SUPREME COURT OF YUKON

Citation: *Fine Gold Resources, Ltd. v. 46205 Yukon Inc.* 2016 YKSC 67

Date: 20161202
S.C. No. 15-A0137
Registry: Whitehorse

Between:

Fine Gold Resources, Ltd.

Plaintiff

And

46205 Yukon Inc., Russian Mining Inc., Them R Gold Ltd., Troy Cahoon and Richard Fanslow

Defendants

Before Mr. Justice R.S. Veale

Appearances:

Gary W. Whittle	Counsel for the Plaintiff
Mark E. Wallace and Anna Starks-Jacob	Counsel for the Defendants 46205 Yukon Inc., Russian Mining Inc., and Richard Fanslow
James R. Tucker and Vida Nelson	Counsel for the Defendants Them R Gold Ltd. and Troy Cahoon

REASONS FOR JUDGMENT
(Interrogatories)

INTRODUCTION

[1] This is an application by the defendants to strike out interrogatories served upon them by Fine Gold Resources Ltd. (“Fine Gold”).

[2] Rule 29 of the *Rules of Court* states the purpose of discovery by interrogatories is to “obtain evidence in a timely and cost effective manner and reduce or eliminate the need of or time required for oral examination for discovery”.

[3] Fine Gold claims, among other things, that the defendants have trespassed and mined gold from their placer gold claims.

[4] The defendants 46205 Yukon Inc., Russian Mining Inc. and Richard Fanslow (collectively referred to as the "Russian Mining defendants") are the owners of adjacent placer claims to those owned by Fine Gold. The defendants Them R Gold Ltd. and Troy Cahoon (collectively referred to as the "Cahoon defendants") are the mining operator retained by the Russian Mining defendants.

[5] For the reasons that follow, I order that the interrogatories served in the case be struck.

BACKGROUND

[6] The following are not findings of fact but the background and context of this dispute.

[7] On December 17, 2015, Fine Gold filed a Statement of Claim consisting of 57 paragraphs and a claim for a further 16 paragraphs of relief. The relief claimed is for injunctions, accounting and an order for the following relief:

a. Delivery of the Claim 7 Chattels to the plaintiff,
b. Alternatively, an order for payment to the plaintiff of the value of the Claim 7 Chattels in the sum determined by this Honourable Court,
c. Delivery of the Claim 8 Chattels to the plaintiff,
d. Alternatively, an order for payment to the plaintiff of the value of the Claim 8 Chattels in the sum determined by this Honourable Court,
e. Transferring and conveying to the plaintiff all property held on trust for the plaintiff,
f. Alternatively, an order for a remedial constructive trust imposed upon the Claim 7 Chattels and the Claim 8 Chattels,
g. Damages for trespass,
h. Damages for conversion,
i. Damages for detinue,

j. Damages for unjust enrichment,
k. Damages for conspiracy,
l. Special damages, including, but not limited to, economic loss,
m. Punitive damages, and
n. Aggravated damages;

and prejudgment and post judgment interest, costs and such further and other relief as may seem just.

[8] As I understand it, the primary claim of Fine Gold is that the defendants have trespassed and mined gold on its placer Claims 7 and 8 on Eureka Creek, in the Dawson Mining District, without Fine Gold's consent and therefore Fine Gold is entitled to damages. The defendants claim that, if they have mined on Claims 7 and 8, it was with lawful excuse or the consent of Fine Gold.

[9] Fine Gold and the defendants agree that, pursuant to a Lease Agreement dated August 1, 2012, Fine Gold (then called Heisey Ventures Inc.) granted the Russian Mining defendants the right to mine gold on Claim 7 from August 2012 to September 30, 2013 ("the Lease").

[10] Michael Heisey is the President of Fine Gold and Troy Cahoon is a shareholder and director of Them R Gold. Mr. Heisey and Mr. Cahoon are the main protagonists in this dispute. They appear to have had a friendly relationship until September 2015, when the boundary dispute arose and Mr. Heisey concluded that Mr. Cahoon and consequently the Russian Mining defendants were trespassing on his Claims.

[11] There is no doubt that Mr. Cahoon conducted mining operations on behalf of the Russian Mining defendants on what the parties identified in the Lease as Claim 7. Mr. Cahoon's last report of gold production under the Lease was July 5, 2013.

Mr. Cahoon signed a Discharge and Release of the Lease and filed it with the Mining Recorder on October 22, 2013.

[12] Mr. Cahoon also claims to have purchased various mining equipment from Fine Gold in order to mine what the parties identified as Claim 7 within the Lease. Whether the Lease and the equipment purchase were performed according to an agreement may be in dispute, although it appears that this dispute did not arise until the boundary dispute did.

[13] Mr. Cahoon also conducted mining operations for the Russian Mining defendants under the Water Licence of Fine Gold during the Lease and up until the boundary dispute arose.

[14] The material suggests that Mr. Cahoon, on behalf of the Russian Mining defendants, was mining in the area in 2014 and 2015 with the knowledge of Fine Gold. What is in dispute, however, is where Mr. Cahoon mined and where the boundaries of Claim 7 and 8 actually are.

[15] It is my understanding that, at the request of Mr. Heisey, on September 15 and 16, 2015, Glen Lamerton, a qualified Canada Lands Surveyor, located and surveyed the claim posts of Claim 7 and the contiguous claims with the assistance of Mr. Cahoon and Mr. Heisey. Mr. Lamerton and Mr. Heisey swear under oath that Mr. Cahoon mined a certain “pit” on Claim 7. Mr. Cahoon swears under oath that at no time during the survey on Claim 7 did he realize or conclude that he had mined on Claim 7 without authorization.

[16] Mr. Heisey retained Mr. Lamerton on March 16, 2016, to conduct an official survey of Claims 7 and 8, pursuant to s. 39 of the *Placer Mining Act,* S.Y. 2003, c. 13.

On April 19, 2016, the Mining Recorder authorized the survey in accordance with s. 39, which sets out a procedure to absolutely define the boundaries subject to an appeal to this court. It also appears from counsel that the s. 39 procedure may take a year or longer if appealed.

[17] It is my understanding that the parties have exchanged Lists of Documents. On February 12, 2016, counsel for Fine Gold delivered a Demand for Further and Better Particulars on the Cahoon defendants consisting of "full particulars of all the specific facts, circumstances, matters and instances, with dates and items" of almost all the allegations of fact in paras. 16 – 54 of the Statement of Defence of the Cahoon defendants. Also on February 12, 2016, counsel for Fine Gold delivered a Demand for Further and Better Particulars on the Russian Mining defendants consisting of "full particulars of all the specific facts, circumstances, matters and instances of" relating to paras. 7, 8, 13, 20, 21, 24, 25, 28, 38, 40, 68 and 70 of the Statement of Defence of the Russian Mining defendants.

Interrogatories to the Russian Mining Defendants

[18] On February 3, 2016, Fine Gold served the First Interrogatories on the Russian Mining defendants, consisting of 26 separate questions with sub-questions for a total of 338 questions set out on 19 pages. These interrogatories addressed the Statement of Defence filed by the defendants.

[19] On March 3, 2016, Fine Gold served the Second Interrogatories on the Russian Mining defendants, consisting of 26 separate questions with sub-questions for a total of 339 questions set out on 18 pages. These interrogatories addressed the documents produced by the defendants.

[20] Counsel for the Russian Mining defendants have not responded to any of the interrogatories, and claim that the entire interrogatories should be struck.

[21] I am not going to list the entire interrogatories to Russian Mining Inc., but suffice it to say that they are lengthy and detailed, covering equipment, property and Claims 7 and 8 from 2012 to 2015. It appears that Mr. Fanslow was not the operator on the ground but rather a businessman who retained Mr. Cahoon as his operator and it appears that he had little interaction with Mr. Heisey.

[22] The following are examples from the First Interrogatories, Questions 6 and 7:

> 6. Referring to the SODF, the paragraph numbered 18:
> a. when did Heisey make this representation to:
> i. 46205,
> ii. Russian, and
> iii. Fanslow;
> b. where did Heisey make this representation to:
> i. 46205,
> ii. Russian, and
> iii. Fanslow;
> c. how did Heisey make this representation to:
> i. 46205,
> ii. Russian, and
> iii. Fanslow;
> d. to whom, on behalf of:
> i. 46205,
> ii. Russian, and
> iii. Fanslow
> did Heisey make this representation;
> e. based upon this representation, what steps were taken by:
> i. 46205,
> ii. Russian, and
> iii. Fanslow; and,
> f. when were each of these steps taken?
>
> 7. Referring to the SODF, the paragraph numbered 20:
> a. what are the dates of the negotiations;
> b. when did Heisey consent to Russian Mining or its operator digging test holes on:
> i. Claim 7, and
> ii. Claim 8;

c. who was Russian's operator at the time this consent was given;
d. if Russian had no operator at the time this consent was given, who was the operator whom Russian was considering to be its operator;
e. to whom, on behalf of Russian, did Heisey inform of this consent;
f. how and in what form was this consent given to Russian;
g. where was this consent given to Russian;
h. what are all of the test holes dug on Claim 7 by Russian for:
    i. gold deposits, and
    ii. silver deposits;
i. who dug each of these test holes;
j. where were each of these test holes dug;
k. when were each of these tests holes dug;
l. what were the results of each of these tests;
m. for each test hole, what determinations did Russian make;
n. how many tests hole [as written] dug on Claim 8 by Russian for:
    i. gold deposits, and
    ii. silver deposits;
o. who dug each of these test holes;
p. where were each of these test holes dug;
q. when were each of these tests holes dug;
r. what were the results of each of these test; and,
s. for each test hole, what determinations did Russian make?

Interrogatories to the Cahoon Defendants

[23] Similarly, two sets of Interrogatories were served upon the Cahoon defendants. The First Interrogatories consisted of 35 separate questions and sub-questions totalling almost 300 questions relating to the Cahoon Statement of Defence. The Second Interrogatories contained 56 questions and over 600 questions relating to the Cahoon documents. To give a snapshot of the detail and subject matter of the Second Interrogatories, questions 10 and 11 are as follows:

10. Referring to the document numbered 038, at the pdf page numbered 01:
    a. who is “Richard”;
    b. when did you and Richard talk;
    c. where did you and Richard talk;
    d. what did you and Richard talk about;
    e. in what capacity were you receiving instructions from Richard;
    f. what ground did Richard instruct you to test;
    g. to the best of your knowledge, information and belief, what:
        i. “deal on equipment” was Richard going to make,
        ii. was the equipment that Richard was going to make a deal on,
        iii. was the “purchase of the ground” that was to follow, and
        iv. what was the ground;
    h. how many “test holes” did you dig;
    i. when did you dig these test holes;
    j. where did you dig these test holes;
    k. for each test hole, what were the results;
    l. why was he “a hard man to deal with”;
    m. what was hard about dealing with him;
    n. what are all of the facts upon which you based your opinion that: “he is a hard man to deal with”;
    o. why “would you hate to loose this opportunity” (sic);
    p. what was the “opportunity” that you “would hate to loose” (sic);
    q. what steps did you take to let Mr. Heisey “know how samples look”;
    r. when did you take these steps;
    s. how many samples were there;
    t. how did each of these samples “look”;
    u. what did Richard say “to results”;
    v. when did Richard say this; and,
    w. what did you mean by: “Trying for you some people funny.”?

11. Referring to the document numbered 040, at the pdf page numbered 01:
    a. what did you mean by the words: “he’s not a good business man acting goofy”;
    b. to whom were you referring;

c. what are the facts upon which you based your opinion that:
   i. "he's not a good business man", and
   ii. "he's … acting goofy";
d. why did you "Wish to pursue this deal";
e. what are the facts upon which you relied in concluding "don't know if it worth all the frustration and aggravation";
f. what was the:
   i. "frustration" and
   ii. "aggravation"
   to which you referred;
g. what did you mean when you wrote "tell him to get his shit together or loose out on excellent opportunity to expand operations and feed his greed" (sic);
h. what are the "operations" to which you referred; and
i. what is the "greed" to which you referred?

[24] I do not wish to leave the impression that all the interrogatories are as prolix or nitpicking as these examples would suggest, but the general style is similar. Although counsel for the defendants challenged the interrogatories as cross-examination, irrelevant and addressing collateral issues, counsel for the plaintiff did not respond to any of these specific challenges in his response submission.

[25] There is no indication before me as to the length of time that would be required for discoveries if the interrogatories are answered. However, counsel for Fine Gold estimated that five days would be required to discover each of Mr. Cahoon and Mr. Fanslow, without knowing whether the interrogatories would be answered.

[26] As a general comment, it does not appear that counsel had any reasonable discussion on the appropriate timing or cost-effectiveness of the interrogatories and whether or not they would reduce or eliminate examination for discovery.

The Law of Interrogatories

[27] Interrogatories have been considered in two decisions in this jurisdiction: *Ross River Dena Council v. Canada (Attorney General),* 2011 YKSC 56, and *Dana Naye Ventures v. Canada (Attorney General),* 2011 YKSC 59. These cases generally focussed on very specific questions of relevance. *Dana Naye Ventures* is not particularly applicable to the case at bar but I will address *Ross River Dena Council* below.

[28] Three specific subsections of Rule 29 apply to this case:

> **Purpose**
>
> (1) The purpose of interrogatories is to obtain evidence in a timely and cost effective manner and reduce or eliminate the need of or time required for oral examination for discovery.
>
> **Service of and answer to interrogatories**
>
> (2) A party to an action may serve on any other party, who is or has been a director, officer, partner, agent, employee or external auditor of a party, interrogatories in Form 26 relating to a matter in question in the action, and the person to whom the interrogatories are directed shall, within 21 days, deliver an answer on affidavit to the interrogatories. The party serving the interrogatories shall serve all other parties of record.
>
> …
>
> **Application to strike out interrogatory**
>
> (8) Where a party objects to an interrogatory on the grounds that it is not necessary for disposing fairly of the action or that the costs of answering would be unreasonable, that party may apply to the court to strike out the interrogatory, and the court shall take into account any offer by him or her to make admissions, to produce documents or to give oral discovery.

[29] Rule 1(6) sets out the object of the *Rules* generally:

> (6) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,
>
> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
>
> (c) the complexity of the proceeding.

[30] Prior to the *Rules of Court* becoming effective on September 15, 2008, there was considerable debate by the Rules Committee about the value of interrogatories. The Court decided to retain them so long as they met the purpose of time- and cost-effectiveness and reduced or eliminated the need or time required for oral examination for discovery.

[31] Although Rule 29(1) does not appear in the former British Columbia Rule 29 on interrogatories, the British Columbia case law before 2010 is nonetheless helpful. It should also be noted that the British Columbia Supreme Court *Civil Rules* changed on July 1, 2010. Whereas Rule 29 provided for interrogatories as of right, Rule 7.3(1) permits interrogatories only where the party to be examined consents or the court grants leave. The reasons for abandoning the former interrogatories Rule in British Columbia were expressed in a 2006 document entitled *Effective and Affordable Civil Justice*, a Report of the Civil Justice Reform Working Group to the Justice Review Task Force, at pages 25 and 27:

> Many lawyers have commented that while discovery tools have successfully eliminated trial by ambush, they have replaced it with something that may be as bad or worse – trial by avalanche. We compared approaching the discovery

> stage of litigation to standing on the edge of a dark abyss. As litigants move forward they are required to descend into the abyss, and only the wealthiest are able to crawl up and out the other side.
>
> …
>
> In addition to document exchange, the discovery phase of litigation also includes requests to admit facts, and interrogatories. While we believe that Notices to Admit have a very useful purpose, we have heard many complaints about the use and misuse of interrogatories. In today's word-processed world, interrogatories can be cranked out by computers without sufficient thought to their purpose and usefulness. They are typically strategically answered by lawyers, not by the parties. They are time-consuming (and therefore costly) to answer, are often answered vaguely, and generally do not produce enough of a benefit to justify the costs. Interrogatories are sometime used for tactical reasons to harass the other party or delay the proceedings.

[32] The Report continued on to state that interrogatories typically have a high cost with little benefit.

[33] In *Hou v. Wesbild Holdings Ltd.* (1994), 98 B.C.L.R. (2d) 92 (S.C.), (sometimes referred to as *Tse-Ching v. Wesbild Holdings Ltd.)*, Baker J. set a list of requirements for and limitations on the use of interrogatories (at para. 15):

1. Interrogatories must be relevant to the matter in issue;
2. Interrogatories must not be in the nature of cross-examination;
3. Interrogatories must not include a demand for discovery of documents;
4. Interrogatories should not duplicate particulars;
5. Interrogatories should not be used to obtain the names of witnesses;
6. Interrogatories are narrower in scope than examinations for discovery;
7. The purpose of interrogatories is to enable the party delivering them to obtain admissions of fact in order to establish his case and provide a

foundation upon which cross-examination can proceed when examination for discoveries are held; and

8. Interrogatories are only one form of discovery. The court may permit the party interrogated to defer its response until other discovery processes have been completed, including examinations for discovery.

[34] In *Hou*, the interrogatories were struck as they would not promote the speedy and inexpensive determination of a just result and because they were complex, circular and "frankly, boggling".

[35] I interject to say that in this jurisdiction, asking for the name of a relevant witness is not objectionable.

[36] In *Plumrose Inc. v. A & A Foods Ltd.*, [1994] B.C.J. No. 2250 (S.C.), at para. 6, Boyd J. reviewed *Hou* and concluded at para. 16 that interrogatories that seek production of documents or amount to cross-examination are improper. However, she concluded:

1. The mere fact that the interrogatories posed questions that required the defendant to review documents is not objectionable;
2. Requiring the defendant to make inquiries is not objectionable, unless the cost is unreasonable;
3. Requiring the defendant to make inquiries that are not within the knowledge of the defendant are not objectionable, unless the cost is unreasonable;
4. There is no requirement that the defendant be examined for discovery first;

5. Questions relating to the facts in an expert report submitted by the defendant were not objectionable.

[37] In *Plumrose*, Boyd J. concluded that the interrogatories were appropriate and ordered that they be answered. Neither of the British Columbia cases set out the actual wording of the interrogatories.

[38] It is important to stress that the Yukon *Rules of Court* specifically state that:

1. The purpose of interrogatories is to obtain evidence in a timely and cost effective manner;
2. The purpose of interrogatories is to reduce or eliminate the need or time required for oral discovery;
3. Interrogatories must be necessary for disposing fairly of the action and the costs of answering must not be unreasonable;
4. Interrogatories are subject to the general object of the rules to secure the just, speedy and inexpensive determination of every proceeding on its merits;
5. Finally, the amount of time, process and expense must be proportionate to the court's assessment of the dollar amount in the case, the importance of the dispute to Yukon jurisprudence and the complexity of the proceeding.

[39] At issue in the case at bar is whether interrogatories in Yukon are narrower in scope than examinations for discovery and whether they can be in the nature of cross-examination.

[40] The case of *Ross River Dena Council* relates to a small Yukon First Nation that has not settled its land claim and is suing the government of Canada on the implications

of the 1870 Imperial Order with respect to Rupert's Land and the North-Western Territory and the obligation of Canada to negotiate honourably, among other things. Gower J. relied upon the comments of Hugessen J. in *Montana Band v. Canada*, [2000] 1 F.C. 267, who observed that, in complex historical cases, the Crown has "a particular duty to be open and frank in its disclosures". Without creating special rules for Aboriginal claims, Gower J. applied that principle to specific interrogatories of the First Nation about Canada's pleadings which Canada refused to answer on the ground that the question sought a legal conclusion. Gower J. ultimately ruled that it was not objectionable to question Canada on its current legal position or positions it may have taken in the past.

[41] Counsel for the plaintiff relies upon the statement in paras. 25 and 26 of *Ross River Dena Council* that the addition of sub-rule 29(1) in the Yukon *Rules* "arguably" expands the ambit of our Rule 29 significantly beyond that of British Columbia's. I do not take issue with that assertion in the context of that case to the extent that it refers to "evidence" and the principle that Rule 29 can be used to reduce or eliminate the need or time required for oral discovery. However, it cannot be interpreted to permit cross-examination on collateral issues when the object of Rule 29(1) requires that interrogatories be cost effective and reduce or eliminate oral discovery.

[42] As I understand the *Ross River Dena Council* case, the First Nation did not conduct oral examinations for discovery and, in effect, used interrogatories for that purpose. Hence, the expansive interpretation of Rule 29(1) was consistent with the *Rules of Court* in that case because it was cost effective and eliminated the need for discovery.

DISPOSITION

[43] In my view, a significant objection to these interrogatories lies with their timing. There will be, at the very least, the delay of a year in this court action before there will be a determination of the boundaries of Claims 7 and 8. This makes it objectionable to ask questions that require specific answers to relating to Claims 7 and 8 when the legal boundaries have not been determined. While the Court could simply adjourn or stay the requirement to respond, there are other concerns.

[44] It is apparent that the defendants' mining operation on Eureka Creek is operated by Mr. Cahoon and not Mr. Fanslow. It is objectionable to impose lengthy and detailed interrogatories upon Mr. Fanslow, who appears to be in the background with respect to this dispute. I have been advised since hearing this application that Mr. Fanslow has been struck as a defendant.

[45] There is no doubt that the questions in these interrogatories are in the nature of cross-examination on the statements of defence and documents disclosed. In addition, the cross-examination focusses on collateral issues well beyond the crucial issues of where the mining took place, the amount of gold produced and the costs of producing the gold.

[46] Rule 29 requires that interrogatories be timely and cost effective. In *Ross River Dena Council,* that objective was clearly met, given the context of a small First Nation challenging Canada. Interrogatories in that case met those objectives as they were concise, straightforward and relevant.

[47] These interrogatories are not going to contribute to the speedy or inexpensive determination of this case. They are neither timely nor cost effective. They are designed

to nail down every collateral issue that can be gleaned from the Statements of Defence and document disclosure. I am not suggesting that there is not some factual complexity in this boundary dispute. However, these interrogatories are in no way likely to reduce the time required for examination for discovery. They unfortunately provide a clear illustration of the "avalanche" metaphor and are more akin to a strategy of harassment that requires the defendants "... to descend into the abyss, [where] only the wealthiest are able to crawl up and out the other side."

CONCLUSION

[48] I conclude that these interrogatories are premature, not cost effective, and offer no assurance of reducing or eliminating oral discovery at this stage of the proceeding. The interrogatories are struck.

[49] Counsel may speak to costs, if necessary, in case management.

_____

VEALE J.