

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Plaintiff

- and -

BOREALIS EXPLORATION LIMITED

Defendant  
(Plaintiff by Counterclaim)

- and -

ATTORNEY GENERAL OF CANADA  
and RYAN ST. JOHN

Defendants by Counterclaim

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**Application to strike counterclaim and parts of Statement of Defence or, alternatively,  
security for costs.**

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**REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER**

Heard at Yellowknife, Northwest Territories  
on August 12, 1996

Reasons filed: October 29, 1996

Counsel for the Plaintiff: Alan Regel

Counsel for the Defendant: Rocky Kravetsky

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**REASONS FOR JUDGMENT**

1           The Plaintiff (the "Crown") brings this application to strike the Defendant's ("Borealis") Counterclaim and to strike portions of its Statement of Defence or, alternatively, for security for costs.

**Facts and Allegations**

2           Between January of 1986 and March of 1990, Borealis engaged in mineral exploration and mining activities on lands and waters in the Northwest Territories. It was authorized to carry out this activity by land use permits issued by the Crown and a water licence issued by the Northwest Territories Water Board.

3           In its Statement of Claim, the Crown alleges that Borealis engaged in certain unauthorized activities which contaminated the lands and waters and that on the

expiration of the permits and licence in question, Borealis failed and then refused or neglected to restore and clean up the lands and waters in accordance with the conditions of the permits and licence. The Crown claims damages as well as certain other relief.

4           Borealis has filed a Statement of Defence and Counterclaim. It denies the Crown's allegations and claim. Borealis also claims set-off of funds paid or payable by it pursuant to a previous quasi criminal action as against any damages which might be awarded against it. The Counterclaim asks for, amongst other relief, damages for conversion, abuse of process and intentional interference with a business relationship.

5           The Crown has filed a Defence to Counterclaim.

6           Counsel advised at the hearing of this application that certain matters had been agreed upon so that not all of the relief claimed has to be decided. Those matters may have some bearing on the balance of the relief and so I set them out below.

7           The affidavit material refers to a writ filed by the Crown against Borealis based on an unpaid fine imposed by Bourassa Terr. Ct. J. in 1995. On the basis of the writ, the Crown seized a number of mining claims and leases which are in Borealis' name. The Crown then made an application for removal and sale. I was advised by counsel that a consent order for sale has been executed but will not be filed so long as Borealis pays the amount outstanding on the writ according to a schedule that has been arranged.

8           The affidavit filed on behalf of Borealis also discloses an offer to stay a pending Federal Court action which Borealis had previously commenced against the Crown. It was alleged by the Crown that the Federal Court action and the Counterclaim in this action are duplicitous. As a result of the offer to stay, that aspect of the Crown's application to strike was adjourned sine die.

**Application to Strike Portions of the Statement of Defence**

9           The Crown asks first of all that paragraph 6 of the Statement of Defence be struck. Paragraph 6 reads as follows:

In the further alternative, the Defendant states that in the event that it is obligated to pay damages or costs to the Plaintiff, which is not admitted but denied, the Defendant claims a set-off for any funds which it has, or prior to trial of this action, will have paid to the Government of the Northwest Territories pursuant to previous quasi criminal action brought against the Defendant.

10          The Crown argues that this paragraph should be struck because there is no basis in law to set off a fine. I note that what the Defendant seeks in paragraph 6 is not a set off of mutual debts but a declaration of some kind that any damages or costs for which it might be adjudged liable in this action represent in essence the same debt as is represented by the fine ordered by Bourassa J. The fine, of course, was a sanction imposed pursuant to statute and has no connection to the amounts claimed in the Statement of Claim.

11          Counsel for Borealis submitted that this aspect of the Crown's application does not fall within the terms of the Notice of Motion. Indeed, the Notice of Motion does not specify which parts of the Statement of Defence the Crown seeks to have struck, referring

only to "portions" of it. And the only ground put forward in the Notice of Motion for striking portions of the Statement of Defence is issue estoppel. There is, however, no indication of any prejudice to Borealis. Accordingly, I order that paragraph 6 of the Statement of Defence be struck.

**Issue Estoppel**

12           The Crown also asks that paragraph 7 of the Statement of Defence be struck. That paragraph reads as follows:

In further alternative, the Defendant states that it has materially complied with all land use permits.

13           The Crown submits that paragraph 7 should be struck on the basis of issue estoppel. It says that there was a federal prosecution in which Bourassa Terr. Ct. J. convicted Borealis for not cleaning up the lands in accordance with the land use permits and that the issue raised in paragraph 7 has therefore been determined.

14           The affidavit of Annette McRobert states that:

10.    The writ in favour of the Attorney General of Canada arises out of a fine imposed by Judge R.M. Bourassa of the Territorial Court on March 3, 1993 for failing to clean-up and restore the lands at the Respondent's Fatt Lake camp site in accordance with the terms of the Land Use Permits.

and

12.    The Sentence of Judge R.M. Bourassa show that the convictions of Borealis were based on the failure to clean-up and restore the Fatt Lake campsite in accordance with its Land Use Permits.

15           Ms. McRobert's affidavit does not describe or specify the Land Use Permits beyond what is stated in the foregoing paragraphs.

16 Attached to Ms. McRobert's affidavit is a transcript of remarks made by Judge R.M. Bourassa in imposing sentence. A transcript of the facts adduced at the trial which led to the sentencing was not provided.

17 The transcript of the remarks made by Bourassa J. commences as follows:

THE COURT: I have to sentence the defendant on two counts. On Count 1, failure to remove equipment, materials, and fuel drums from the land use area; and Count 2, failure to restore the land use area. The counts cover a period of 75 days and the maximum penalty is \$5,000 a day.

18 Further references in the transcript to the facts on which the conviction was based are as follows:

The problem, if I can call it that with respect to the continuing presence of these illegal items and the failure to restore the property, has been an ongoing one from what I can glean from the evidence before me. The permit expired in March of 1990, that's three years ago.

Since then, there has been, as I have already referred to in my judgment, some limited cleanup. Some items have been taken apart but the area is generally in a state of disrepair.

19 The Statement of Claim filed by the Crown refers to land use permits for the Defendant's activities at Copperneedle River near Fatt Lake, at Roche Bay and at Naguak Lake. The Statement of Claim alleges failure to comply with all of these land use permits.

20 Paragraph 7 of the Statement of Defence, alleging that the Defendant has materially complied with all land use permits would therefore seem to address all three land use permits, not merely those relevant to the Fatt Lake lands.

21 In *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, the court referred to the doctrine of issue estoppel as applying where, although the cause of action is different, some point or issue of fact has already been decided in another action. The majority in the Supreme Court of Canada framed the question this way (at page 254):

Is the question to be decided in these proceedings ... the same as was contested in the earlier proceedings? If it is not, there is no estoppel. It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. ... The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings...

22 From the information provided, I conclude that the questions determined in the proceedings before Bourassa J. were as follows:

1. Did the Defendant fail to remove equipment, materials and fuel drums from the Fatt Lake land use area?; and
2. Did the Defendant fail to restore the Fatt Lake land use area?

23 In this proceeding, the Defendant pleads that it has materially complied with all land use permits. Its defence relates to more than just the Fatt Lake permits. It is impossible in my view to equate the questions in the two proceedings. I am unable to say that Bourassa J. clearly found that there was material noncompliance with the Fatt Lake permit and there is no evidence that his decision dealt with any of the other permits.

24 The Plaintiff has not met the onus of showing that issue estoppel applies. Accordingly, its application to have paragraph 7 of the Statement of Defence struck is dismissed.

**Security for Costs**

25           The Crown asks that Borealis be ordered to post security for costs. The grounds for the application are that Borealis is not resident in the Northwest Territories, that it has not actively operated since 1992, that it has another action pending (being the Federal Court action, which is subject to the offer to stay) and that it has yet to pay the fine that is outstanding, although an agreement is in place for that purpose. Counsel for the Crown also points out that Borealis has resisted payment of the fine in the proceedings brought by the Crown to enforce it by, for example, objecting to seizure of certain assets.

26           Borealis clearly falls within Rule 633(1), subsections (a) and (b) as it is ordinarily resident outside the Territories and has another proceeding for the same relief pending, although that may soon be stayed. Rule 633 provides that in such circumstances the Court "may make such order for security for costs as it considers just".

27           I am not satisfied that Rule 633(1)(c) applies, as it refers to a failure to pay costs only and not a fine.

28           Security for costs will not be ordered automatically. It is a matter within the Court's discretion, exercised judicially: *McElheran v. Great Northwest Insulation Ltd.*, [1992] N.W.T.R. 363 (S.C.).

29           Counsel for Borealis raises the objection that the affidavit of Annette McRobert, relied on by the Crown, does not comply with the Rule 632(1), which provides as follows:

632. (1)           An application for security for costs may be made at any time after service of the originating document and shall be supported by an



affidavit of the defendant, or an agent of the defendant who can speak positively as to the facts, alleging that there is a good defence to the proceeding on the merits and specifying the nature of the defence.

30 Ms. McRobert does not swear to the Crown having a defence on the merits to the Counterclaim, nor does she refer to the Defence to Counterclaim actually filed by the Crown. She says only that she believes, on information provided, that the Counterclaim is duplicitous to the Federal Court action and vexatious.

31 The affidavit does not, therefore, comply with Rule 632(1). The Rule is mandatory, and failure to comply may result in the application for security for costs being refused: see *McElheran v. Great Northwest Insulation Ltd.*, supra, and *Iqaluit Caterers Ltd. v. Zakal*, [1988] N.W.T.R. 186 (S.C.). However, quite apart from this problem, I consider that I should not exercise my discretion in favour of the applicant.

32 The Crown decided to bring this action in the Northwest Territories. It did not choose to counterclaim in the Federal Court action. Borealis is therefore obliged to respond to this action in this jurisdiction.

33 A defendant who counterclaims will not normally be required to furnish security where the claim and counterclaim arise out of the same transaction: *Athabasca Realty Company Limited v. LaFontaine et al* (1981), 15 Alta. L.R. (2d) 221.

34 In its Statement of Defence, Borealis denies causing damage to the lands and states that it had arrangements in place for clean up and restoration work on the lands.

35           In its Counterclaim, Borealis claims damages as against the Crown for illegal entry onto the lands and vandalism. There is also a claim for abuse of process which is based on an allegation that the Crown commenced legal action with the ulterior motive of, inter alia, interfering with Borealis' clean up efforts. A further claim is based on intentional interference with business relations, again based on an allegation of interference with arrangements made by Borealis to clean up the lands.

36           The Counterclaim in this case is based on the same matter or transaction alleged in the Statement of Claim. The Crown says that Borealis failed to clean up the sites; Borealis says that the Crown interfered with its efforts to do so. While Borealis' claim for damages for illegal entry may go somewhat beyond the original claim, I am not prepared to say that it goes so far beyond it as to constitute in substance a fresh action: see *Jamieson v. Taylor*, [1922] 3 W.W.R. 909 as quoted in *Athabaska Realty*, supra, at page 232.

37           The application of the Crown for security for costs is dismissed. Costs of this application shall be in the cause.

V.A. Schuler

J.S.C.

Dated at Yellowknife, Northwest Territories  
this 29th day of October, 1996

Counsel for the Plaintiff: Alan Regel

Counsel for the Respondent: Rocky Kravetsky

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