Court of Queen's Bench of Alberta

Citation: Bechir v Gowling Lafleur Henderson LLP, 2017 ABQB 667

2017 ABQB 667 (CanLII)

Date: 20171103
Docket: 1501 00956
Registry: Calgary

Between:

Mahamoud Adam Bechir,
Nouracham Bechir Niam

Plaintiffs

- and -

Gowling Lafleur Henderson LLP,
Kristine Robidoux, Glencore E&P (Canada) Inc.,
Glencore International AG, 8682321 Canada Inc.,
Computershare Trust Company of Canada,
and Computershare Investor Services Inc.

Defendants

Memorandum of Decision
of
A. R. Robertson, Q.C., Master in Chambers

Introduction

[1] The defendants Glencore E&P (Canada) Inc. ("**Glencore Canada**"), Gowling Lafleur Henderson LLP ("**Gowlings**") and Kristine Robidoux apply for security for costs. The two Computershare defendants did not take part in the application.

[2] The plaintiffs are a married couple from Chad but they currently reside in South Africa. They have one identifiable asset in Alberta, being a residential condominium unit in Edmonton that, as their counsel admitted during oral argument, they are likely to be selling soon. They are in default in payment of condominium fees and property tax associated with the condominium,

but they have been using rental income to pay those expenses. A previous costs award against the plaintiffs in these proceedings, granted by Jeffrey, J., will have to be satisfied and in order to do that the condominium will likely be sold.

[3] Ms. Niam claims to have a bank account in Canada, but cannot access it for some reason and does not know whether it has a positive balance.

[4] Accordingly, a threshold factor in security for costs application is clearly in play, if not met: there is some reason to believe that the Plaintiffs' asset in Alberta may not be here indefinitely.

[5] The plaintiffs claim to have significant assets in other countries, but have declined to provide details. Accordingly, although they assert ability to pay, a relevant factor, they decline to provide details. They have six children and their counsel asserts that common sense suggests that paying the amounts sought by the defendants would be very challenging for any couple.

[6] For the purposes of this security for costs application, I need not look at the merits other than to determine whether the plaintiff's claim and the defences are reasonably arguable. The parties agree that there is threshold merit to both the claim and both defences. However, in order to address several of the issues raised in the application it is nonetheless necessary to review the merits to determine what the case is about.

[7] The facts giving rise to the claim are sufficiently odd to give pause to a security for costs order that might otherwise be straightforward. Glencore Canada was to pay Ms. Niam $30,000,000, but through some strange turn of events in violation of two court orders the funds ended up in the hands of a different company than was intended to make the payment (Computershare Investor Services Inc. rather than Computershare Trust Company of Canada) in a different country with an apparent strange release of confidential information that led to a seizure there.

[8] That is, the genesis of much of the dispute is the strange failure by Glencore Canada to pay money that was admittedly owed and directed to be paid by court orders. Glencore Canada says that was Computershare's failure.

[9] However, there is much more to the case than that.

[10] I have determined that security for costs must be posted, but I do not require as much as is sought.

Background

[11] The plaintiff Mr. Bashir was an ambassador for Chad to both the United States of America and Canada, and the plaintiff Ms. Niam is his wife. She is highly educated and involved in international activities.

[12] Ms. Niam's claim arises from shares that she held in a corporate predecessor to Glencore Canada prior to a plan of arrangement being accepted. The value of her shares were to be paid to her by payment of $30 million, initially to Computer Share Trust Company of Canada, but for reasons not yet thoroughly explained, Computershare Trust apparently directed the funds to be paid to Computershare Investor Services Inc. in violation of the court orders, and they were deposited to an account with the Royal Bank of Scotland in the United Kingdom.

2017 ABQB 667 (CanLII)

[13] Despite the fact that there were two Court of Queen's Bench of Alberta orders issued in 2014 directing payment for Ms. Niam's shares, in part to her and part to her former legal counsel, the funds left Canada and are now the subject of seizure under the courts in the United Kingdom, on an application by the Director of Serious Fraud Office following a request for legal assistance from the U.S. Department of Justice. U.S. authorities have also seized $106,000 of Ms. Niam's in a Nedbank account in South America. Those U.K. proceedings have not yet been resolved. There are other steps that have been taken to seize Ms. Niam's assets.

[14] The story goes back to at least 2011 when the defendant Ms. Robidoux, then a partner with the defendant law firm Gowlings, was retained to conduct an investigation on behalf of a predecessor company of Glencore, known as Griffiths Energy Inc. ("GEI") in connection with the possible violation by GEI of the *Corruption of Foreign Public Officials Act*, SC 1998, c. 34. Following the completion of Ms. Robidoux' investigation, GEI entered a guilty plea. The actions that led to that guilty plea involved interactions with a company controlled by Ms. Niam, while her husband was ambassador.

[15] Ms. Niam was not made aware of the guilty plea, but the nature of that plea, she argues, substantially affected her reputation and that of her husband, because it was her company that was said to have received a bribe from GEI (now Glencore Canada).

[16] From what I can tell, the various steps taken to seize assets of Ms. Niam and Mr. Bechir all relate to the same issue that Ms. Robidoux investigated. That investigation then led to the guilty plea under the *Corruption of Foreign Public Officials Act*.

[17] However, Ms. Niam argues that important information was not brought to the attention of the Court at the time of that guilty plea, including, in particular, the fact that the alleged bribes supposedly involved the country Chad, when that country was actually aware of her company's involvement in bringing GEI business activities to Chad. Ms. Niam exhibits a copy of a letter to Gary Guidry, of Griffiths Energy from the Minister of Energy & Petroleum for Chad dated November 14, 2011 that says:

> To confirm our conversation, we were aware that Griffiths had contractual relationships with Nouracham Bechir Niam in order to help you to establish a presence in Chad. However, we were not aware of the terms of the contractual relationship.
>
> In addition, we were not aware of any contractual relationship between ambassador Bechir and Griffiths. We recognize that this relationship was regarded as an error and was terminated after a few days considering that no service have been rendered nor compensation paid.
>
> We were not informed about the shareholders and Griffiths, either now nor in the past. We do not consider this to be important. Our selection criteria are based solely on companies' capacity to manage our country's resources.
>
> Finally, I want to assure you that we at the Ministry of Energy and Petroleum are the ones who decide which company to deal with and to recommend for the award of the Production Sharing Contract. There was no outside influence on our decisions with Griffiths concerning all of the Production Sharing Contracts.

[18] Ms. Niam argues that there was no bribe at all, and that the transactions that were "investigated" were transparent. Chad was aware of Mr. Bechir's relationship to GEI.

2017 ABQB 667 (CanLII)

Chad was not informed about "the shareholders and Grifffiths", which I understand to be a reference to Ms. Niam's shares in GEI, but did "not consider this to be important."

[19] I have set out the text of this letter because, although the parties each agree that there is some threshold merit in the others' position, the significant number of steps to seize large quantities of money by international organizations may seem extremely damning without knowledge of what may be a proper response by the plaintiffs.

[20] Ms. Niam alleges that Ms. Robidoux then took improper steps disclosing the whereabouts of her shares, and then either she or the other defendants participated in a series of actions that led to her shares being paid out in such a manner that the funds were never available to her or to her lawyer.

[21] Ms. Niam submits that her claim, although not Mr. Bechir's claim, sounds in oppression under the *Canada Business Corporations Act*, R.S.C. 1985, c, C-44 (the *CBCA*). The *CBCA* specifically says in section 242(3) that security for costs are not to be ordered in such an action. When the claim was originally filed (by previous legal counsel) it did not specifically assert oppression. That was added in an amendment.

[22] Ms. Niam's claim, even as amended, is not just for oppression. Both she and Mr. Bechir also sue for other claims that are not normally part of an oppression claim. In particular, their claim asserts claims by both of them for defamation, as well as other associated claims relating to what they say is now their tarnished reputation.

[23] Nonetheless, her claim against Ms. Robidoux and Gowlings is closely connected to the oppression for which Glencore Canada is said to be responsible: paragraph 102 of the amended statement of claim expressly pleads that "[Glencore Canada] is vicariously liable for the acts and omissions of Robidoux and the Gowlings Investigation Team." Paragraph 104 of the amended statement of claim expressly states that the actions and omission by Glencore Canada and its affiliates and by Robidoux and Gowlings

> have effected a result, the business or affairs of [Glencore Canada] and its affiliates have been carried on or conducted in a manner and the powers of the directors of [Glencore Canada] and its affiliates have been exercised in manner [sic] that is oppressive and unfairly prejudicial to and that unfairly disregards the interests of Niam as a shareholder of [Glencore Canada] ultimately resulting in the seizure of the proceeds of Niam's shares when those proceeds were transferred outside of Canada without any proper disclosure or consent and contrary to the April 2014 restated plan of arrangement. Niam pleads and relies upon section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

[24] Another unusual fact is that Ms. Niam and Mr. Bechir have spent hundreds of thousands of dollars, and incurred liability for several million dollars, in legal fees in their attempt at recovering the value of the lost shares. It has involved court proceedings in Alberta as well as in the United Kingdom. Parties now involved include the United Kingdom regulators as well as the United States Department of Justice. I will not get into the details of those activities but the steps taken so far have involved significant funds.

[25] Accordingly, these are not frivolous plaintiffs attempting to bring a lawsuit with no risk. They have already invested a considerable amount of money in trying to protect the rights that they assert.

2017 ABQB 667 (CanLII)

[26] The defendants applied for security for costs at an early stage. In fact they applied before they even needed to do so. The statement of claim had not been served, and defences were filed *ex gratis*. Despite having not been served or called upon to file a defence, the defendants filed this application right away. In the case of Gowlings and Ms. Robidoux, the application was filed the same day as the statement of defence.

[27] Another unusual fact is one mentioned above: after a hearing, Justice Brooker of this Court directed that Ms. Niam's share proceeds be paid to her and to her former legal counsel. A later order was entered by consent, signed by Justice Sullivan, to the same effect. The orders were not followed. The funds travelled to the United Kingdom where they were seized, as mentioned above.

[28] The seizure in the United Kingdom was by way of an *ex parte* order, and the circumstances of the *ex parte* order are at least suspicious, because it is suggested that the order could not have been obtained without some inside information being provided from someone associated with Glencore Canada, or perhaps Gowlings, or perhaps both.

[29] One of the defendants insisted on service *ex juris*. Glencore International AG **("Glencore International")** was first named as a party in the amended statement of claim, which was filed in a rush after the defences appeared. A closure of pleadings follows the delivery of defences, after which an amendment to the claim is allowed only by consent or by court order. Newly-added defendant Glencore International, in Switzerland, would then not allow service on it to be accepted in Canada. Glencore International is clearly an affiliate of Glencore Canada, which defended without even being served, but Glencore International insisted upon being served out of the country under the Hague Convention, which would require translation of the statement of claim into German - so that it could then be served on English-speaking business people.

[30] In response, the plaintiffs simply issued a separate statement of claim against Glencore International. That company has not been served in this action and is accordingly no longer a party, although its name still appears in the style of cause. I am told that service on Glencore International in the other action is in process.

[31] Accordingly, the plaintiffs submit that Glencore International, and by association, Glencore Canada, have accelerated the security for costs issue and then intentionally made the lawsuit more expensive than it needed to be. This is a factor I am encouraged to take into account when considering the defendants' application for security for costs.

[32] Glencore argues the converse: that the plaintiffs have "instructed their counsel to conduct lengthy cross-examinations, file interlocutory applications, and seek access to large volumes of records that Glencore Canada claims are irrelevant or privileged." This relates to issues about records over which privilege is claimed, discussed below.

[33] When Glencore's counsel wanted to cross-examine Ms. Niam, she was originally going to attend in Alberta for that purpose, but later said she could not obtain a visa, and the cross-examination was done by video-conference from South Africa. It is suggested that her connection with Alberta is so distant that she cannot come here.

[34] A further factor I am encouraged to take into account is that Glencore Canada and its affiliates, collectively, is one of the largest companies in the world. I am told that it is larger than

2017 ABQB 667 (CanLII)

AT&T and larger than General Electric. This is a financial Goliath asking for security for costs when sued by two individuals.

[35] Furthermore, I am told that Glencore Canada no longer has a real presence in Alberta, perhaps not in Canada. It is a *Canada Business Corporations Act* entity with a head office in Toronto, and counsel for the plaintiffs asserts that the Calgary office has been closed, resulting from the plan of arrangement mentioned above. The assertion is made that Glencore is actually a foreign litigant defending a case that had to be brought in Alberta, given the circumstances, and the playing field would not be levelled by requiring only the plaintiffs to post security for costs.

[36] Counsel for Glencore points out that there is no evidence on this point. He expressed surprise at the issue being raised in argument before me.

[37] No application has been brought for security for costs to be posted by Glencore Canada.

[38] The plaintiffs argue that had the $30 million not been sent outside the country, and had it been paid in accordance with the court orders, they would have plenty of money to provide security for costs for the balance of the claim. Of course, that significant part of the claim would not be advanced but for the seizure of the funds. They say that that is a factor to take into account, although it requires presuming that the plaintiff's case will succeed at trial, at least on key points.

Expected Days in Questioning

[39] The defendants say that the nature of the claim is complex, and will require perhaps 30 days of questioning as well as the production of perhaps thousands of documents.

[40] However, counsel for the plaintiffs asserts that he intends to examine six representatives of the defendants, and there are only two plaintiffs. An estimate of 30 days is excessive for the amount of pre-trial questioning appropriate here. He suggests that seven days is closer to an accurate forecast.

Anticipated Application

[41] From the arguments made before me, it seems clear that there will be at least another special application, dealing with issues of privilege. Gowlings/Ms. Robidoux and Glencore argue that Ms. Robidoux' notes of meetings with witnesses and other documents are privileged.

[42] The plaintiffs say that it is apparent that some documents, at least, have been disclosed to the courts in the United Kingdom, so privilege may have been waived, at least in part. Furthermore, Ms. Robidoux is said to have spoken publicly about the facts of this case at a conference, without identifying the parties, and in doing so the privilege of her former client may have been adversely affected. That issue may have to be explored.

[43] Accordingly, it seems likely that there will be an application about the production of records that will be hotly contested by both sides.

Analysis

[44] Rule 4.22 sets out the factors to be taken into account when ordering that security for costs be posted:

Considerations for security for costs order

2017 ABQB 667 (CanLII)

> The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:
>
> (a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;
>
> (b) the ability of the respondent to the application to pay the costs award;
>
> (c) the merits of the action in which the application is filed;
>
> (d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;
>
> (e) any other matter the Court considers appropriate.

[45] The last "factor" makes it very clear that the posting of security for costs is very much discretionary and an order is based on the specific facts of the case.

[46] Counsel for the applicants/defendants argue that the factors enumerated in rule 4.22 are either neutral or militate in favour of a significant award of security for costs.

[47] The defendant Glencore Canada seeks security for costs of $492,187.50, based on the forecast that there will be 30 days of questioning and using a 3 times multiplier of the figures in Schedule "C" to the *Alberta Rules of Court*.

[48] That figure includes GST of $23,437.50 despite the fact that Glencore, as a Canadian corporation said to be carrying on business here, would get an input tax credit for GST that it pays in legal fees. It is not entitled to claim them without proof that Glencore is not entitled to the input tax credit: rule 10.48(2). Gowlings and Ms. Robidoux seek security for costs of $259,502.25 including GST of $12,357.25. It seems very likely that there is an input tax credit available and that the claim of GST is inappropriate here as well. They should not be part of the claim.

[49] Item (a) of rule 4.22 is satisfied. Item (b) is clouded because the plaintiffs assert that they have assets but do not want to disclose details.

[50] Item (c) is neutral in light of both sides' admissions for the purposes of this application.

[51] Item (d) is also clouded by the plaintiffs' refusal to provided details of their assets and accordingly their ability to prosecute if costs are required to be posted.

[52] Accordingly, the most important "factor" for consideration here is item (e): "any other matter the Court considers appropriate".

"Any Other Matter the Court Considers Appropriate"

[53] The purpose of an order for security for costs was set out in ***Singh v Dura***, 59 Alta. L.R.(2d) 1 (C.A. 10988) at para. 43:

> Security for costs is designed to protect a defendant from a plaintiff who wants to gamble and collect if he wins, but not pay if he loses. Indeed, such a plaintiff acts more unfairly than that, for by his groundless suit he inflicts serious expenses on the defendant.

[54] (Although where a suit appears to be groundless that is an important factor on an application for security for costs, it is not necessary to show that a claim is "groundless" to

2017 ABQB 667 (CanLII)

obtain an award for security for costs – see ***Attila Dogan Construction & Installation Co v AMEC Americas Ltd***, 2011 ABQB 175, 2011 CarswellAlta 407 at para. 17 - and the defendants here admit a threshold merit to the plaintiffs' claim.)

[55] Here, as mentioned, that plaintiffs have already expended significant funds trying to protect their claims. The defendant Glencore Canada, at least, is a large corporation and not at risk of financial problems if the claim proceeds. These are factors that I take into account.

[56] As well, in my view Ms. Niam's claim is largely based on oppression. That puts section 242(3) of the *CBCA* in play. However, her claim goes beyond that. As well, Mr. Bechir's claim does not sound in oppression at all.

[57] Although the oppression allegations were not in the original statement of claim and first appeared in the amended statement of claim, I am dealing with the pleadings as they exist now.

[58] If the action is, at its core, an oppression action, then even though several causes of action are pled the plaintiff is entitled to protection from the requirement to post security for costs: ***Logan v Riley***, 2008 ABQB 72, at para. 35, citing ***Agbi v Durward***, 1998 CarswellAlta 1136, at para. 41. However, in ***Emerex Oil and Gas Ltd v Drover***, 2016 ABQB 420, 2016 CarswellAlta 1485, at para. 96 McCarthy, J. found it possible to do a mathematical deduction of 20% to account for the oppression claim mixed with other claims.

[59] There are many factors here that make this claim extremely unusual. One very troubling factor is that Glencore Canada filed a defence *ex gratis*, apparently in order to bring its security for costs application. There is no suggestion that the existence of the claim was creating hardship for Glencore Canada. However, despite its decision not to require service on itself, its associated corporation then demanded formal service out of the country for no practical purpose other than (it would clearly appear) to create a roadblock and increase the costs of prosecution of the claim. That has led to parallel proceedings.

[60] I am not favourably impressed by the requirement of service under the Hague Convention of the related corporation, in light of the interpretation and application of the *Rules of Court* mandated by the foundational rules, and the virtual certainty that the two Glencore corporations would have been instructing the same legal counsel to defend the claim. There may be an application to consolidate the new claim against Glencore International with this one, although I would not include that possibility in the calculation of security for costs at this time.

[61] These circumstances do not militate in favour of security for costs for Glencore Canada. I am aware that the two corporations are separate legal persons, but for these purposes in my view I am entitled to treat them as one.

[62] The plaintiffs argue that there are issues of international comity at play and that is a factor to take into account in requiring security for costs.

[63] Their position is that there are two Alberta Court of Queen's Bench orders that have not been honoured by the courts in the United Kingdom. Also, the investigation done by Ms. Robidoux was on its face a private investigation although it was "part of a potential criminal investigation", and then used for that purpose, and was done with the "dominant purpose" of obtaining and advantage for Glencore Canada in having an Initial Public Offering proceed and protecting its directors, officers, major shareholders and employees. The fine paid is said to have been modest compared to the planned IPO.

2017 ABQB 667 (CanLII)

[64] The Robidoux investigation is said to have been conducted as if it were an independent neutral internal review, but it was then used for other purposes in contravention of the *Vienna Convention on Diplomatic Relations, 1961*. The plaintiffs further argue that the investigation had been done negligently.

[65] These appear to be arguable positions that involve important issues that may be said to rise above the private aspects of this dispute. I have tried to take these factors into account.

[66] The plaintiffs have not made their case easier by declining to give any details of assets that they say they own offshore.

[67] The nature of the claim as a whole naturally draws in the concern about documents that are said to be privileged. Ms. Robidoux was functioning as an investigator, a role that does not have to be performed by legal counsel. Many investigators are former police officers, and their notes and reports may be confidential but not subject to solicitor/client privilege. I gather this was argued before Master Laycock but his oral reasons are not available to me. (There is an apparent citation of Master Laycock's decision in the published report of Jeffery J.'s reasons, but the citation is in error – it simply refers back to Jeffery J.'s decision, not Master Laycock's.)

[68] Justice Jeffery declined to make a ruling on the claim of privilege. At paragraph 21 of his decision (reported at 2017 ABQB 214) he said, "Ultimately the various privilege claims may or may not succeed ...". It is not obvious that issues of privilege are going to be resolved in either party's favour. A further court application is all but a certainty.

[69] It is clear that if the defendants are successful and recovers a costs award against one or both of the plaintiffs they will have limited assets, if any, in Alberta to satisfy the award. Furthermore, the costs award previously made has not been satisfied, tending to confirm Glencore Canada's concern about recovery.

The Calculation: Time in Questioning

[70] In my view the better forecast is not that this case will be in questioning for 30 days, but rather that it will be 12 days, at least for the first round of questioning, which will tend to lay the groundwork for future steps. There are only two plaintiffs. The plaintiffs are at risk of having to post more security if the questioning stage is extended. I am confident that their questioning of the defendants will be conducted efficiently. Furthermore, I would not require, at this stage, the posting of security for costs for the balance of the proceedings. I will only require security for costs to the conclusion of document production and this first round of questioning.

The Calculation: The Anticipated Application

[71] I would include an amount to reflect one contested application with briefs in respect of the dispute about privileged records, although that is a dispute primarily between Ms. Niam and Glencore Canada.

[72] Gowling Lafleur and Ms. Robidoux will have an interest in the outcome, although the claim as I understand it is that it is primarily solicitor/client privilege, and that is a privilege (assuming it exists at all) that is the client's – Glencore Canada's. Their security for costs award will include one-half of the fee amount otherwise described in Schedule "C" (times three as explained below) for their anticipated participation in the application.

The Calculation: The Level of Costs in Schedule "C"

2017 ABQB 667 (CanLII)

[73] I would use a 3 times multiplier on the Schedule "C" amounts in doing the calculation, reflecting the awards previously made by Master Laycock and Justice Jeffery and the amount claimed. I was advised in oral argument that the plaintiffs will be reducing their claim significantly, but it will still be a claim for about $35,000,000 after the intended reduction.

Conclusion

Reduction

[74] In my view the amount required for security for costs for both Glencore Canada and Gowlings/Robidoux is to be reduced by 35 per cent to take into account the prohibition of security for costs for oppression claims as well as other factors. That is not a mathematically-based deduction but rather an exercise of my discretion.

Prior Costs Unpaid

[75] The amounts of costs already awarded, but not paid, must be included in the amount set for security.

Stay of Action and Final Resolution

[76] The action generally shall be stayed until the costs are posted, and they are to be posted within three months of the date the final figure is determined and a decision rendered, failing which the action shall be dismissed with costs of steps taken so far awarded to each of the groups of defendants (Gowlings and Ms. Robidoux being one group, for example) at 3 times Schedule "C".

[77] However, costs of this application are in the cause at this time.

[78] If counsel for the two applying defendant groups submit revised draft bills of costs taking into account these directions, after allowing plaintiffs' counsel to review them, I will set the final amounts. If a further hearing is required to settle details, counsel may contact the masters' chambers clerk to arrange for an appointment.

[79] Of course, any party has leave to re-visit security for costs on proper grounds as matters move forward.

Heard on the 3rd day of October, 2017.
Dated at the City of Calgary, Alberta this 3rd day of November, 2017.

A. R. Robertson, Q.C.,
M.C.C.Q.B.A.

2017 ABQB 667 (CanLII)

Appearances:

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2017 ABQB 667 (CanLII)