

CANADA / JUDGMENT

AM Gold Inc. v. Kaizen Discovery Inc.

2020 BCSC 1097

COURT

Supreme Court of British Columbia

DECIDED

17 July 2020

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2020 BCSC 1097 AM Gold Inc. v. Kaizen Discovery Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

AM Gold Inc. v. Kaizen Discovery Inc.,

2020 BCSC 1097

Date: 20200717

Docket: S176227

Registry: Vancouver

Between:

AM Gold Inc.

Plaintiff

And

Kaizen Discovery Inc.

Defendant

Before: Master Elwood

Oral Ruling Re Application for Further Discovery of a Representative Witness

In Chambers

Counsel for the Plaintiff:

B. Brock

K. Baim

M. Turcott, Articled Student

Counsel for the Defendant:

D. Brown

M. Teetaert

Place and Date of Hearing:

Vancouver, B.C.

July 16-17, 2020

Place and Date of Ruling:

Vancouver, B.C.

July 17, 2020

- [1] THE COURT: The plaintiff applies for an order that the defendant produce its representative for the purposes of discovery, Matthew Horner, for three further days of examination for discovery. The plaintiff also seeks an order that the defendant forthwith pay the plaintiff's costs thrown away of and incidental to Mr. Horner's first day of examination.
- [2] Mr. Horner was the president and chief executive officer of the defendant, Kaizen Discovery Inc. ("Kaizen"), during the material time period in this case. Mr. Horner is one of four individuals identified by the defendant as being a key custodian of documents and an individual who was involved in all of Kaizen's affairs during the relevant time period. He is listed as one of Kaizen's witnesses for a trial that begins on August 4, 2020.
- [3] I am told that Mr. Horner's name appears in many documents in this case, including news releases, minutes of board meetings, minutes of technical committee meetings, presentation materials, emails, and letters.
- [4] The plaintiff submits that three further days of examination with Mr. Horner are required to afford the plaintiff meaningful discovery, on two broad grounds:
- 1) Mr. Horner's inability or unwillingness to provide clear, complete, and substantive evidence, or to prepare himself for examination; and
 - 2) the complexity of the case, the large production of documents, and a significant claim of damages, up to something approaching \$5 million.
- [5] The action arises out of an agreement pursuant to which Kaizen acquired all of the shares of the plaintiff, AM Gold Inc., in a subsidiary that owned mineral rights in a mining project in Peru known as the Pinaya Project. The plaintiff alleges a number of misrepresentations relating to nature and value of Kaizen and its portfolio of mining projects, including a project in Nunavut called Coppermine. A second aspect of the plaintiff's case is an allegation that Kaizen illegally entered on to the Pinaya Project to obtain soil and water samples and

conducted an environmental study on contamination issues that ought to have been, but was not, disclosed to the plaintiff.

- [6] The plaintiff conducted a one-day, four-hour examination of Mr. Horner on June 19, 2019. At the end of that day, the plaintiff's counsel adjourned the examination for discovery. During the discovery, Mr. Horner professed a lack of knowledge or a lack of memory on a number of matters in question in the action. The plaintiff points to a lengthy list of responses in which Mr. Horner testified that he could not remember. The plaintiff also characterizes some of Mr. Horner's evidence as evasive, irrelevant, and unresponsive, and provides examples.
- [7] Mr. Horner was the chief executive officer of Kaizen from 2004 to March 2016. In May 2017, he became the CEO of Aurvista Gold Corporation, now called Maple Gold Mines Ltd. Mr. Horner deposes that he has had no continuing connection to Kaizen or its ownership since May 2016. Mr. Horner deposes:

When I was CEO of Kaizen, I was responsible for overseeing the entire business and affairs of Kaizen, but I was not involved on a day-to-day basis in every aspect of that business. In many cases, I was not personally involved in or even aware of the details relevant to the Pinaya Project and the Coppermine project that appear to be the main subject matter of this lawsuit.

- [8] In advance of the discoveries, the plaintiff asked Kaizen to nominate a person to be examined. Kaizen advised that a Mr. Steven Vanry, who I understand to be the Vice-President of Exploration, was the most knowledgeable witness. The plaintiff rejected this nominee and selected Mr. Horner. Once Mr. Horner was selected by the plaintiff, defence counsel informed the plaintiff's counsel that:

Mr. Horner advises he has very little recollection of the facts related to this matter and suggested it might be more efficient for you to instead provide him with written questions for his written response. I think there is a reasonable chance that any discovery will consist largely of requests and undertakings, and so wanted to check first whether the idea of proceeding with written questions would be of interest to you. So we'd be willing to facilitate such a process.

- [9] Unknown to the plaintiff's counsel at the time, Mr. Horner also experienced some tragic and traumatic events in mid-2016, which he deposes had a profound emotional and psychological impact on him and resulted in a great deal of memory loss for a period of more than a year before and after those events.
- [10] At the examination, Mr. Horner was asked to describe what efforts he made to prepare. The question was objected to on the basis of relevance and privilege.
- [11] On an application to extend the time for an examination for discovery, the court must consider the factors set out in Rule 7-2(3), including the witness' responsiveness.

[12] I have reviewed the transcript extracts provided by both parties. While I agree with the plaintiff that the number of occasions on which Mr. Horner testified that he could not remember the matter in question is remarkable given his role in the events and documents, I am unable to conclude that his failure to recall those matters was evasive, deliberate, or dishonest.

[13] I accept Mr. Horner's explanation that his failure to recall was the result of the following factors:

- 1) the nature of his role as CEO of an active mining company;
- 2) the time that has passed since the events in issue;
- 3) the number of documents that were potentially relevant for his examination; and
- 4) in some part, the personal trauma described in his affidavit.

[14] On my review of the extracts of the discovery, Mr. Horner provided information where he could. Where he could not, he pointed to potential sources of information or to documents that might refresh his memory. Mr. Horner frequently suggested that Mr. Vanry, the defendant's nominee to be examined, would be a source of the information sought.

[15] Rule 7-2(22) provides that:

In order to comply with subrule (18) or (19), a person being examined for discovery may be required to inform himself or herself and the examination may be adjourned for that process.

[16] In this case, Mr. Horner was not asked to inform himself on most of the matters for which he professed a lack of recall. The examination for discovery was not adjourned for the purpose of Mr. Horner informing himself.

[17] On the other hand, I am unable to assess the defendant's assertion that Mr. Horner made reasonable efforts to prepare prior to the discovery so as to provide the plaintiff with a meaningful right of discovery without unnecessary adjournments. This is because the defendant has asserted privilege over information relating to Mr. Horner's preparation. That claim of privilege is not before me, but I think, in all fairness, the defendant cannot be heard to provide evidence through counsel of what the preparation was in the circumstances.

[18] Turning to the other factors under Rule 7-2(3), I do not accept the plaintiff's characterization of Mr. Horner's evidence as evasive, irrelevant, and unresponsive. Some answers were indeed very general in nature; but, on my review, they were in response to very general questions. Mr. Horner described matters at a high level, but the plaintiff's counsel did not follow up or, in most cases, drill down on his answers to elicit more specific and meaningful evidence.

- [19] Moreover, some questions I would describe as in the nature of a memory test that would be very difficult for any witness to answer, let alone a witness in Mr. Horner's position. Mr. Horner at times said that he would need documents in front of him, which I think was reasonable in the circumstances. Many questions called for information that would be contained in the documents. At times, documents that might have assisted Mr. Horner were not shown to him.
- [20] Having said all of this, I think it is also fair to say that Mr. Horner was a challenging witness to examine. His memory of detail was worse than what one would reasonably anticipate for a person so closely involved in the events, even with the notice from defence counsel that he may have limited recollection. Mr. Horner also seemed at times, in my view, reluctant to admit uncontroversial facts and showed flashes of impatience with some of the questions being asked. I would not go so far as to characterize his responses as evasive or uncooperative. However, it is necessary, in my view, with a witness like Mr. Horner, to take extra time to patiently exhaust his memory, follow up on his answers, determine who might have information that he cannot remember and ask that he inform himself.
- [21] In October 2019, when efforts were first made to have this application heard, defence counsel suggested that the plaintiff first conduct one further day of examination of Mr. Horner and see whether doing so was sufficient before deciding to proceed with the application. The plaintiff did not take the defendant up on that offer, and it was withdrawn. As I understand it, the defendant's current position is that it is now too close to trial to produce Mr. Horner even for the three hours remaining in the seven-hour entitlement under the Supreme Court Civil Rules.
- [22] In my view, Mr. Horner must be produced for the remaining three hours provided under the Rules. Although it would have been preferable if the plaintiff had agreed to complete the seven hours when it was proposed in October 2019, I do not think the defendant can withhold the full seven hours or make a second day of examination for discovery conditional on the plaintiff adjourning the application to determine the full scope of further discovery. Moreover, I think in the very unusual circumstances we find ourselves in in the summer of 2020, some latitude needs to be given to litigants for the difficulty of bringing these matters before the court in a more timely manner.
- [23] Further, I find that some additional time is justified by the nature of Mr. Horner's evidence to date, the complexity of the case, the number of potentially relevant documents, and the amount of money that may be in issue in this action.
- [24] However, I will not grant the plaintiff three additional days. The plaintiff has not provided a plan for how that time would be used. I am not convinced that it would be productive to allow the plaintiff time to go back over matters Mr. Horner has testified he cannot recall, unless there is a realistic means of refreshing his memory. Further, I think there needs to be an incentive for the plaintiff to be efficient and focus on the real issues at a trial that will commence shortly. I am also taking into consideration the need for both parties to prepare

for trial in the short time that remains.

- [25] For all of these reasons, there will be an order that the defendant produce Mr. Horner for a continued examination for discovery for up to a maximum of six hours, consisting of the three hours remaining under the normal entitlement of seven hours and an additional three hours. The continued examination will occur over no more than two days and conclude by July 29.
- [26] I will direct that at least two clear business days prior to the continued examination, the plaintiff will provide Mr. Horner with a list of documents, not to exceed 20 documents, on which the plaintiff requests that Mr. Horner refresh his memory, and an outline of the topics on which Mr. Horner will be examined. The plaintiff will not be limited to these documents or questions, but the plaintiff's counsel should bear in mind the evidence that Mr. Horner has difficulty providing meaningful discovery on matters on which he has not had an opportunity to refresh his memory or inform himself.
- [27] The application for an order that the defendant pay the costs of the first day of the examination for discovery is dismissed.
- [28] As the plaintiff was substantially successful on this application, the plaintiff is entitled to costs in the cause.

"Master Elwood"

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