthly expenses and accounts payable do not include approximately \$1.2 million owed for severance obligations and related liabilities. Bonterra must make payments in the amount of \$230,000 on July 25, 2019 and \$947,000 on August 8, 2019 in respect of severance obligations and related liabilities.
16. If the funds garnished and paid into court in the amount of \$2,184,080 (the "Garnished Funds") are not released to Bonterra by mid-July, Bonterra may not be able to pay all of its debts as they become due.

[Bold in original.]

- [22] What is apparent from this evidence is that if the stay is not ordered, all of Bonterra's cash will be gone by the end of the summer. In my view, this is sufficient to establish a risk of a dry judgment for the appellants, at least in the interim. The long-term viability of the company depends on its non-liquid assets, consisting of mining property, plant and equipment in Québec. The financial statements indicated significant liabilities. Whether or not the appellants will be able to execute on those assets is unclear.

### Balance of convenience

- [23] Given this evidence, I consider the balance of convenience favours the appellants. However, to offset any harm caused by granting a stay and given the interim nature, I am granting the stay on the condition that the appeal be expedited.
- [24] I am granting the stay on the condition that the appeal be set down to be heard for two hours or less on July 17, 2019.

### Disposition

- [25] For all of these reasons, the application for a stay pending the determination of the appeal is allowed on condition that the appeal be expedited as discussed.

[Discussion with counsel re: timeline to file factums]

- [26] FISHER J.A.: The appellants' factum to be filed by July 5, 2019 and the respondent's factum to be filed by July 12, 2019. If there is any reply, the factum should be filed by July 15, 2019.

"The Honourable Madam Justice Fisher"

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