

Date: 1998 11 23
Docket: CV 06454

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

COLLEEN ALLEN

Plaintiff

- and -

**FORT GOOD HOPE SETTLEMENT CORPORATION,
FORT GOOD HOPE DENE COMMUNITY COUNCIL,
THE SETTLEMENT OF FORT GOOD HOPE,
THE COMMISSIONER OF THE NORTHWEST TERRITORIES,
and THE MUNICIPALITY OF FORT GOOD HOPE**

Defendants

- and -

JACK BOURASSA and FGH SERVICES LIMITED

Third Parties

Application for security for costs. Dismissed with costs.

Application heard: September 11, 1998

Reasons filed: November 23, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for applicant Commissioner:

Douglas R. Lester

Council for plaintiff:

Graham Watt

Counsel for defendants Fort Good Hope Settlement Corporation,
Fort Good Hope Dene Community Council, and the

Settlement of Fort Good Hope:

Christopher Jesswein

Counsel for Third Parties:

Heather Potter

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REASONS FOR JUDGMENT

[1] The plaintiff is an ordinary resident of Minnesota in the U.S.A.. In 1993-1994 she was a temporary resident of Fort Good Hope in the Northwest Territories. In the within action she alleges that while in Fort Good Hope she consumed water which she later learned was contaminated. She alleges that one or more of the defendants caused the contamination through negligent acts on a date or dates prior to June 14, 1994. She further alleges that, as a result of the contaminated drinking water consumed by her, she became gravely ill and suffered serious injury, pain and suffering. In this lawsuit she seeks general damages, and special damages as a result of medical expenses, loss of income, etc.

[2] On the present interlocutory application the defendant Commissioner of the Northwest Territories seeks an Order requiring the plaintiff to post security for costs. The basis for the request is the plaintiff's ordinary residence outside the Northwest Territories.

[3] The allegations of negligence in the statement of claim are made against the defendants generally; i.e., there are no specific acts of negligence attributed to this applicant, the Commissioner of the Northwest Territories, as opposed to the other named defendants.

[4] In the statement of defence filed on behalf of the Commissioner, the Commissioner generally denies the allegations in the statement of claim. There is a specific denial of any contract with the plaintiff for the supply of water, and a specific denial of knowledge of the existence of any contamination.

[5] The reason for providing a mechanism for ordering security for costs against a non-resident plaintiff was aptly stated by de Weerd J. in *Drywall Services v. PCL Constructors* [1991] N.W.T.R. 210:

Security for a defendant's anticipated costs is intended to offset the disadvantage, and avoid the potential injustice, which can accrue to a defendant when successful in defeating the claims of a plaintiff who is in effect beyond the Court's reach for purposes of enforcing an award of costs in favor of the defendant. It being a question of what may or may not be just in the circumstances, since the security is to be given before judgment is rendered or the outcome of the case is known, the grant must be left to judicial discretion.

[6] An application for security for costs, however, cannot be made at large but only pursuant to the **Rules of Court**. Indeed, in her filed Notice of Motion the Commissioner states reliance on, *inter alia*, Rules 632 and 633:

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.

(2) An application for security for costs shall be made on notice to the plaintiff and every other defendant who has appeared on the record of the proceeding.

633.(1) The Court, on the application of a defendant in a proceeding, may make such order for security for costs as it considers just where it appears that

- (a) the plaintiff is ordinarily resident outside the Territories;
- (b) the plaintiff has another proceeding for the same relief pending;

- (c) the plaintiff has failed to pay costs as ordered in the same or another proceeding;
- (d) the plaintiff brings the proceeding on behalf of a class or an association, or is a nominal plaintiff, and there is good reason to believe that the plaintiff has insufficient assets in the Territories to pay costs;
- (e) there is good reason to believe that the proceeding is frivolous or vexatious and that the plaintiff has insufficient assets in the Territories to pay costs; or
- (f) a statute entitles the defendant to security for costs.

(2) Notwithstanding subrule (1), the Court may order any party to a proceeding to furnish security for costs where the Court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rule 635 applies with such necessary modifications as the circumstances require.

(emphasis added)

[7] Before deciding whether to exercise its discretion to order security for costs, the Court must be satisfied that the stated prerequisites are met.

[8] The plaintiff concedes that she is indeed ordinarily resident outside the Northwest Territories, hence the requirement of R.633(1)(a) is met.

[9] The other prerequisite poses more difficulty; i.e., an affidavit of an agent of the defendant Commissioner “who can speak positively as to the facts, alleging that there is good defence to the proceeding on the merits and specifying the nature of the defence”. These characteristics of the affidavit used in support are mandatory, and in previous decisions this Court has determined that their absence is fatal. See *Iqaluit Caterers Ltd. v. Zakal* [1988] N.W.T.R. 186 and *McElheran v. Great Northwest Insulation Ltd.* [1992] N.W.T.R. 363.

[10] On this application the defendant Commissioner relies on four affidavits filed in support -- affidavits sworn by Winston McNeely, Carl McLellan, Gail MacKay and Randy Reusch.

[11] Each of McNeely and McLellan state they are longtime employees of the Government of the Northwest Territories. Each had some job responsibilities for the supply of water to residents of Fort Good Hope. McLellan gives some description of how the water supply system works. Each says the responsibility for water supply was transferred from the Government of the Northwest Territories to the community of Fort Good Hope in 1993. McNeely states “I am not aware of any situations where

contamination has existed at the water supply building”. McLellan states “I was not aware of any incidents in Fort Good Hope relating to water contamination problems until 1997 when this claim arose”. Neither affidavit specifies the nature of the defence which the Commissioner relies upon in the within action nor the *bona fides* of any such defence.

[12] Gail MacKay states in her affidavit that she lives in Abbotsford, B.C. and is a secretary for the solicitors for the defendant Commissioner. She attaches to her affidavit copies of correspondence between counsel on this application (a practice not to be encouraged). She also attaches a draft Bill of Costs and states that the amounts stated therein for anticipated disbursements were determined by her following appropriate inquiries. On the face of her affidavit Ms. MacKay is neither an agent of the defendant Commissioner nor does she have personal knowledge of the facts alleged in the pleadings.

[13] Randy Reusch states in his affidavit that he is an insurance adjuster who lives in Vancouver and that he is employed with the defendant Commissioner’s insurance company. To his affidavit he attaches copies of correspondence between counsel on this application (again, not a practice to be encouraged). He very briefly summarizes his investigation into the plaintiff’s claim in this proceeding and opines that there is a good defence to the action. The alleged facts that he summarizes are not, by his affidavit, within his personal knowledge. Nor does he purport to be agent of the defendant Commissioner.

[14] The applicant Commissioner has not provided the affidavit evidence in support of the application for security for costs, as required by Rule 632.

[15] Accordingly, the application is dismissed, with costs.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
23rd day of November 1998

Counsel for applicant Commissioner:

Douglas R. Lester

Counsel for plaintiff:

Graham Watt

Counsel for defendants Fort Good Hope Settlement Corporation,

Fort Good Hope Dene Community Council, and the

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