

Federal Court of Appeal



Cour d'appel fédérale

Date: 20201001

Docket: A-25-20

Citation: 2020 FCA 153

[ENGLISH TRANSLATION]

Present: RIVOALEN J.A.

BETWEEN:

**BRESSE SYNDIC INC.
ACTING FOR THE BANKRUPTCY OF CO2
SOLUTION TECHNOLOGIES INC.**

Appellant in continuance of suit

and

HER MAJESTY THE QUEEN

Respondent

Motion dealt with in writing without appearance of parties.

Judgment rendered at Ottawa, Ontario, on the 1st of October, 2020.

REASONS FOR ORDER:

RIVOALEN J.A.

Federal Court of Appeal



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Appellant

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REASONS FOR ORDER

RIVOALEN J.A.

[1] This is a motion by the respondent seeking an order directing the appellant in continuance of suit to pay the amount of \$3,420.00 into court as security for costs, in the form and the deadline prescribed by this Court pursuant to Rules 415 and 416 of the *Federal Courts Rules* SOR/98-106 (the Rules).

[2] The relevant facts in support of this motion are as follows.

[3] On January 20, 2020, CO2 Solution Technologies Inc. (CO2) filed a Notice of Appeal with the Court in respect of the judgment rendered on December 20, 2019, by the Tax Court of Canada (the TCC) in docket 2015-5635(IT)G. The TCC had dismissed CO2's appeal, finding that it was not a Canadian-controlled private corporation and was therefore not entitled to the enhanced investment tax credit for its scientific research and experimental development activities, nor to the refund of this credit. The respondent sought costs of \$10,354.46 against CO2 pursuant to the judgment rendered by the TCC. These costs have not been paid.

[4] On February 26, 2020, CO2 transferred its assets to Bresse syndics inc. (Bresse syndics), in accordance with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Bresse syndics was subsequently appointed to act as trustee of CO2's assets.

[5] On April 27, 2020, Bresse syndics filed a Notice of Continuance of Suit. On July 31, 2020, this Court authorized Bresse syndics to act as the appellant in continuance of suit on behalf of CO2.

[6] CO2 is a legal entity incorporated on June 20, 2005, pursuant to the *Business Corporations Act* (C.Q.R.L., c S-31.1). It does not have sufficient assets to pay the costs of this appeal. The balance sheet filed by CO2 at the time of the disposal of its assets showed a \$2,759,199 deficit. The only assets reported were \$2,000 in cash and the \$1 million amount

receivable as an investment tax credit, the amount in dispute before this Court. Even if the case is decided in its favour, CO2's deficit will still exceed \$1.7 million.

[7] The respondent estimates the legal costs for preparing the memorandum of fact and of law and the pending legal proceedings in this case at \$3,420. Consequently, she asks this Court to set the security at \$3,420.

[8] The respondent bases its motion on paragraphs 416(1)(b) and (f) of the Rules, because CO2 does not have sufficient assets to pay the costs if ordered to do so, and the \$10,354.46 costs that the TCC ordered it to pay are still unpaid.

[9] In its respondent's motion record, Bresse syndics cites section 417 of the Rules and asks this Court to decline to order that security for costs be given under paragraphs 416(1)(b) and (f) because CO2 demonstrated impecuniosity. In addition, Bresse syndics submits that the appeal to this Court is well founded.

[10] Finally, Bresse syndics submits that fair access to justice constitutes a ground of dismissal of the motion.

[11] In response to the submissions of Bresse syndics, the respondent argues that Bresse syndic is not legally bound to take legal action; it simply has the power to do so (*Caron (Syndic de)*, 2008 QCCS 457 (CanLII) at paragraphs 14 and 27.) The respondent adds that once Bresse syndics decided to continue the proceedings, it had a duty to ensure that it had sufficient

securities to cover the costs. (*Belhumeur Pronovost inc. c. Bombardier inc.*, 2010 QCCA 700 (CanLII) at paragraphs 20–25 [*Belhumeur*]).

[12] I agree. The right to security for costs exists in this case. The situations at issue are addressed in paragraph 416(1)(b) where CO2 does not have sufficient assets to pay the costs and paragraph 416(1)(f) because the respondent obtained an order against CO2 for costs at trial before the TCC for which it has not been paid.

[13] Bresse syndics itself admitted that CO2 is unable to pay these costs nor will it be able to comply with a potential order for security.

[14] Pursuant to subsection 197(3) of the *Bankruptcy and Insolvency Act*, the trustee is not personally liable for costs unless the Court otherwise directs. This discretion is exercised based on the circumstances of each case.

[15] In this case, the trustee is acting at his own risk. Even if the trustee is acting in good faith, insufficient bankruptcy assets constitute a ground for making an order directing the trustee to pay the cost of the proceedings. As the Appeal Court of Québec recognized in *Belhumeur*, it is not necessary to establish abusive conduct to make an order directing a trustee to personally pay the costs. It is up to the trustee to ensure that he has sufficient securities to cover the costs of the proceedings where he had the power and not the duty to litigate.

[16] I am of the opinion that each case is subject to the sole discretion of the Court, which must exercise it judicially, bearing in mind that “trustees in bankruptcy should not be allowed to pursue litigation with immunity against personal liability for costs in circumstances where there is no statutory duty to prosecute the litigation and the trustee knows or ought to know that there will be insufficient assets in the estate to satisfy an award of costs in the event that the trustee is unsuccessful in the litigation.” (*Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.*, (1998) 7 C.B.R. (4th) 3 (BCSC) at paragraph 30).

[17] Pursuant to Rule 417, the Court may refuse to order that security for costs be given under any of paragraphs 416(1)(a) to (g) if the plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit. However, it is always for the Court, in exercising its discretion, to allow or dismiss the motion for security.

[18] Given that CO2 is impecunious, that the costs order was not paid, that the trustee is not legally bound to take legal action and that the amount of the security requested is reasonable and warranted under the tests set out in paragraphs 416(1)(b) and (f) of the Rules, I exercise my discretion in favour of the respondent and allow the motion.

[19] For all these reasons, the appellant in continuance of suit is required to post \$3,420.00 as security for costs. This amount will be paid into court within 30 days of the date of this order made concurrently with these reasons.

“Marianne Rivoalen”

J.A.

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

COUNSEL OF RECORD

DOCKET: A-25-20
STYLE OF CAUSE: BRESSE SYNDIC INC. ACTING
FOR THE BANKRUPTCY OF
CO2 SOLUTION
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MAJESTY THE QUEEN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES.

REASONS FOR ORDER: RIVOALEN J.A.
DATED: OCTOBER 1, 2020

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