

CANADA / JUDGMENT

Encorp Pacific (Canada) v. Rocky Mountain Return Centre Ltd. et al

2005 BCSC 1700

COURT

Supreme Court of British Columbia

DECIDED

5 December 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2005 BCSC 1700 Enrcorp Pacific (Canada) v. Rocky Mountain Return Centre Ltd. et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Encorp Pacific (Canada) v. Rocky Mountain Return Centre Ltd. et al,

2005 BCSC 1700

Date: 20051205

Docket: S053544

Registry: Vancouver

Between:

Encorp Pacific (Canada)

Plaintiff

And

Rocky Mountain Return Center Ltd., Alan Gerald Hague, Keeli Patricia-Anne McMillan, Jeffery Robert Acheson, Jeffery Robert Acheson doing business as Jeff Acheson Transport Services, and Jeff Acheson Transport Services Inc.

Defendants

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Plaintiff

T. M. Cohen

S. E. Elliott

Counsel for the Defendants

W. D. Mussio

Date and Place of Trial/Hearing:

November 17 and 18, 2005

Vancouver, B.C.

Introduction

- [1] On June 29, 2005 I granted the plaintiff's ex parte application for an interlocutory Mareva injunction against all defendants except Keeli Patricia-Anne McMillan. The defendants now apply to have that order set aside.

Facts

- [2] The plaintiff, Encorp Pacific Canada ("Encorp"), is a federally incorporated not-for-profit corporation and is the stewardship agent for brand owners of used beverage containers in British Columbia. Pursuant to applicable legislation, Encorp manages the collection and recycling of used beverage containers. To carry out its mandate, Encorp contracts with depots, who receive used beverage containers, and transporters, who truck the used containers from the depots to recycled materials processing plants.
- [3] The defendant Rocky Mountain Return Centre Ltd. ("Rocky Mountain"), located in New Westminster, British Columbia, is one of the depots with whom Encorp contracted. Alan Gerald Hague is the president and director of Rocky Mountain.
- [4] Jeffery Acheson, who also did business as Jeff Acheson Transport Services and Jeff Acheson Transport Services Inc., operated a trucking business with whom Encorp contracted to transport used beverage containers.
- [5] Pursuant to various licensing agreements, Rocky Mountain received used beverage containers from consumers and institutions and refunded their deposits. The used containers were transported by Jeff Acheson from Rocky Mountain to P.E.T. Processing Inc. ("PPI"), a recycled materials processor. Encorp paid Rocky Mountain the amount of the deposit plus a handling fee for each used container delivered to the processor. Encorp also paid Jeff Acheson a fee based on the number of bags of used containers that he transported in his trucks.
- [6] The amounts payable both to Rocky Mountain and to Jeff Acheson were calculated on the basis of Moving Authorization ("MA") forms submitted by the defendants, which listed the number of bags of each category of used containers that they claimed were loaded in each truck being transported from Rocky Mountain to PPI. Although each MA form listed only the number of bags and not the number of used containers, the latter could be calculated on the

basis of a standard number of containers that were required to be placed in each bag. For example, Encorp stipulated that the depots were to place 150 used containers of the SKU2025 variety (plastic, under one-litre) in each bag. Thus, the number of SKU2025 containers could be calculated by multiplying the number of bags by 150.

- [7] The plaintiff's claim against the defendants is that from early 2002 until late 2004 the defendants knowingly overstated the number of bags (and therefore the number of used containers) that were delivered, with the result that Encorp paid both Rocky Mountain and Jeff Acheson substantially more than they were entitled to.
- [8] The evidence of this alleged fraud is indirect. It is based on the pattern of reported volumes of delivered containers, which rose dramatically from 2001 to 2003, and then declined steeply in 2004. It is also based on an analysis of the reported deliveries compared with the weight of the materials actually received by the processor.
- [9] The plaintiff relies heavily on an analysis prepared by Paul McEwen, a forensic accountant with the accounting firm Ernst and Young. In my original judgment of June 29, 2005, I concluded that the McEwen report provided compelling evidence that Rocky Mountain and Jeff Acheson handled far fewer used beverage containers than they claimed during the 2002 to 2004 period and that this resulted in an overpayment to Rocky Mountain of about \$1.2 million and an overpayment to Jeff Acheson of approximately \$50,000.

Issues

- [10] An application to set aside an ex parte injunction may take two forms: an application to "discharge the order" for irregularity, that is, failure to make full and frank disclosure of all material facts on the original ex parte application; or an application to "dissolve the injunction" as unjustified by the facts, including any additional facts brought forward by the defendant: *Gulf Islands Navigation Limited v. Seafarers' International Union* (1959), 28 W.W.R. 517 (B.C.C.A.) at p. 519.
- [11] The issues on the present application are whether the Mareva injunction should be set aside on either of these bases.

Non-Disclosure

- [12] The discretion to discharge an order for failure to make full and frank disclosure arises from the stringent duty the law places upon an applicant for ex parte relief. In *U.S.A. v. Friedland*, [1996] O.J. No. 4399 (Ont. Ct. Gen. Div.), Sharpe J. described the nature of this duty at para. 27-28:

[T]he law imposes an exceptional duty on the party who seeks ex parte relief. That party is not entitled to present only its side of the case in the best possible light, as it would if the other side were present. Rather, it is incumbent on the moving party to make a balanced presentation of the facts in law. The moving party must state its own case fairly and must inform the Court of any

points of fact or law known to it which favour the other side. The duty of full and frank disclosure is required to mitigate the obvious risk of injustice inherent in any situation where a Judge is asked to grant an order without hearing from the other side.

If the party seeking *ex parte* relief fails to abide by this duty to make full and frank disclosure by omitting or misrepresenting material facts, the opposite party is entitled to have the injunction set aside. That is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party.

[13] The consequences of incomplete disclosure were described by Huddart J. in *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335 (B.C.S.C.) at para. 19:

It is well settled that a party applying *ex parte* for a Mareva injunction must make full and fair disclosure of all material facts known to him and make proper inquiries for any additional relevant facts before making the application. Such facts must include those relevant to the defendant's position, to the extent it is known. If there is less than full accurate disclosure or if there is a misleading of the court about material facts in the original application the order will be discharged. *Chitel v. Rothbart* (1982), 69 C.P.R. (2d) 62, 141 D.L.R. (3d) 268 (Ont. C.A.); *Gulf Islands Navigation Ltd.*, *supra*; *Canadian Pacific Railway v. United Transportation Union, Local 144 et al.* (1970), 14 D.L.R. (3d) 497 (B.C.S.C.)

[14] As Huddart J. went on to make clear at para. 20, however, the law does not demand perfection, and orders need not be set aside for minor irregularities or inconsequential omissions from the affidavits:

An *ex parte* chambers application is not a trial and should not be turned into one by demands for an unrealistic standard of disclosure. Disclosure must be full in the sense that it must be adequate to the demands of the particular application and always fair to the absent defendant. *Re Philip's Manufacturing Ltd.* (1991), 60 B.C.L.R. (2d) 311 (B.C.S.C.).

[15] In the present case, the defendants have filed affidavits that contradict some of the facts alleged by the plaintiff in the original *ex parte* application. The discrepancies have to do with such things as the weight of certain kinds of used beverage containers, the number of containers that fit in a recycling bag, and the number of bags on each truck. The existence of these discrepancies does not by itself establish that the plaintiff failed to make full and frank disclosure. A final determination of whose figures are correct will ultimately be made at trial. In the context of the present application, the discrepancies would amount to material non-disclosure only if the plaintiff knew or ought to have known that the defendants would be asserting the additional facts that they now put forward.

[16] Having re-examined the material originally presented to me by the plaintiff and having compared it to the new material now presented by the defendants, I am satisfied that there has not been a material failure to disclose. There is no basis for concluding that the plaintiffs knew or ought to have known of the facts now asserted by the defendants.

The New Facts Asserted by the Defendants

- [17] The next question is whether the Mareva injunction continues to be justified when the new facts alleged by the defendants are considered along with the facts alleged by the plaintiff on the original application.
- [18] The defendants say that in 2003 a large part of Rocky Mountain's recycling volume was attributable to polycups, which are small cup-like containers that come within the SKU2025 category. Polycups are different from other SKU2025 containers in three ways: they are smaller, they are more compactable, and they are made out of a different kind of plastic, polystyrene.
- [19] The defendants say that polycups are largely used by hospitals and that there was a dramatic decline in the number of polycups turned in to Rocky Mountain in the Spring of 2004. They submit that this decline is attributable to the hospital strike that occurred at that time, which accounts for the rising volume of Rocky Mountain's business in 2003 and its sharp decrease in 2004.
- [20] The defendants submit that their claims are confirmed by audits performed by Encorp in 2004. A March 17, 2004 audit showed that 82.1% of Rocky Mountain's SKU2025 containers were polycups, while a June 9, 2004 audit, after the hospital strike, showed that volume declining to only 12%. This, the defendants submit, confirms their claim that there is a legitimate explanation for the rising and falling volumes they reported between 2001 and 2004.
- [21] The plaintiff counters, and I agree, that the audits are of little significance since they were done with advance notice to Jeff Acheson.
- [22] The defendants next argue that Paul McEwen's analysis is unreliable because it is founded on inaccurate assumptions.
- [23] The McEwen report is based on an analysis of the number of truckloads it would take to deliver the reported quantity of SKU2025 containers from Rocky Mountain to PPI in 2003 compared with the actual number of truck deliveries. For the purpose of this calculation, Paul McEwen had to calculate the percentage of SKU2025's that was attributable to polycups, since their size and weight are dramatically different from other containers in the SKU2025 category. This had to be calculated, since the MA forms on which the defendants reported the number of bags of SKU2025's delivered did not distinguish between polycups and other containers in the same category.
- [24] According to Paul McEwen, this calculation was possible because polycups are made from polystyrene, a different kind of plastic from that used in any other SKU2025 container. His method was to take the total weight of polystyrene material reported by PPI for 2003, which was 11,000,000 grams, and divide it by the weight of a single polycup, which he took to be 5.1 grams. From this he calculated that the actual number of polycups delivered by Jeff Acheson from Rocky Mountain to PPI in 2003 was 2,156,863. He then subtracted that amount from the

total number of SKU2025's, based on the number of bags of SKU2025's reported by the defendants on the MA's. Assuming that there were 150 containers in a bag, as stipulated by Encorp, Mr. McEwen concluded that there would have been 25,582,487 non-polycup containers, or 170,550 bags of them. On the basis that 320 such bags is the maximum that would fit on a truck the size of Jeff Acheson's, it would take 533 truckloads to transport that number of non-polycup SKU2025 containers. He labelled this figure, the number of "implied" truckloads.

- [25] In a separate calculation, Mr. McEwen derived the number of actual or "expected" truckloads. The defendants reported a total of 443 truckloads of all kinds of SKU's on their MA forms for 2003. Based on the volumes of other SKU categories, Mr. McEwen found that of Jeff Acheson's 443 truckloads, there would be 257 expected truckloads used to transport SKU2025 containers.
- [26] From those two figures, Mr. McEwen concluded that the defendants reported far more SKU2025's on their MA forms than they actually delivered, since it would have taken 533 truckloads to deliver the amount they reported, and yet the number of actual or "expected" truckloads of SKU2025 containers was only 257.
- [27] The defendants attack the McEwen report on the basis that the assumptions on which it is based have not been established by the plaintiff. Moreover, they say those assumptions are demonstrably inaccurate.
- [28] The defendants have submitted evidence that an individual polycup does not weigh 5.1 grams as assumed by Mr. McEwen, but rather 3.9 to 4.5 grams. They also claim that Mr. Acheson's truck can hold more bags than Mr. McEwen assumed. Finally they say that the total weight of polystyrene plastic delivered to PPI in 2003 was more than 11,000,000 grams. They say that the figure of 11,000,000 grams represents the amount of bailed polystyrene that went out from PPI, which is not necessarily the same as the amount that was delivered to it, since there is "shrinkage" attributable to such factors as mis-sorting and employee theft.
- [29] The plaintiff responds in two ways. First, it says that the assumptions used by Paul McEwen in his calculations are all substantiated by affidavits demonstrating the careful methods by which they arrived at their figures. Second, the plaintiff submits that even if the figures from which Mr. McEwen worked are to some extent imprecise, this would affect only the extent of the fraud, and not its existence.
- [30] The plaintiff's second point is persuasive. Even if one takes the figures suggested by the defendants' evidence and substitutes them for the plaintiff's figures in McEwen's analysis, the conclusion remains that more material was reported on the MA forms than could have been delivered in the actual number of truck trips that Jeff Acheson made in 2003. For example, even if the weight of an individual polycup is assumed to be 3.9 grams, and if the total weight of polystyrene delivered to PPI is assumed to be 22,000,000 grams (making a generous allowance of 50% for shrinkage), and if the number of possible bags per truck is

assumed to be 400 instead of 320, the result is still that it would have taken over 100 more truckloads to deliver the quantity of SKU2025 containers reported by the defendants on their MA forms than the actual number of truckloads of SKU2025 containers that Jeff Acheson delivered that year.

- [31] Nevertheless, the evidence of fraud is still indirect. There was, for example, no surprise audit where bags and containers were counted by the plaintiff in 2003 to prove directly that the defendants failed to deliver as many containers in that year as they claimed on their MA forms. The only audits conducted in 2003 were bag audits done according to a schedule, with notice to Jeff Acheson, and they do not show any significant irregularities.
- [32] In its written argument, the plaintiff submitted that an adverse inference should be drawn against the defendants from their failure to produce cash pay-out summaries to support their claims regarding the level of recyclables received at the depot. However, on the afternoon of the second day of submissions, counsel for the defendants produced a new affidavit of Allan Hague sworn November 18, 2005. I permitted the defendants to file Allan Hague's Affidavit #6, and counsel for the plaintiff has filed further written submissions in reply.
- [33] Allan Hague's Affidavit #6 contains some of the business records and financial statements that the plaintiff said were missing. These records appear to show that the amounts Rocky Mountain paid out as refunds for recyclables rose and fell from 2002 to 2004 in a pattern that is similar to the pattern of deliveries from Rocky Mountain to PPI as reported on their MA forms over the same period.
- [34] In the plaintiff's written reply submissions, the point is made that the weekly log sheets attached to Allan Hague's Affidavit #6 are not independently verifiable, and the financial statements are unaudited.
- [35] The plaintiff submits that I should weigh all the conflicting evidence and make findings of credibility in favour of the plaintiff. The plaintiff submits that I should apply the test in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 357 to determine which evidence is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."
- [36] Nevertheless, it is impossible to make the same kind of credibility assessments on an interlocutory application based solely on affidavits that one would make at trial. As Huddart J. observed in *Mooney v. Orr* at para. 21:

Rarely can a judge assess credibility on affidavits or at a trial until all the evidence has been heard and the submissions made. A conspiracy to defraud has usually to be inferred from behaviour. No one can say whether or not such a conspiracy has been established until all the evidence has been heard, the arguments made, and the facts as to behaviour found.

The Test for a Mareva Injunction

[37] The plaintiff wants to maintain the Mareva injunction to prevent the defendants from disposing of their assets pending trial. The plaintiff claims this is necessary to ensure that any judgment it might ultimately obtain will not turn out to be hollow.

[38] The term "Mareva injunction" derives from the English case of *Mareva Compania Naviera S.A. v. International Bulk Carriers S.A.*, [1980] 1 All E.R. 213. The availability of this remedy in Canada was discussed in *Aetna Financial Services Ltd. v. Feigelman et al.*, [1985] 1 S.C.R. 2. The first requirement is that the plaintiff must show "a strong prima facie case." That by itself, however, is not enough. At para. 8 Estey J. referred to *Lister & Co. v. Stubbs*, [1886-90] All E.R. 797 for "the simple proposition that in our jurisprudence, execution cannot be obtained prior to judgment and judgment cannot be recovered before trial." As a Mareva injunction derogates from this general principle, it is to be considered an "exceptional order". Thus, the applicant must demonstrate there is a genuine risk of disappearance of the defendant's assets.

[39] In *Aetna*, the Court set aside the injunction, holding at para. 43:

There is still, as in the days of *Lister*, a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed of or moved out of the country or put beyond the reach of the courts of the country.

[40] Over the ensuing years, however, greater flexibility has been advocated. In *Mooney v. Orr*, Huddart J. suggested a more "relaxed approach". This was subsequently endorsed by the Court of Appeal in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 59 B.C.L.R. (3d) 196 (B.C.C.A.). Delivering the reasons of the Court, Madam Justice Newbury stressed the importance of finding the balance of justice and convenience between the parties. She said at paragraphs 20 to 21:

I agree with this approach, which in my view is true to the historical roots of injunctions generally and Mareva injunctions in particular. Thus I would be reluctant to adopt a hard and fast rule, as counsel for the defendants urged upon us, that a Mareva injunction may never be made or continued unless there is a fraudulent intent on the part of the debtor; or where the payment in question is one proposed to be made in the ordinary course of business; or where it would materially and adversely affect an innocent third party. (In the latter regard, Mr. Moshonas referred us to *Galaxia Maritime S.A. v. Mineralimportexport (Eleftherios)*, [1982] 1 All E.R. 796 (C.A.) at 800, *Northern Sales Co. Ltd. v. Gov't. Trading Corp. of Iran*, *supra*, at 75-6. But this factor cannot be taken too far, for almost every Mareva injunction is likely to inconvenience another party in some way.) The overarching consideration in each case is the balance of justice and convenience between the parties, and those concepts can embrace many factors that do not fit easily into the "rules" or "conditions" advanced by the defendants.

Having said that, however, it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

[41] The current test for a Mareva injunction in British Columbia was summarized by Sinclair Prowse J. in *Leaton Leather & Trading Co. v. Ngai* (1997), 32 B.C.L.R. (3d) 14 (B.C.S.C.) at para. 11:

Applying this line of authority to this application, to succeed the plaintiff must establish that:

- (1) it has a strong prima facie or good arguable case;
- (2) the defendants have assets within the jurisdiction of British Columbia (as it is a domestic injunction that is being sought); and
- (3) a consideration of the interests of both parties favours the granting of this Mareva injunction relief.

[42] Notwithstanding the new evidence the defendants have submitted on this application, I remain satisfied that the first two requirements are met. That is, the plaintiffs have a good arguable case, and the defendants have assets within British Columbia. The third step, however, the balancing of interests between the parties, must be re-evaluated in light of all the evidence that is now before me.

[43] The factors to be considered in assessing the balance of convenience are discussed in *Netolitzky v. Barclay*, [2002] B.C.J. No. 1796 (B.C.S.C.) at para. 22. These factors include:

- (a) the nature of the transaction giving rise to the cause of action;
- (b) enforcement measures available in B.C.;
- (c) the amount of the claim;
- (d) the history of the defendant's conduct;
- (e) the relative strengths of the parties' cases; and
- (f) evidence of irreparable harm either way.

[44] The plaintiff emphasizes the first factor and submits that as the allegation is fraud, this in itself weighs heavily in favour of granting the plaintiff the protection that a Mareva injunction affords: *Netolitzky* at para. 23-31; *Mills and Mills v. Petrovic et al.* (1980), 118 D.L.R. (3d) 367 (Ont. H.C.) at p. 368; and *Sutton Resources Ltd. v. Sinclair* (1997), 38 C.C.L.T. (2d) 217 (B.C.S.C.) at paras. 22 to 23. The plaintiff also points out that the claim is for over one million dollars, and that the plaintiff is a not-for-profit corporation. The plaintiff maintains that without the injunction, there may be no way of satisfying an eventual judgment in its favour, and this would have a detrimental effect on the public's confidence in

an important social program, namely, recycling.

- [45] Apart from the allegation of fraud which forms the basis of the plaintiff's action, there is no compelling evidence that the defendants are likely to dissipate their assets or move them out of the jurisdiction.
- [46] The defendants submit that the injunction has already made it difficult to carry out necessary financial transactions and that its continuation would pose significant hardships and perhaps even result in bankruptcy.
- [47] In the particular circumstances of this application, the most significant factor that must be re-evaluated in light of the new evidence put forward by the defendants is the relative strengths of the parties' cases. Although I remain satisfied that the plaintiff has a good arguable case, this does not foreclose a re-evaluation of the relative strength of each party's case in order to determine whether it is just and convenient to maintain the injunction: *Mooney v. Orr* at para. 32.
- [48] On the original ex parte application, it appeared that the plaintiff's case was very strong, based on the analysis contained in the McEwen report. Although, as I have discussed above, the defendants' new evidence does not destroy the value of the McEwen report, there is no doubt that it potentially weakens it. In my view, the plaintiff's case does not now appear as strong as it did on the original application in June.
- [49] In addition, I now have evidence from the defendants upon which a possible defence emerges. Attached as exhibits to Alan Hague's Affidavit #6 are Rocky Mountain's business records that purport to show the amounts it paid out to individuals returning used containers to Rocky Mountain from 2001 to 2004. These records appear to show that Rocky Mountain paid out increasing amounts from 2002 to 2003, with a dramatic fall off occurring at the end of April 2004, that is, around the time of the hospital strike. If those records are accurate, they would tend to support the defendants' argument that the amounts reported on their MA forms, which follow a similar pattern, were accurate and not fraudulent.
- [50] Thus, the defendants' case now appears stronger than it did at the time of the original ex parte application.

Conclusion

- [51] For the reasons above, I conclude that the balance of convenience has shifted. It is no longer just and convenient to maintain the interlocutory Mareva injunction. The order of June 29, 2005 is set aside.

"W.F. Ehrcke, J."

The Honourable Mr. Justice W.F. Ehrcke

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/05/17/2005bcsc1700.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/encorp-pacific-canada-v-rocky-mountain-return-centre-ltd-et-al-2005>

Prepared on 26 October 2026 · Esheria