

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NAHANNI CONSTRUCTION LTD

Plaintiff

-and-

BONITO CAPITAL CORP and LUPIN MINES INCORPORATED

Defendants

**MEMORANDUM OF JUDGMENT
ON SUMMARY JUDGMENT APPLICATION**

OVERVIEW

[1] Nahanni Construction Ltd (“NCL”), has brought an action against Bonito Capital Corp (“BCC”) and Lupin Mines Incorporated (“LMI”) for the breach of a settlement agreement. NCL filed an application for a partial summary judgment arguing that there is no genuine issue for trial for portions of its claim.

[2] The Defendants BCC and LMI submit that the application for summary judgment should be dismissed because it is premature and because the portions of the claim covered by the summary judgment application are intertwined with issues raised by the Defendants in a counterclaim, such that disposing of these questions at this stage of the proceedings would not lead to a fair and just resolution of the issues in dispute.

[3] For the following reasons, I dismiss the application for partial summary judgment.

BACKGROUND

[4] The Lupin Mine is an underground gold mine situated in Nunavut, which was in operation from 1982 to 2005. In 2014, the Defendants acquired the mine. In 2017, they decided to close and reclaim it. In 2019, BCC awarded a contract to NCL (the “Prime Contract”) as the head contractor of the closure and reclamation project. The terms of the Prime Contract included that NCL would supply construction equipment required to complete the project.

[5] The work started in March 2020, but a dispute arose between NCL and BCC. The dispute led to NCL departing the project site in September 2020 before the project was completed, leaving behind pieces of construction equipment and other materials (the “NCL Materials”). BCC terminated the Prime Contract. The parties agreed to engage in mediation to resolve the dispute.

[6] In December 2020, the parties entered into a settlement agreement (the “Settlement Agreement”). The Settlement Agreement, which resolved several outstanding issues between the parties, includes terms related to the NCL Materials left on the mine site, notably:

- Clause 5 - NCL permits BCC to use the NCL Materials until the closure of the Tibbit to Contwoyto winter road in 2022 without any additional charge.
- Clause 6 - NCL is to provide a mechanic who will attend the mine site at the beginning of the 2021 construction season to provide an inventory and report on the state of repair of the NCL Materials.
- Clause 6 - The report must be agreed upon by NCL and BCC before BCC takes control over or makes use of the NCL Materials.
- Clause 9 - BCC agrees to operate and maintain the NCL Materials in accordance with industry standards.
- Clause 13 - BCC agrees to return the NCL Materials to NCL at its Yellowknife yard by the closure of the Tibbit to Contwoyto winter road in 2022 in substantially the same condition as described in the report prepared by the mechanic, except for reasonable wear and tear.

- Clause 14 - If BCC is delayed in returning the NCL Materials by (a) fire, unusual delay by common carriers and unavoidable casualties, (b) abnormally adverse weather conditions, or (c) any cause beyond BCC's control, including, without limitation, the work performed by NCL prior to the date of the settlement agreement, the time for the return of the NCL Materials is extended until the closure of the winter road in 2023.
- Clause 14 - If any delay occurs, BCC will advise NCL as soon as practicable.
- Clause 15 - NCL is not entitled to any payment for delays unless the delay results from actions by BCC. If the delay results from actions from BCC, BCC shall compensate NCL for the rental of the NCL Materials that are not returned, in advance, at the rental rates outlined in the Prime Contract, to a maximum of \$1.5 million for the use of the NCL Materials until the closure of the Tibbit to Contwoyto winter road in 2023.

[7] The parties also grant each other full and absolute releases and discharges for any disputes arising from the Prime Contract or from work previously performed by NCL at the Lupin Mine site.

[8] At the beginning of the 2021 construction season, a mechanic hired by NCL and an agent appointed by the Defendants attended the mine site and conducted inspections of the NCL Materials. They produced a report on the condition of the NCL Materials, which was approved by BCC on May 4, 2021.

[9] BCC performed work at the mine site from April 2021 to October 2021 using some of the NCL Materials.

[10] The Tibbit to Contwoyto winter road closed on March 31, 2022. At that time, BCC had not returned the NCL Materials to NCL's yard in Yellowknife.

[11] On April 28, 2022, NCL issued an invoice to BCC for \$1.5 million plus GST for a total of \$1,575,000.

[12] On May 9, 2022, counsel for BCC sent NCL formal notice of the delay explaining what had prevented the return of the NCL Material. BCC claimed it was not able to return the NCL Materials because:

- The age and condition of the NCL Materials were such that the equipment was consistently under repair, which resulted in delay in completing the work.

- Procuring parts to repair the equipment during the COVID-19 pandemic made the task difficult which prevented BCC from finishing the work.

The letter further states that BCC considered this delay was beyond its control and therefore NCL was not entitled to compensation under the Settlement Agreement.

[13] To this day, BCC has not returned the NCL Materials to NCL.

[14] The procedural history in this case is important to understand the positions of the parties.

- On September 9, 2023, NCL filed its Statement of Claim in this case. It alleges that BCC and LMI breached the Settlement Agreement when they did not return the NCL Materials by the close of the Tibbitt to Contwoyto winter road in 2022. It also alleges that the Defendants have damaged the NCL Materials. NCL is seeking \$1,575,000 for the rental of the NCL Materials until the closure of the winter road in 2023 and damages in the amount of \$1,575,000 annually for what it claims is BCC and LMI's wrongful retention of the NCL Materials. It is also seeking at least \$5,000,000 for property damage or diminution in value of the NCL Materials.
- On October 26, 2023, the Statement of Claim was served on BCC and LMI.
- On March 14, 2024, BCC and LMI filed a Statement of Defence and Counterclaim. The Defendants claim that the delay in returning the materials did not result from their actions and that consequently they are not in breach of the Settlement Agreement. They allege that the delay is in fact due to the poor condition of the NCL Materials and to logistical challenges due to the COVID-19 pandemic. They also advance a counterclaim on similar grounds, alleging that NCL's failure to ensure the NCL Materials were operational and adequate for the work to be performed at the mine site was a breach of the Settlement Agreement that resulted in loss, damage and expense for the Defendants.
- On April 4, 2024, counsel for BCC and LMI sent a letter to counsel for NCL indicating that NCL had yet to file a Statement of Defence to the Counterclaim.

- On November 7, 2024, NCL served BCC and LMI with a copy of a Notice of Motion for Partial Summary Judgment. This is the application that is before me.
- On November 20, 2024, BCC and LMI served a copy of their Statement as to Documents and corresponding documents on NCL.
- On December 6, 2024, NCL filed the Notice of Motion for Partial Summary Judgment seeking \$1,575,000 for the rental of the NCL Materials from 2022 to 2023 and damages in the amount of \$1,575,000 annually for the wrongful retention of the NCL Materials. The issue of property damage or diminution in value of the NCL Materials is not covered by this application.
- On March 7, 2025, NCL filed a Statement of Defence to Counterclaim.
- NCL has yet to file their Statement as to Documents.

[15] The parties do not agree whether disposing of this matter by way of summary judgment is appropriate. They also take different positions on the substantive issues that this application raises.

[16] NCL argues that there is no genuine issue that requires a trial in this case. It submits that the fact that there is a counterclaim does not prevent granting a summary judgment application because the arguments that support the counterclaim are baseless. NCL claims that the Settlement Agreement did not require the NCL materials to be fit for a specific use or purpose or meet any performance requirements. In addition, NCL argues BCC and LMI were aware of the condition of the equipment. NCL refutes the Defendants' claim that they experienced delay beyond their control because the Defendants failed to provide timely notice of the delay. NCL submits that BCC and LMI breached the leasing provisions of the Settlement Agreement and that, as a result, this Court should award NCL \$1,575,000 for BCC and LMI's failure to return the NCL Materials by the close of the winter road in 2023 and \$1,575,000 annually for what NCL claims is BCC and LMI's wrongful retention of the NCL Materials.

[17] BCC and LMI raise procedural, evidentiary and substantive arguments. They submit that NCL has breached several *Rules of the Supreme Court of the Northwest Territories* (the *Rules*) that disentitles them to a summary judgment. They claim this

application is premature because it was filed before the close of the pleadings and before NCL filed a Statements as to Documents. They further argue that the issues raised by the claim and the counterclaim are so intertwined that it would be inappropriate to determine issues raised by the claim now, while the counterclaim goes to trial. The Defendants also take issue with the admissibility of parts of the affidavit evidence of Kenneth Ruptash, filed by NCL in support of this application. In addition, BCC and LMI claim there is insufficient evidence before the court to allow me to make a confident determination of the facts and the law. Finally, on the substantive issues, the Defendants argue that they did not breach the Settlement Agreement because the delay in returning the NCL Materials was beyond their control, resulting from the poor condition of the NCL Materials and COVID-19 related logistics problems. In addition, if the court does find a breach of contract, BCC and LMI dispute that NCL has a claim under the Settlement Agreement for damages of more than the \$1,575,000 specifically agreed to by the parties.

ANALYSIS

[18] Before I turn to the arguments raised by the parties, I will set out the general principles that govern summary judgment applications.

Summary Judgment Principles

[19] An application for summary judgment is a means by which a party can get a determination of a claim without the necessity of holding what can be a lengthy and expensive trial. The *Rules* have provisions that deal with summary judgment applications. Rules 174 and 176, which govern such an application when made by the plaintiff, state the following:

174. (1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.

(2) The plaintiff may, on an application made *ex parte*, seek leave to serve a notice of motion for summary judgment on a defendant with the statement of claim and the Court may grant the leave where special urgency is shown, subject to such directions as it considers just.

176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(3) Where the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

(4) Where the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.

[20] In *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*], the Supreme Court of Canada took an expansive approach to summary judgments, ruling that “summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims” (at para 5). In deciding whether to grant an application for summary judgment, the question is “whether a full-blown trial is required to resolve the issue and reach a fair and just result” (*The Commissioner of the Northwest Territories v 923115 N.W.T. Limited et al.*, 2018 NWTSC 24, at para 45 [*Commissioner of the Northwest Territories*]; also see *Leishman v Hoechsmann et al.*, 2016 NWTSC 27, at para 42). As stated by the Supreme Court of Canada in *Hryniak*, this will be the case “when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result” (at para 49).

Breach of the Rules and Prematurity

[21] BCC and LMI argue that despite their requests, NCL has not filed its Statement as to Documents in breach of R 219 and R 221. Rule 219 imposes an obligation on the parties to disclose documents related to matters in issue they have or had in their possession, control or power. Rule 221 provides that the parties have 30 days after the close of pleadings to file a Statement as to Documents.

[22] The Defendants also say that NCL has not complied with R 230, which states that a party cannot rely on documents that have not been disclosed or otherwise produced without a reasonable excuse. In addition, the Defendants note that NCL filed the application for partial summary judgment before they filed their Statement of Defence to the Counterclaim. The Defendants say that NCL has attempted to improperly advance its claim while failing to comply with important procedural rules. They submit the application for partial summary judgment is premature. BCC

and LMI claim that NCL's failure to comply with the *Rules* has been prejudicial to them as they have not had a fair opportunity to pursue discovery.

[23] NCL submits there is no authority supporting the proposition that a plaintiff cannot obtain a summary judgment unless the Statement as to Documents has been filed and discoveries are completed noting that such a requirement is not found in R 174. NCL argues the purpose of R 230 is to prevent taking the opponent by surprise at trial, not to impede on the efficient use of summary judgment applications. NCL points out that most of the documents filed in support of this application come from the parties and consequently, it says there is no unfairness to the Defendants. NCL claims that the Defendants are simply alleging the litigation has not progressed and that they might be able to produce a better record in the future. Relying on *Commissioner of the Northwest Territories*, NCL invites me to reject the proposition that the application is premature.

[24] I agree with NCL that R 230 has no application here. The purpose of this rule is to promote fairness between the parties by ensuring that they only rely on documents that have been disclosed before the hearing. In this case, NCL relies on documents that are appended as exhibits to two affidavits of Kenneth Ruptash, which were produced weeks before the hearing of this application. There is no unfairness to the Defendants.

[25] I also agree with NCL that the *Rules* do not bar applications for summary judgment before the filing of a Statement of Defence to Counterclaim or before the filing of the Statement as to Documents. Rule 174 does not impose such conditions. In fact, it expressly provides that the plaintiff may apply for summary judgment "after a defendant has delivered a statement of defence". However, the absence of a formal prohibition on seeking a summary judgment does not mean that the court cannot take into consideration the procedural history in determining whether a summary judgment would "achieve a just result". In this case, it would be unfair to the Defendants to proceed with this application at this stage considering the way the proceedings have unfolded.

[26] The Statement of Defence and Counterclaim was filed and served on March 14, 2024. On April 4, 2024, the Defendants' counsel wrote to NCL's counsel and specifically indicated that NCL was yet to file a Statement of Defence to the Counterclaim. On May 22, 2024, counsel for the Defendants emailed NCL's counsel and requested NCL's list of documents. NCL never responded to this request. In fact, at the time I heard this application on March 25, 2025, NCL had not yet

produced a Statement as to Documents. NCL filed this partial summary judgment application in November 2024.

[27] The close of pleadings occurred on March 7, 2025, when NCL filed their Statement of Defence to the Counterclaim. Rule 93(1)(b) sets a 30-day deadline to file a Statement of Defence when the defendant is served out of the jurisdiction as it was the case here. NCL did not meet this time limit. In fact, it filed the Statement of Defence to Counterclaim almost a year after the Statement of Defence and Counterclaim was filed. As indicated above, R 221 provides that the parties have 30 days after the close of pleadings to file a Statement as to Documents. Because NCL failed to file a Statement of Defence to Counterclaim within the period imposed by R 93, the documentary disclosure obligation was not triggered. Without complete pleadings and without the documentary disclosure, the Defendants did not know the full scope of the issues at play in these proceedings and could not meaningfully initiate discoveries.

[28] I must add that it is not unusual for parties to file pleadings outside the timelines imposed by the *Rules*. That is not what the Defendants take issue with. The issue is that NCL delaying the close of the pleadings resulted in the Defendants not having a fair opportunity to obtain the information they are entitled to.

[29] NCL relies on the following quote from *Commissioner of the Northwest Territories* at para 60:

I appreciate that civil litigation can move slowly, particularly where, as here, there are multiple parties and highly technical issues; however, the Plaintiff is responding to a summary judgment application and it is thus required “to put its best foot forward”. *Arctic Environmental v Northern Mgmt. & Komaromi et al*, 2000 NWTSC 53 (CanLII) at para 23. It is not enough for the Plaintiff to simply state that the litigation has not progressed or that there may be a better evidentiary record sometime in the future.

[30] NCL argues that this is similar to what is happening in this case, that the Defendants are simply making a bald assertion that litigation has not progressed or that there may be a better evidentiary record sometime in the future.

[31] I disagree. In oral submissions, the Defendants identified the types of documents they wished to discover and the areas they wished to cover during examinations for discovery. They hope to obtain lists of the NCL Materials brought to the mine site and left on site when the Prime Contract was terminated, records of

usage by NCL of the equipment during the summer of 2020, records of the NCL Materials' condition while NCL was using them, records of the value of the NCL Materials, including accounting records and depreciation records, and records of NCL's plan for the use of the NCL Materials after the close of the winter road in 2022. The Defendants also wish to question witnesses on the reasons NCL did not demand the return of the NCL Materials until they brought this action. These steps are necessary to reach a fair determination of this matter. This application for partial summary judgment is premature.

Overlap with Counterclaim

[32] The Defendants invite me to dismiss this application on an additional basis. They say the issues raised by the claim and the counterclaim overlap such that the claim should not be discretely decided by a summary judgment. They argue that proceeding with the partial summary judgment application creates a real risk of inconsistent findings of fact.

[33] NCL submits that the fact that a defendant raises a set-off claim does not in itself mean that a summary judgment cannot be granted in favour of the plaintiff. In addition, NCL argues that if there are any concerns about inconsistent findings of fact, the remedy is the severance of the claim and the counterclaim.

[34] I agree with NCL that the existence of a counterclaim does not in itself prevent the granting of a summary judgment (*Bank of Montreal v Rolseth*, 1986 CanLII 1821 (AB KB) [*Rolseth*] at para 33; *Torode Realty Limited v Redcliff Realty Management Inc.*, 2003 ABQB 1037 at para 12). The question is whether it is possible to give judgment to the plaintiff on the claim and give judgment to the defendant on the counterclaim without the possibility of a conflict between the judgments (*Rolseth* at para 46).

[35] In this case, the issues raised by the claim and the counterclaim significantly overlap. The Defendants claim they did not breach the Settlement Agreement because the main reason for the delay to return the NCL Materials is the poor condition in which the NCL Materials were left at the mine site by NCL. The basis for the counterclaim is NCL's failure to ensure the NCL Materials were operational and adequate for the work to be performed at the mine site, which the Defendants argue was a breach of the Settlement Agreement that resulted in loss, damage and expense. These issues are intertwined. They both require determining the condition of the NCL materials and interpreting the Settlement Agreement to decide whether

NCL had an obligation to ensure the NCL Materials were fit for the purposes of the work carried out at the mine site. The findings of fact related to the claim will necessarily also apply to the counterclaim.

[36] I do not accept NCL's argument that severing the claim and the counterclaim is the appropriate remedy for this situation. The same evidence will be adduced, and the same findings will be required whether they are made in the same action or in a separate action. In addition, severance would result in an inefficient use of judicial resources.

[37] Because I have decided that the application must be dismissed based on the procedural arguments put forward by the Defendants, I do not, at this time, need to examine the evidentiary and substantive issues raised by the parties.

Costs

[38] In their legal brief, the Defendants submit that if NCL obtains no relief on this application, they are entitled to solicitor-client costs to be paid without delay. They rely on R 180. In its legal brief, NCL only addressed costs in the event of being the successful party to this application. The issue of costs was not argued by the parties at the oral hearing.

[39] Because I have not heard NCL's position on costs in the event I dismissed the summary judgment application, I am not prepared to rule on this issue at this time. The parties may file written submissions of a maximum of five pages on the issue of costs for this application within 21 days of the filing of this decision.

CONCLUSION

[40] Because the application for partial summary judgment was filed before the close of the pleadings and before NCL filed a Statements as to Documents, the application is premature. It would be unfair to the Defendants to dispose of the merits of the claim without giving them the opportunity to obtain disclosure and complete discoveries. I also find that the claim and the counterclaim are so intertwined that they must both be decided at trial. As a result, I am dismissing the application.

[41] I am mindful that this litigation needs to progress. Rule 179 gives me the power to give directions or impose terms that I consider just for the further conduct of the trial. NCL's failure to produce a Statement as to Documents has been one of the main reasons that has prevented this matter from moving along. As a result, I

direct NCL to produce and serve their Statement as to Documents within 60 days of the filing of this judgment.

[42] I make the following order:

- a. I dismiss the application for partial summary judgment.
- b. I direct the Plaintiff to produce a Statement as to Documents and serve it on the Defendants within 60 days of the filing of this judgment.
- c. The parties may file written submissions of no more than five pages on the issue of costs for this application within 21 days of the filing of this judgment.

Annie Piché
J.S.C.

Dated at Yellowknife, NT, this
23rd of May, 2025

Counsel for the Plaintiff: Jonathan Hillson, Bennett Jones LLP

Counsel for the Defendants: Michael Morgan, Lawson Lundell LLP

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