
CANADA / JUDGMENT

South Yukon Forest Corp. v. Canada

2004 FC 1644

COURT

Federal Court

DECIDED

23 November 2004

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South Yukon Forest Corp. v. Canada

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T-2012-01

Decision Content

Date: 20041123

Docket: T-2012-01

Citation: 2004 FC 1644

Ottawa, Ontario this 23rd day of November 2004

Present: The Honourable Madam Justice Heneghan

BETWEEN:

SOUTH YUKON FOREST CORPORATION

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

- [1] Her Majesty the Queen (the "Defendant") has also brought a motion seeking the following relief:
- (1) the Plaintiff give security for costs; after which:
 - (2) the Plaintiff serve an accurate and complete affidavit of documents within 30 days of the order;
 - (3) the Plaintiff disclose in an affidavit of documents all relevant documents that are in the possession, power or control of any corporation or individual that directly or indirectly controls the Plaintiff;
 - (4) Donald Oulton be cross-examined on the Plaintiff's affidavits of documents; and
 - (5) costs of this motion be paid forthwith by the Plaintiff.
- [2] The Defendant filed the affidavit of Mr. D. Malcolm Florence in support of this motion. Mr. Florence is a solicitor with the federal Department of Justice. He is familiar with the conduct of this action to date and the costs associated with the pre-trial steps, including discovery examinations. He has deposed that the amount of disbursements to the Defendant, up to December 31, 2003, total \$65,276.92.
- [3] He has reviewed a draft bill of costs that projects the Defendant's taxable costs, in accordance with Column III of Tariff B of the Rules, to be \$127,976.92, calculated by reference to the memorandum of the Chief Justice of the Federal Court of Appeal, dated March 26, 2004. The draft bill of costs is based on an estimated twenty day trial and this is acknowledged to be less than the actual time required. Indeed, the file shows that the Plaintiff is anticipating a sixty day trial.
- [4] The Defendant refers to statements made by Mr. Alan Kerr, the representative of the Plaintiff who was examined by way of discovery. In that process, Mr. Kerr said that the Plaintiff was unable to meet its financial commitments. The Defendant relies upon this evidence and the status of the Plaintiff as a trustee for various joint venturers to support its argument that the Plaintiff lacks sufficient exigible assets in Canada to meet an award of costs.
- [5] As well, the affidavit of Mr. Florence shows that certificates have been registered by the Plaintiff under personal property security legislation in the Yukon, British Columbia and Alberta. There is also an outstanding mortgage registered in favour of the Government of the Yukon.

- [6] Further, the Defendant refers to an audit that was prepared in March 2001 and says that at that time, the value of the mill at Watson Lake had an assessed value of \$4,000,000.00, while its salvage value is in the area of some \$657,900.00. The salvage value represents about 25 per cent of the Plaintiff's indebtedness. In these circumstances, the Defendant argues that an order for security for costs pursuant to Rule 416(1)(b) is justified.
- [7] The Defendant submits that the Plaintiff has not produced a complete affidavit of documents required by the Rules.
- [8] The Defendant also requests access to all relevant documents that are in the possession, power or control of any corporation or individual that is controlled, directly or indirectly, by the Plaintiff. This request is also authorized by the Rules.
- [9] As well, the Defendant wants the opportunity to cross-examine the deponent of the Plaintiff's affidavit of documents, that is Mr. Donald Oulton. The basis for this request is that the Plaintiff has, so far, served five affidavits of documents and even on its response to this motion, the Plaintiff has produced a document that had not been previously disclosed. The Defendant wants to cross-examine Mr. Oulton, to satisfy himself that all relevant documents are available for production.
- [10] The Plaintiff opposes the motion. It relies on the affidavit of Mr. Kerr filed in response to the Defendant's motion for security for costs, as well as the affidavit filed upon its motion for joinder and amendment of the statement of claim.
- [11] The Plaintiff disputes the valuation placed upon the mill property at Watson Lake and further argues that its debt to the Bank of Nova Scotia has been discharged, although there is no documentary evidence to that effect. It argues that the motion should be dismissed because the Defendant has delayed in seeking an order for security for costs.
- [12] It also argues that notwithstanding the sufficiency of its assets, it has a meritorious claim and the Court should exercise its discretion to deny the motion, having regard to the merits of its claim.
- [13] The Plaintiff also opposes the request that Mr. Oulton be produced for cross-examination. Although acknowledging that Rule 227(a) allows for such cross-examination, the Plaintiff submits that such examination is exceptional and that there are no grounds for such an order being made in this case. The Plaintiff further argues that it has been merely complying with the requirements of the Rules for continuing disclosure, per Rule 226, when it produced the four supplementary affidavits of documents, in addition to original affidavit of documents.
- [14] I agree with the Plaintiff that an order for security for costs involves the exercise of discretion. That is clear from the wording of Rule 416(1)(b), as follows:

416. (1) Where, on the motion of a defendant, it appears to the Court that

...

- (b) the plaintiff is a corporation, an unincorporated association or a nominal plaintiff and there is reason to believe that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant if ordered to do so,

...

the Court may order the plaintiff to give security for the defendant's costs.

416. (1) Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur :

...

- b) le demandeur est une personne morale ou une association sans personnalité morale ou n'est demandeur que de nom et il y a lieu de croire qu'il ne détient pas au Canada des actifs suffisants pour payer les dépens advenant qu'il lui soit ordonné de le faire;

- [15] According to the decision of Prothonotary Hargrave in *Early Recovered Resources Inc. v. Gulf Log Salvage Co-Operative Association et al.*, (2001), 205 F.T.R. 127, the onus lies initially on a defendant to show that there are good reasons to believe that a plaintiff has insufficient assets to answer an award of costs. Once that has been shown, the burden shifts to the plaintiff to show either that it does have sufficient assets or that it has a meritorious cause which should proceed to adjudication.

- [16] In the present case, I am satisfied that the Defendant has met the burden upon it for an order for security for costs. The Plaintiff is said to be a trustee with no beneficial interest in the assets at Watson Lake. The Defendant has shown that the recorded debts against the Plaintiff, even accepting that the debt due to the Bank of Nova Scotia has been satisfied, are in excess of \$2,000,000.00. The Plaintiff has not shown that it has sufficient exigible assets to pay costs.

- [17] I am not satisfied that the Defendant has unduly delayed in seeking this order. The timing of such a motion will vary from case to case. It would not be appropriate, in my opinion, to seek security for costs as soon as an action is started. In any event, there is no evidence of prejudice to the Plaintiff.

- [18] I am prepared to grant the Defendant's motion but, in the exercise of my discretion, I will establish the amount of security, for the present time, at \$20,000.00. This represents less than twenty per cent of the Defendant's estimated taxable costs up to December 31, 2003.

- [19] I am satisfied, on the basis of the evidence submitted by the Defendant and the arguments made, that the Plaintiff shall be ordered to produce all relevant documents in the possession, power or control of the corporations or individuals which are subject to its direct or indirect control. This will require the preparation of a complete affidavit of documents. It appears that, to date, the Plaintiff has been making productions on a piecemeal basis and that is not the intention of the Rules.
- [20] As for the Defendant's request for an order pursuant to Rule 227(a), I am not persuaded that such an order should issue at this time. If the Defendant can demonstrate that Mr. Kerr, the Plaintiff's representative for discovery, is unable to adequately identify or address the documents described in Mr. Oulton's affidavits, then she can make a further notice for the cross-examination of Mr. Oulton.
- [21] A preliminary issue arose at the beginning of the hearing of the Defendant's motion concerning the Plaintiff's non-compliance with a direction of the Court as to the time for filing its reply to this motion. On hearing argument, I awarded costs on that preliminary matter to the Defendant, in any event of the cause. The Defendant wishes to be heard on the question of costs relating to the hearing of the balance of the motion on its merits.
- [22] Accordingly, I will receive submissions from the parties, the Defendant to serve and file its submissions within seven days of this order and the Plaintiff to serve and file its submissions within five days after receipt of the Defendant's submissions. There will be no reply submissions.

ORDER

The Plaintiff shall post security for costs in the amount of \$20,000.00 within fifteen (15) days of this Order and the action is stayed pending the posting of such security.

The Defendant shall have its costs relative to the preliminary matter argued in connection with this motion, such costs payable in any event of the cause.

The Plaintiff shall produce a further affidavit of documents, within fifteen (15) days of this Order, including all relevant documents within the possession, power or control of the corporations or individuals that are under its direct or indirect control.

The parties shall serve and file their submissions on costs as follows: the Defendant shall serve and file its submissions within seven days of this order and the Plaintiff to serve and file its submissions within five days after receipt of the Defendant's submissions. There will be no reply material.

"E. Heneghan"

J.F.C.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2012-01

STYLE OF CAUSE: South Yukon Forest Corporation v. HMQ

PLACE OF HEARING: Whitehorse, Yukon Territory

DATE OF HEARING: November 1, 2004

REASONS FOR ORDER AND

ORDER : Heneghan J.

DATED: November 23, 2004

APPEARANCES:

Mr. Timothy S. Preston, Q.C. FOR PLAINTIFF

Mr. Gary W. Whittle FOR DEFENDANT

SOLICITORS OF RECORD:

Lackowicz Shier and Hoffman FOR PLAINTIFF

Whittle and Company FOR DEFENDANT

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