In the Court of Appeal of the Northwest Territories

Citation: Fullowka v. Royal Oak Ventures Inc., 2008 NWTCA 10

Date: 2008 09 22
Docket: A-0001-AP2005000021

Between:

Pinkerton's of Canada Limited, The Government of the Northwest Territories as Represented by the Commissioner of the Northwest Territories, National Automobile, Aerospace, Transportation and General Workers Union of Canada, Timothy Alexander Bettger

Appellants/Respondents by Cross-Appeal

- and -

Sheila Fullowka, Doreen Shauna Hourie, Tracey Neill, Judit Pandev, Ella May Carol Riggs, Doreen Vodnoski, Carlene Dawn Rowsell, Karen Russell, Bonnie Lou Sawler

Respondents/Appellants by Cross-Appeal

- and -

James O'Neil

Respondent/Appellant by Cross-Appeal

- and -

Harry Seeton, Allan Raymond Shearing and Roger Wallace Warren

Respondents/Respondents by Cross-Appeal

- and -

Royal Oak Ventures Inc. (formerly Royal Oak Mines Inc.)

Respondent

BEFORE:

The Honourable Mr. Justice J.Z. Vertes

Memorandum of Judgment Regarding Stay Application

Vertes J.A.:

[1] This is an application for a stay of proceedings pending final disposition of this litigation before the Supreme Court of Canada.

[2] The applicants (those identified as the "Respondents/Appellants by Cross-Appeal" in the style of cause) were plaintiffs in an action in the Supreme Court of the Northwest Territories where, after a lengthy trial, they were awarded substantial damages (see *Fullowka et al* v. *Royal Oak Ventures et al*, 2004 NWTSC 66). The respondents to this application (those parties identifiedas the "Appellants/Respondents by Cross-Appeal" in the style of cause) appealed that judgment and were successful in having the trial judgment set aside (see *Fullowka et al* v. *Royal Oak Ventures et al*, 2008 NWTCA 4). The applicants have filed an application for leave to appeal to the Supreme Court of Canada. They now seek a stay of all further proceedings arising as a result of the appeal judgment pending either a dismissal of their application for leave to appeal or, if leave is granted,pending final determination of this action by the Supreme Court of Canada.

[3] The panel of this court that heard the appeal directed that the stay application be determined by a case management judge. The Chief Justice designated me to be that judge.

[4] The anticipated "further proceedings" include a determination of what amount of interest ought to be paid on the amount of the trial judgment to be repaid to the successful appellants and quantification of costs. The appeal panel issued a ruling on costs on September 2, 2008 (see 2008 NWTCA 9) but that ruling was stayed until the hearing of this stay application.

[5] It should be noted that, after the trial judgment, the respondents sought a stay of execution of the trial judgment. That application was dismissed with costs (see 2006 NWTCA 2). As a result, the trial judgment with interest was paid by the respondents. The principal amount of the trial judgment has now been repaid to the respondents (but without agreement on the amount of interestthat should be paid on that amount).

[6] It must also be noted that this is not a case where the individually named applicants are the ones responsible for payment of interest and costs. The action was a subrogated one brought by the Workers' Safety and Compensation Commission of the Northwest Territories and Nunavut. It is the body responsible for those payments and there is no question concerning its ability to meet any such obligation.

[7] The parties agree on the test to be applied on this application. It is well-known: see *Attorney-General of Manitoba* v. *Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. The applicant must satisfy the court that (a) there is a serious issue to be tried; (b) the applicant will suffer irreparable harm if the stay is not granted; and (c) the balance of convenience favours the granting of a stay.

[8] The first part of the test requires a determination as to whether the prospective appeal is at least arguable and not frivolous. This is admittedly a low threshold. The applicants say that the

leave application raises several compelling grounds of appeal of national significance. Included among these are (i) the relationship between intentional tortfeasors and concurrent negligent tortfeasors, specifically, whether an intentional tort overcomes the mere negligence of others; (ii) the liability of unions for acts of violence during strikes; (iii) the vicarious liability of unions for the intentional torts of a union member; and, (iv) the liability of safety and security regulators and professionals for harm caused by a reasonably foreseeable intentional tort.

[9] The respondents argue, however, that this is essentially a tort law case that was resolved by the Court of Appeal on points of law well-settled by decisions of the Supreme Court of Canada. They also point to statistics showing how few leave applications are granted by that court as indicative of the unlikelihood of leave being granted.

[10] As many cases have noted, it is not a judge's function on a stay application to predict the odds of an appeal succeeding. Even less so can I dare predict the odds of leave being granted by the Supreme Court. What I can and must do is decide if the grounds are at least arguable and not clearly bound to fail. On that basis I conclude that the first part of the test is satisfied.

[11] The second part of the test requires a showing of potential irreparable harm if a stay is not granted. Irreparable harm in this context has its focus on the kind of harm as opposed to its magnitude. Generally, irreparable harm refers to harm which either cannot be quantifiedin monetary terms or which cannot be cured: see *RJR-Macdonald Inc.* v. *Canada*, [1994] 1 S.C.R. 311, at para. 59. This is not much different from what was described in one case as the "traditional approach" to requests for stays of money judgments, that being if the parties are good for the amount and will remain so, there should be no stay of a money judgment barring some unusual circumstance: see *Jager Industries Inc.* v. *Leduc*, [1997] A.J. No. 870 (C.A. per Côté J.A.), at para. 14.

[12] I will address this part of the test in conjunction with the third part, the balance of convenience. That part requires a determination as to which of the two sides will suffer the greater harm from the granting or refusal of a stay. I do so because all parties seem to have conflated their arguments on these two aspects into the same essential points.

[13] First, the applicants submit that even though this is a money judgment, and even though all parties are solvent and can meet whatever monetary demands are put on them, what is not recoverable, and therefore "irreparable", is the time that would be expended in addressing the still unresolved matters arising as a result of the appeal judgment and the ruling on costs.

[14] Second, the applicants say that the further legal expense incurred by going through these steps now would not be fully recoverable in costs and therefore would ultimately decrease the amount available for distribution to the Workers' Safety and Compensation Commission and to the individual claimants.

[15] Finally, the applicants argue that the balance of convenience favours the grantingof a stay so that time and money not be wasted should leave be granted and the trial judgment ultimately restored. Indeed they suggest that a stay will save all parties time and money at this point.

[16] The respondents submit, however, that the argument about lost time is really an argument about money spent on litigation and litigation expense is not recognized as "irreparable harm". To the extent that there is a difference between what a litigant actually pays and what may be recoverable as costs, then this is a problem faced by all litigants in every case. The fact that it may be inconvenient to resolve the outstanding issues now is no different than what any litigant would have to face in any case.

[17] In my opinion, the arguments about time and money being potentiallywasted do not meet the criteria of either irreparable harm or balance of convenience. The expenses of litigation are compensated by costs. Every litigant understands that in most cases such awards do not cover all of the expenses or time spent on litigation. That, right or wrong, is an aspect of the system that applies to every case. And it applies to every litigant, including all of the litigants in this case.

[18] I agree with applicants' counsel when he submits that harm need not be inevitableto meet the test. But it has to be harm that is of a nature not compensable in money. That is not the case here. And while I may think, as a practical matter, that it may be prudent to defer further steps until the decision of the Supreme Court is known, imprudence does not equate either to harm or inconvenience.

[19] The weight of authority holds, as noted by the respondents, that merely incurring additional litigation expenses is not an aspect of "irreparable harm". In *Northwest Territories* v. *Public Service Alliance of Canada*, [2001] F.C.J. No. 19 (C.A.), for example, Sharlow J.A. wrote (at para. 19):

> The Government also argues that if the stay is not granted but its appeal eventually succeeds, it will have wasted all of the time and money required to prepare for and attend the hearing (including travel to Ottawa, where most of the hearings are held), and will have no means of recovering the wasted funds. I am unable to agree that resources that may be wasted on litigation is irreparable harm ...

[20] I do not say that wasted legal resources or the inability to recover costs may never constitute irreparable harm (see for example, my comments in *North American Tungsten Corp.* v. *MacKenzie Valley Land & Water Board*, 2003 NWTCA 3), only that these factors are normally considered insufficient to meet the irreparable harm test where costs are incurred in the ordinary course of litigation.

[21] In my opinion, the circumstances today are no different from the circumstances that existed at the time of the stay application after the trial judgment, only the parties have switched sides. I am not satisfied that the requirements for a stay have been met.

[22] For these reasons, the application for a stay is dismissed. The respondents will have their costs of this application (but one set of costs only) payable forthwith and on the same basis as set out in paragraph 36 of this court's ruling on costs issued on September 2, 2008.

[23] Earlier in these reasons I commented on the fact that the principal amount of the trial judgment has been repaid. To complete that process, and at the request of counsel, I direct that, upon an undertaking to repay in the event of a successful appeal being filed by the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW"), the firm of Field LLP shall pay out the principal portion of the contribution made by CAW to the trial judgment.

Memorandum filed at Yellowknife, N.W.T.
this 22 day of September, 2008

Vertes J.A.

Appearances:

J.M. Hope, Q.C.
for Pinkerton's of Canada Ltd.

P.D. Gibson
for the Government of the Northwest Territories as Represented by the Commissioner of the Northwest Territories

P. Nugent and S. Barrett
for the National Automobile, Aerospace, Transportation and General Workers Union of Canada

S.L. Polsky
for Timothy Alexander Bettger

J.P. Warner, Q.C.
for the Applicants (Fullowka et al)

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Royal Oak Ventures Inc. (Formerly Royal Oak Mines Inc.)
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MEMORANDUM OF JUDGMENT REGARDING STAY APPLICATION
