

CANADA / JUDGMENT

Gilson v. 605541 B.C. Ltd. and Monical

2006 BCSC 1984

COURT

Supreme Court of British Columbia

DECIDED

7 September 2006

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2006 BCSC 1984 Gilson v. 605541 B.C. Ltd. and Monical IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Gilson v. 605541 B.C. Ltd. and Monical, 2006 BCSC 1984 Date: 20060907 Docket: 31727 Registry: Kamloops Between: Caroline Gilson and George Gilson Petitioners And: 605541 B.C. Ltd., Ed Monical and Cheryl Monical Respondents Before: The Honourable Mr. Justice Powers Oral Reasons for Ruling on Admissibility of Evidence after Reference to the Registrar September 7, 2006 Counsel for the Petitioners: J. R. Leverman Counsel for the Respondents: P. D. Messner, Q. C . Place of Trial/Hearing: Kamloops, B.C.

- [1] THE COURT: The overall objective of this proceeding is to separate these parties from each other and from the company. I have been told that all of the parties wish to deal with all of the accounting issues between them, so that they are no longer involved in any litigation with each other. It was a specific term of an order that with regard to hay production, that it would have to be accounted for. Before the hay was even grown, the Monicals knew they would have to keep track of all of the hay that was produced, and that they would have to keep track of all of their expenses.
- [2] Unfortunately, what seems to have happened throughout this litigation is the parties keep trying to change horses in mid-stream and ride off in different directions. Mr. Messner knows more about horses than I do, I am sure, so he probably has a more vivid understanding of why that is not a good idea, but what we have now is a situation where, because of either simply a failure to pay attention or make the time available, although this was critically important, the parties failed to comply with the orders and failed to have the evidence available for the master. It appears from the master's report that except for backing out some expenses and talking about hay production as it relates to pasturage -- at least those were the words used -- there has not been any determination as to what the costs of the production of hay was. I do not even know if there is a determination of the amount of hay which was produced, if that has been covered.
- [3] There is a great deal of discussion in the Kelly v. Kelly, [1964] B.C.J. No. 62 decision and the Larson v. Larson, [1993] B.C.J. No. 661 decision that Mr. Leverman has referred me to. The Kelly decision, I do not think is of much help. I think the Larson decision is a much more extensive review of the law, and certainly if Kelly represented what the law was in 1964 when

it was decided, it does not represent what the law was in 1993 or today. In fact, the law as to what happens after reference to the registrar and a report is not very clear, because there can be so many different circumstances.

- [4] The best that can be said is that the court retains a discretion to hear evidence in whatever fashion the court thinks is necessary after the report to the registrar, but should exercise that discretion in a judicial fashion, and not arbitrarily or without good reason allow the parties to re-argue. If a party simply wishes to re-argue a matter which has already been canvassed at length in front of the master or the registrar, the usual course is to go through an analytical review of the report itself and argue why it is or is not consistent with the evidence, and why the conclusions that were reached are not supported by the primary facts that were found by the registrar or master conducting that reference.
- [5] Overall, the court must keep in mind that it is up to the judge who hears the case to make the decision, not for the master or the registrar, and must do so expeditiously. This matter should be dealt with expeditiously and on the merits.
- [6] I am now faced with a situation where I am told that one of the matters dealing with the production of hay has not been fully canvassed before the master, that the evidence that the Monicals now wish to present, although it would have been available to the Monicals, was not put together in the form in which it is now presented. There is also a very great likelihood that many of these expenses may have already been covered at least in a portion of the master's approach to the cost of pasturage or expenses, at least that the Monicals were entitled to credit for as company expenses and that have been backed out of or have been given credit for with regard to the cost of pasturage.
- [7] I am told, though, that these expenses total about \$168,000 and that is a significant figure. The Gilsons are understandably caught by surprise, only receiving this information yesterday.
- [8] The question is do I simply ignore a claim for \$168,000, because it comes late in the day, or is there some other alternative? In this case, I think the only fair way to do it is to say that, yes, this matter is open, it can be dealt with.
- [9] There will be a penalty and costs, and that penalty will be, including the costs in any event of the cause, of the time spent dealing with silage costs and hay production before the master, because that obviously served no purpose. It was not consistent with the order. It was simply a question of the parties attempting to change horses in mid-stream and deal with the matter in a way that was inconsistent with the orders, without any agreement from the other side that that was an appropriate way to deal with matters.
- [10] Once the parties have orders and agreements as to how they proceed, they should proceed in that fashion, unless they agree to some other approach. It is the same argument that could be made with regard to pasturage. The argument is that, "Gee, the end result doesn't seem fair. We'd like to take a different approach." You have an agreement, you have an order;

without some consent by the other party, I do not see how you can simply change your agreement, any more than you could if it had simply been a commercial agreement between two parties, one side finding out that it was not as profitable as they had hoped it would be.

- [11] In addition, because I think that this may result in some delay or some costs thrown away, the Gilsons will have their costs thrown away in any event of the cause. "R.E. Powers, J." The Honourable Mr. Justice R.E. Powers
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