No. 15 1867
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SHAWNIGAN RESIDENTS ASSOCIATION

PETITIONER

AND:

DIRECTOR, *ENVIRONMENTAL MANAGEMENT ACT*,
COBBLE HILL HOLDINGS LTD. and
ENVIRONMENTAL APPEAL BOARD

RESPONDENTS

NOTICE OF APPLICATION

Name of applicant: Cobble Hill Holdings Ltd.

To: Shawnigan Residents Association

And to: Director, Environmental Management Act
Environmental Appeal Board

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 850 Burdett Avenue on 15 July 2015 at 9:45 am for the order set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order that the Petitioner, Shawnigan Residents Association pay security for costs in an amount to be determined at the hearing of this application, but in any case no less than $79,430.40 prior to the Petitioner being permitted to take any further steps in connection with the Petition, the application for an injunction filed July 9, 2015, or any other proceeding pertaining to these matters;

2. That the Petition and all applications be stayed until such time as costs are paid;

3. Costs of the application payable by the Petitioner to the Respondent are payable forthwith, in any event of the cause;

4. That the within application be heard in conjunction with the Petitioner's application filed on July 11, 2015 on short notice.

Part 2: FACTUAL BASIS

1. Cobble Hill Holdings Ltd. is the holder of Permit -105809 (the "Permit).

2. Shawnigan Residents Association ("SRA") is a local residents association.

3. SRA has no assets and no ability to pay. Its last financial statements were published in 2013 and indicated approximately $3500 in the bank.

4. SRA has recently publically advertised that it owes upwards of $375,000 in legal fees to its own counsel from the appeal hearings before the Environmental Appeal Board and continues to fundraise for that shortfall at a success rate of 40%.

5. SRA was a full party in a 31 day hearing at the EAB and the Permit Holder was put to the same expenses, in terms of legal fees in that hearing for which it received no compensation as a third party. In fact, no costs were awarded against any of the appellants arising from the EAB hearing.

6. The Permit Holder has a draft bill of costs which is a modest estimate of costs of $79,430.40, assuming 13 total court days for applications and the hearing of the Petition.

7. The Permit Holder has already suffered loss as a result of the SRA's involvement in the application process, which should be taken into account in the present analysis.

8. As a direct result of the challenges to the Permit in the EAB hearing, the Petitioner says it has experienced financial costs which include, but are not limited to the following:

    a. ongoing harm to business reputation throughout the Island generally. Specifically, they lost customers and tenants in every aspect of their various business ventures (even those unrelated to the permit) and were advised by those customers that the reason was they did not wish to be associated with us due to the negative attention and civil action targeted at the permit holder;

    b. lost contracts that were interrupted by the stay that was put in place by the EAB in November 2013 and substantially in force until March 2015;

c. they were forced to sell equipment at reduced rates to generate cash flow during the stay resulting in a loss on equipment of $1,255,271.63;

d. their commercial lenders (unrelated to the mine) refused to do business with them because the SRA had contacted the lenders, resulting in a refinance at an increased rate of interest with an annual interest differential of $93,084.20;

e. lost opportunity costs for work they were not able to take during the stay;

f. carrying costs and annual permit fees of $75,000.00,(paid twice since the Permit was issued) and payable notwithstanding the fact that the permit was stayed; and

g. the direct cost of legal fees and expert costs for the hearing.

9. In addition, the Permit Holder has now invested a total of $2,762,059 in preparation to operate under the Permit.

10. If a stay is issued the Permit Holder will lose everything including, but not limited to the following:

a. the $2,762,059 invested in the Permit;
b. the land, which will go into foreclosure;
c. the three investors' shareholders loans;
d. the land and shareholders loans are approximately 7,000,000;
e. the combined total loss for Cobble Hill Holdings Ltd. would be 10,000,000;
f. other business ventures personal to the permit holder will be compromised by a compromised personal and corporate guarantee; and
g. personal assets may be lost under personal guarantees of the directors of Cobble Hill Holdings Ltd.

11. The Permit Holder will be potentially exposed to liability in an amount upwards of $13,000,000 from the operations manager who is expending resources in reliance on the Permit.

12. What the Permit Holder stands to lose should be taken into account in the analysis.

13. The ordinary application process for a permit of this kind involves application, public consultation and review of permit terms.

14. SRA participated actively in the public consultation process, hiring a hydro-geologist to comment on the property in question who made public comments, that were later proved to be incorrect, suggesting the site was full of limestone which would erode if it came into contact with certain chemicals. This resulted in a significant public response.

15. The assumptions underlying the Permit were closely scrutinized as a result of these statements. The site was closely inspected by a geologist, the chemicals to be allowed were reviewed internally, hydro-geologic assumptions were challenged and assessed internally and externally by the Ministry of Environment, further testing was obtained and ultimately the terms of the Permit were substantially revised to take into account the concerns raised by the SRA. The revisions to the Permit included the requirements that all potential contact water that leaves the site must meet the higher of drinking water or aquatic life standards. That is, no water that could have come in contact with any of the subject soils leaves the site without treatment. The soil itself is not 'land filled" despite the use of the term in the Permit. It is encapsulated in natural and synthetic barriers and is used in the reclamation of the mine.

16. The delay to the issuance of the Permit caused by the extra consultation and revisions was almost a year.

17. The SRA immediately appealed the issuance of the Permit and applied for a stay which was granted in November 2013. With the exception of a small amount of soil that was permitted to be brought on site in or about February 2014, no operation under the Permit was allowed, or took place.

18. At the Environmental Appeal Board the SRA that the changes made to the Permit at their request were not good enough, but they did not provide any evidence to this effect.

19. Notwithstanding that the stay was in place the Permit Holder was still required to pay the annual licensing fee of $75,000, to incur costs of monitoring and reporting. The Permit Holder had invested $2,762,059 in the Permit and has carrying costs in addition. The lost opportunity cost to the Permit Holder while the stay was in place was in the multi-millions.

20. The loss to the Permit Holder of interruption of its operation of any kind includes liability for its operations manager in a magnitude of $8,000,000 in bonds and $5,000,000 in equipment purchased for the mine, liability to customers, foreclosure and personal bankruptcy and corporate insolvency of gross guaranteed corporate ventures.

21. Meanwhile, the SRA organized and coordinate boycotts, public demonstrations and picketing of any customers or businesses associated with the Permit Holder or the related businesses of the Permit Holders' principals. This conduct continues to the present.

22. The stay remained in force until the Environmental Appeal Board issued its reasons, upholding the Permit in March 20, 2015.

23. The Permit was delayed by a year and stayed for a further 16 months due to the direct involvement of the SRA in the application and appeal process.

24. The SRA once again seeks to challenge the Permit. It once again does so without any evidence of a risk to the environment or human health and is attempting to bring the matter to court without providing the record of the decision for scrutiny.

25. The SRA seeks to raise arguments about what is new argument and would have affected the Environmental Appeal Board's decision without putting before the Court the record of that same decision. This is an impermissible attempt to reverse the onus of proof and it is a strategy that has costly implications for the Permit Holder to defend against because if the SRA is permitted to proceed on its current course the only way to answer its preliminary allegations becomes to reargue the 31 day hearing.

26. The SRA's failure to provide evidence of risk means its claims are without merit and being forced to repeat a 31 day hearing where the same was establish definitively is a gross prejudice to the Permit Holder.

Part 3: LEGAL BASIS

1. The Court has jurisdiction to order a society to post security for costs pursuant to s. 236 of the *Business Corporations Act*, S.B.C. 2002, c. 57, which provides:

> 236. If a corporation is the plaintiff in a legal proceeding brought before the court, and if it appears that the corporation will be unable to pay the costs of the defendant if the defendant is successful in the defence, the court may require security to be given by the corporation for those costs, and may stay all legal proceedings until the security is given.

2. A society is included in the definition of "corporation" under the *Business Corporations Act*.

3. In addition, the Court has inherent jurisdiction to order a party to post security for costs. Where a corporate party is impecunious, it is up to that party to justify why it should not post security.

4. The inherent jurisdiction of the court permits an order to stay the action until Shawnigan Residents Association has posted security for costs because justice requires it .

5. The onus falls to Shawnigan Residents Association to justify why such an order should not be made. This must fail for the following reasons:

a. The SRA has put the Permit Holder to by interfering with its business relationships, clients and customers.

b. The SRA paid no costs arising out of the 31 day hearing at the EAB;

c. The Permit Holder stands to lose everything; and

d. The SRA has not put the record of the EAB before the Court limiting the ability of the Court to properly understand the argument and of the respondents to defend.

6. The decision to order security for costs is a discretionary decision and that discretion must be exercised judicially. Here the facts require that such an order be issued.

7. Supreme Court Rule 14-1 allows the Court to order costs of an application payable in any event of the cause and that they be assessed as special costs.

Part 4: MATERIAL TO BE RELIED ON

1. The petition;
2. Affidavit #1 of Michael James Kelly;
3. All materials in the proceeding and applications.

The applicants estimate that the application will take 1 hour.

[*Check the correct box*]

[ ] This matter is within the jurisdiction of as master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that
  (i) you intend to refer to at the hearing of this application, and
  (ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  (i) a copy of the filed application response;
  (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: 14/July/2015

Signature of Aurora L. Faulkner-Killam
Lawyer for the Applicant

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....
.....
.....

Date: .....[*dd/mmm/yyyy*]..... .....

Signature of [ ] Judge [ ] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

n/a