

Federal Court



Cour fédérale

Date: 20100413

Docket: T-1475-09

Citation: 2010 FC 401

Vancouver, British Columbia, April 13, 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

[1] The Applicant was required by Order dated January 25, 2010 to post security in the amount of \$50,000.00 for the Respondent's costs no later than February 25, 2010, failing which the Respondent would be at liberty to apply to dismiss the proceeding. The Applicant attempted to

comply with the Order by tendering a letter of credit on February 19, 2010. Directions were issued on February 26, 2010 rejecting the Applicant's document on the grounds that a time-limited letter of credit did not constitute proper security for the Respondent's costs. On March 1, 2010, counsel for the Applicant wrote to the Court requesting an opportunity to post alternate security.

[2] The Applicant subsequently moved for an order approving a proposed form of security as set forth in Schedule "A" to its Notice of Motion. The Respondent concurrently brought a motion to dismiss the proceeding on the grounds that the Applicant failed to satisfy the clear terms of the Order dated January 25, 2010.

[3] There is no dispute that the letter of credit originally tendered by the Applicant was unsatisfactory since it expired after one year if notice was given by the Toronto-Dominion Bank. Moreover, the Applicant had not sought prior approval of the Court to post security in a form other than cash. It remains, however, that the Applicant sought to comply with the Order dated January 25, 2010 prior to the expiration of the deadline, and moved promptly upon being notified that the time-limited letter of credit had been rejected. In the absence of any apparent prejudice to the Respondent, I consider it in the interests of justice to grant the Applicant an extension of time to post proper security.

[4] Rule 418 of the *Federal Courts Rules* provides that money or a bond are the only two forms of acceptable security. As the Applicant seeks leave to post security in the form of a letter of credit, it is necessary to consider whether there are any practical differences between a bond and a letter of credit that are relevant in the circumstances of the present case.

[5] The difference between a bond and a letter of credit is discussed at length in chapter 12 of K.P. McGuinness, *The Law of Guarantee: A Treatise on Guarantee, Indemnity and the Standby Letter of Credit*, 2d ed. (Toronto: Carswell, 1996). Although a distinguishing characteristic is that a bond is made under seal, letters of credit and bonds are closely analogous, as acknowledged by the Respondent. In fact, letters of credit are said to have a number of advantages: see *The Law of Guarantee*, p. 838:

From the perspective of the creditor in a given transaction, a letter of credit will usually be found to provide a form of protection that is simpler from an administrative point of view than is a surety bond, and it is likely this simplicity that has led to the popularity of stand-by letters of credit. There are several aspects to the relative simplicity of stand-by letters of credit. For instance, sureties are entitled to a broad range of defences that arise from dealings between the creditor and principal and from dealings by the creditor with collateral securities. These defences are not available to the issuers of letters of credit. While the defences to which a surety is entitled may be excluded by contract, there is no need to rely upon the skillful drafting of a guarantee contract where a stand-by letter of credit can be used as a substitute for a surety bond. A further aspect of the simplicity of letters of credit is that they provide for payment of a liquidated sum, rather than for payment of a loss or damage. As a result, payment under a letter of credit is not dependent upon actual proof of damage, and thus there is no inherent element of dispute between the issuer and the creditor as to the amount owing under the letter of credit.

[6] The purpose of security for costs is to protect the defendant where there might be reason to believe that the claimant could not meet any cost order against it. If properly drafted, a letter of credit is as secure as if cash were deposited with the court.

[7] The form of security proposed by the Applicant is an irrevocable Letter of Credit issued by TD Canada Trust in the amount of \$50,000.00. The form of Letter of Credit provides that it can be

cash and the funds paid into Court in the event the Letter of Credit is not renewed and the judicial review application has not been determined on the merits. In my view, the proposed Letter of Credit from a reputable financial institution provides adequate protection for the Respondent's costs in the event the application is dismissed. The Applicant shall therefore be granted leave to post the form of security for costs as proposed, without prejudice to the Respondent's right to move for better security in the event circumstances so warrant.

ORDER

THIS COURT ORDERS that:

1. The Applicant is granted leave to give security for costs, in satisfaction of the Order of January 25, 2010, in the form of a letter of credit deposited with the Registry in the form as set forth in Schedule “A” to its Notice of Motion.
2. The Letter of Credit shall be posted forthwith and no later than April 21, 2010.
3. The Respondent’s motion is dismissed.
4. There shall be no order as to costs of the parties’ motions.

“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 WITHOUT PERSONAL APPEARANCE OF THE PARTIES

**REASONS FOR ORDER
AND ORDER:** LAFRENIÈRE P.

DATED: April 13, 2010

WRITTEN REPRESENTATIONS:

Mr. Kenneth Fitz FOR THE APPLICANT

Mr. Colin Feasby FOR THE RESPONDENT

SOLICITOR OF RECORD:

McLennan Ross LLP FOR THE APPLICANT
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