Date: 20100125

Docket: T-1475-09

Citation: 2010 FC 84

Vancouver, British Columbia, January 25, 2010

PRESENT: Roger R. Lafrenière, Esquire
Prothonotary

BETWEEN:

HIGHLAND PRODUCE LTD.

Applicant

and

EGG FARMERS OF CANADA (formerly known as the CANADIAN EGG MARKETING AGENCY)

Respondent

REASONS FOR ORDER AND ORDER

LAFRENIÈRE P.

[1] The underlying proceeding is an application for judicial review by the Applicant, Highland Produce Ltd. (Highland) of a decision of the National Farm Products Council (NFPC) dated August 5, 2009, whereby the NFPC dismissed a complaint by Highland under s. 7(1)(f) of the *Farm Products Agencies Act*. The judicial review application is the latest in a decade long dispute between Highland and the Respondent, the Egg Farmers of Canada (EFC), formerly known as the

Canadian Egg Marketing Agency (CEMA), concerning the pricing of eggs during the period from 1999 to 2003.

[2] By motion in writing, EFC seeks an order requiring Highland to pay into court security for costs in the amount of $250,000.00, representing an unpaid costs award registered as a judgment in favour of EFC against Highland in the Alberta Court of Queen's Bench, and additional security for costs of the present application in the amount of $59,662.82. Highland opposes the motion, both as to EFC's entitlement to security for costs and the quantum of the security claimed.

[3] In its written representations in response to the motion, Highland suggests that the Court may want to hear from counsel for the parties to help clarify some of the issues raised in the motion; however, there is no formal request for an oral hearing. Upon reviewing the material filed by the parties, I am satisfied that the matter can be fairly disposed of without personal appearance.

Background

[4] By way of background, Highland is a third generation family-run business that has carried on operations as an egg processor since 1969. At all material times, CEMA was responsible for running the supply management system for eggs in Canada.

[5] Prior to 1998, CEMA supplied eggs to industrial egg processors on an informal basis. CEMA sought to formalize the terms of egg supply to egg processors and, in 1998, entered into formal agreements with all egg processors, including Highland (1998 Agreement). In June 1999, CEMA re-opened contract and price discussions with respect to eggs that were surplus to the table

market and reached a compromise on a new contract with the egg processors in 2000 (2000 Agreement). Highland objected to various terms contained in the 2000 Agreement.

[6] CEMA terminated its 1998 Agreement with Highland in June 2000, but continued to charge Highland lower prices for six months as required by the notice provisions of the 1998 Agreement.

[7] Highland commenced an action in the Alberta Court of Queen's Bench against CEMA and its directors on November 10, 2000. Highland sought damages in the amount of $18,000,000.00 for breach of contract arising from the alleged wrongful termination of the 1998 Agreement. Highland alleged, in particular, a breach of the duty of fairness and duty to negotiate in good faith. The action was stayed by Order of Madam Justice J.B.Veit dated October 24, 2003. At paragraph 41 of her reasons, Justice Veit concluded that Highland was required to proceed by way of arbitration in accordance with the contract governing the parties. She wrote:

> The arbitration clause in the contract survives the termination of the contract; therefore, independently of the issues relating to service ex juris, Highland's proceedings must be stayed to allow the arbitration proceedings to run their course. Moreover, some of the relief requested by Highland, specifically a declaration against a federal government agency, is relief which can only be granted by the Federal Court of Canada; for that reason as well, Highland's Alberta action must be stayed.

[8] Highland did not appeal Justice Veit's decision. Instead, it changed counsel and commenced a second action against CEMA and the Canadian Poultry & Egg Processors Council on June 28, 2005, alleging that CEMA breached its duty to act in good faith and fairly "through ineffective price adjustments that effectively eliminated the supply of Industrial Product Eggs to Highland". The damages claimed totalled $11,500,000.00.

[9] After some preliminary motions, the parties agreed that the issues identified in the second action should be referred to arbitration, along with the issues in the first action. On consent of the parties, the second action was stayed by Order dated October 17, 2005.

[10] The arbitration agreement between the parties provided that the decision of the arbitrator was to be final and binding, subject only to statutory rights of appeal, and that no collateral attack on the arbitration decision would be made.

[11] In the arbitration, Highland sought damages against CEMA for negligence, breach of fiduciary duty, breach of contract, breach of a duty of good faith, and conspiracy. The acts that were alleged to have given rise to these private law breaches all concerned CEMA's administration of the egg supply management system.

[12] The arbitration was conducted by the Honourable John W. Morden, formerly a Justice of the Ontario Court of Appeal (Arbitrator). Following a 22-day hearing, the Arbitrator rendered an Arbitration Award on August 5, 2008. Although he found that CEMA was "far from perfect in many respects", the Arbitrator concluded that Highland had failed to establish liability on CEMA's part and to prove any loss. Accordingly, he dismissed all of Highland's claims.

[13] Highland did not appeal or otherwise challenge the Arbitration Award, which was recognized as a Judgment of the Alberta Court of Queen's Bench on January 8, 2009. Highland's two actions which had been stayed in favour of the Arbitration were dismissed by Justice Graesser of the Alberta Court of Queen's Bench. Highland did not appeal the dismissal of its two actions.

[14] The parties subsequently made submissions to the Arbitrator with respect to costs of the arbitration. On April 29, 2009, the Arbitrator awarded costs to CEMA in the amount of $250,000.00, noting that CEMA was successful with respect to each one of Highland's claims. Highland did not appeal or otherwise challenge the cost award, which was recognized as a Judgment of the Court of Queen's Bench of Alberta on October 8, 2009. Despite a demand for payment, Highland has not paid the costs awarded either in whole or in part.

[15] Highland's President, Larry Ewanishan, deposes in his affidavit in response to EFC's motion that Highland has not been an operative company since October 2003 when the actions of CEMA caused Highland to close down operations. Mr. Ewanishan states that Highland has earned no significant revenue since that time, has no significant assets, and lacks funds to pay the cost award. Highland's 2008 Financial Statement, attached as an exhibit to Mr. Ewanishan's affidavit, shows that its cash balance decreased from $3,442,573.00 to nil between 2007 and 2008. The amount of $3,390,000.00 was paid in 2008 to J.D.D. Holdings Ltd., a related company.

[16] On September 18, 2008, Highland submitted a formal complaint to the NFPC relating to matters that, according to Highland, were not addressed by the arbitration process and fall within the jurisdiction of the NFPC. On August 5, 2009, the NFPC dismissed Highland's complaint in its entirety. Highland brought the present proceeding on September 3, 2009 seeking an order in the nature of *certiorari* to quash and set aside the NFPC's decision.

Analysis

[17] There is no dispute between the parties as to the law and general principles applicable on a motion for security for costs. Security for costs is a discretionary award. The initial onus is on the moving party to demonstrate that it is entitled to security for costs pursuant to Rule 416 of the *Federal Courts Rules*. If the moving party has demonstrated that it is entitled to an award of security, unless there is some other reason why security should not be granted, the onus shifts to the responding party to demonstrate under Rule 417 that it is impecunious and that it has a meritorious case.

[18] EFC relies on Rule 416(1)(f), which provides that the Court may order a plaintiff to give security for a defendant's costs where it appears that the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part. (Rules 416 to 418 apply, with such modifications as are necessary, to applicants and respondents in an application: see Rule 415.)

[19] Highland does not dispute that a *prima facie* case for security for costs has been made out, but submits that it should be relieved from the requirement to give security pursuant to Rule 417 based on impecuniosity. After having carefully reviewed Mr. Ewanishan's affidavit, I am not satisfied that impecuniosity has been made out with "robust particularity": see *Morton v. Canada (Attorney General)* 2005 CanLII 6052 (ON S.C.), (2005), 75 O.R. (3d) 63 (S.C.J.) at para.32.

[20] First, according to Mr. Ewanishan, Highland owns a building and land on which the company used to operate. While the assets are said to encumbered by loans to secured creditors, no information is provided as to the equity remaining in the property.

[21] Second, Highland has failed to explain why all of the cash reserves were removed from the company and transferred to a related company contemporaneously with a negative decision from the Arbitrator. I agree with EFC that, absent a plausible explanation, a negative inference should be taken that Highland was seeking to avoid potential liability for costs arising from the arbitration.

[22] Third, Highland has failed to establish that it does not have any other source of revenue, such as shareholders, to post security for costs.

[23] Based on the record before me, Highland has failed to meet the burden of establishing that it is impecunious. As a result, I need not consider under Rule 417 whether Highland's application has merit.

[24] EFC has produced two bills of costs reflecting its projected fees and disbursements with respect to the forthcoming application. The first bill of costs is prepared on a party-and-party basis assessed in accordance with column III of Tariff B in the amount of $8,154.07. The second bill of costs is prepared on a solicitor and client basis in the amount of $59,662.82.

[25] Taking into account the number of proceedings instituted by Highland against CEMA over the past decade, which were all resolved in CEMA's favour, the hearing judge may be inclined to

censure Highland in the event the application for judicial review is found to be vexatious and an abuse of process. In the circumstances, I conclude that security for costs should be posted by Highland in an amount roughly equivalent to the solicitor-client costs projected by EFC, excluding those related to a student.

[26] EFC submits that in order to obtain security for costs under Rule 416(1)(f), the unpaid order for costs need not arise out of proceedings in the Federal Court, relying on a recent decision of the Federal Court of Appeal in *B-Filer Inc. v. Bank of Nova Scotia*, 2007 FCA 409 (CanLII). In *B-Filer*, the respondents had been awarded costs in a hearing of the Competition Tribunal in the amount of $887,049.62. The appellants did not challenge the fact that the costs award was owing and that it was not paid. Mr. Justice Marc Noël of the Federal Court of Appeal awarded security for costs in an amount equivalent to the unpaid costs arising from the Competition Tribunal proceeding.

[27] *B-Filer* is distinguishable, however, on the grounds that the applicant in that case was appealing the original decision of the Competition Tribunal to the Federal Court of Appeal. Even though Highland is raising issues in this application similar to some considered by the Arbitrator, it remains that Highland's complaint before the NFPC is a discrete proceeding.

[28] For the above reasons, an order will issue compelling Highland to post security in an amount of $50,000.00 within thirty-one days from the date of this order. The order will also provide that no further step, except for an appeal of this order, shall be taken in the application until security is posted in accordance with this order. EFC shall be entitled to the costs of the motion.

ORDER

THIS COURT ORDERS that:

1. The Applicant, Highland Produce Ltd., shall post security in the amount of $50,000.00 for the costs of the Respondent, Egg Farmers of Canada, no later than February 25, 2010, failing which the application may be dismissed without further notice at the request of the Respondent.

2. The Applicant shall pay to the Respondent its costs of this motion, hereby fixed in the amount of $3,000.00, forthwith and no later than February 25, 2010.

3. Except with respect to any appeal of this Order, no further steps shall be taken in the proceeding until the Applicant posts the security for costs ordered herein.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1475-09
STYLE OF CAUSE:	HIGHLAND PRODUCE LTD. v. EGG FARMERS OF CANADA (formerly known as the CANADIAN EGG MARKETING AGENCY)

MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA, PURSUANT TO RULE 369

REASONS FOR ORDER AND ORDER:	LAFRENIÈRE P.
DATED:	JANUARY 25, 2010

WRITTEN REPRESENTATIONS BY:

Kenneth Fritz	FOR THE APPLICANT
Colin Feasby Tamara Prince	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McLennan Ross LLP Edmonton, Alberta	FOR THE APPLICANT
Osler Hoskins & Harcourt LLP Calgary, Alberta	FOR THE RESPONDENT