

CANADA / JUDGMENT

AM Gold Inc. v. Kaizen Discovery Inc.

2020 BCSC 2179

COURT

Supreme Court of British Columbia

DECIDED

30 June 2020

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2020 BCSC 2179 AM Gold Inc. v. Kaizen Discovery Inc. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: AM Gold Inc. v. Kaizen Discovery Inc., 2020 BCSC 2179 Date: 20200630 Docket: S176227 Registry: Vancouver Between: AM Gold Inc. Plaintiff And Kaizen Discovery Inc. Defendant Before: The Honourable Mr. Justice Groves Oral Ruling Re Various Applications Including to Seal an Affidavit Counsel for the Plaintiff: B. Brock Counsel for the Defendant: D.R. Brown D. Crimeni Place and Date of Hearing: Vancouver, B.C. June 30, 2020 Place and Date of Ruling: Vancouver, B.C. June 30, 2020

- [1] This is an application brought on by the defendant, which requests essentially four prayers of relief, although it is more detailed than just three. The character of the three aspects of the relief that are sought are:
- 1) An order that the affidavit of Asmita Panchal, sworn on March 6, 2020, be sealed pursuant to a sealing proposal attached as schedule A to the notice of application of June 15, 2020;
 - 2) The second series of prayers are for what are called and what is described as "further and better evidence" in respect of a March 6, 2020 application. Basically it is a request in regards to an application for particularization and identification of evidence or particularization generally as is set out in the rules;
 - 3) An application that a certain notice of application currently set with other applications for July 16 and 17 be adjourned; and
 - 4) Costs.
- [2] The circumstances and the facts as I find them in regards to the application to seal the sworn affidavit of Asmita Panchal, March 6, 2020, appear to be these. There is an application generally in this litigation, not before the court today, brought on by the plaintiff which is to be heard in July 2020. This application requests liberty to be relieved of the implied undertaking in litigation, in order to use documents disclosed in this litigation as the basis for other litigation. As part of that application, counsel for the defendant sought from the plaintiff to disclose the evidence on which they intended to rely at that application set for July 15 and 16. In response to that request comes the affidavit of Asmita Panchal. That is the affidavit that is being requested to be sealed.

- [3] It perhaps goes without saying, but I will re-state what is perhaps obvious, or perhaps obvious to me, and I hope I get it right, that documents that are disclosed in litigation do not become part of the public record unless and until those documents are presented publicly at trial of the action. As everyone knows, most court cases settle. As everyone knows as a result, documents disclosed in litigation do not become public. It is only when the documents are referred to in open court that the implied undertaking is vitiated. Those documents attached to Asmita Panchal's affidavit are documents which have not become public as of yet in the action between this plaintiff and this defendant, and they are only produced by way of affidavit for the purpose of the plaintiff's application. They are the documents of the defendant, and they are documents to which the defendant has an expectation and a right to believe the implied undertaking applies.
- [4] There has been cited to me numerous bits of case law about the importance of documents with the public interest being allowed to be public and the importance of public access to court and freedom of information related to what is being litigated in court. None of those cases, in my view, apply to a circumstance where as a result of the need for an interim application, and an interim application only, an interim application which may or may not be successful, documents became public, in the sense that they were filed in the court file and would become public. It would seem to me that the overriding principle of confidentiality and the overriding principle of the maintenance of an implied undertaking is an important principle to rely on and that is more important in this circumstance than the public's right to know, which is what would happen in the affidavit if not sealed.
- [5] Essentially what I am saying in a most inarticulate way, for which I apologize, is this. These documents are currently subject to an implied undertaking. There is an application to waive that implied undertaking. If that application is dismissed, then these documents would, in theory, still be bound by the implied undertaking and not subject to public disclosure. As such, in my view, it is important that these documents be sealed, at least and until such time as a determination is made as to whether or not the plaintiff have the authority to step away from the implied undertaking and use these documents for a purpose other than litigation. As a result of what I have said, I am granting paragraph 1A of the application.
- [6] In regards to the request for essentially further and better particulars, Rule 3-7 of the Supreme Court Civil Rules is the rule on which particulars are generally ordered. That is, of course, in the pleadings section and it relates to pleadings themselves, not applications. I agree with counsel for the plaintiff here that there is no basis that I can see in the rules for an order sought by the defendant. There is no basis, in my view, for the court to order particularizations of claims made in applications as opposed to pleadings.
- [7] It is true that the court has a general discretion to impose terms and conditions and give directions it considers will further the object of the rules generally. That said, there is no specific rule which allows a party to ask that a request in a notice of application be particularized. Even if there was and even if I am wrong on that point, I am satisfied that there is sufficient information in the notice of application and in the evidence provided to

allow this defendant to understand the nature of the application and the test it has to meet in opposing the application. I agree with Mr. Brock when he says that the allegations which give rise to the application for relief from the implied undertaking are sufficiently set out for the purposes of the July application, and they are set out not only in the application but they are set out by providing the evidence of Asmita Panchal which, of course, are the defendant applicant's own documents.

- [8] It may be the case that the applicant here, the defendant, will have to review their own documents and consider the detailed allegations set out in the notice of application, particularly the Factual Basis at page 7, the detailed allegations of alleged misconduct which could give rise to separate litigation. That is something you simply have to do in preparation for an application, but it is not a difficult task when in fact you know what the claims are that are being made and you simply have to review some of your own documents to anticipate what the plaintiff here, AM Gold Inc., may in fact be arguing.
- [9] For reasons that I think the matters are sufficiently particularized for the purpose of an application and for the reason that I am not aware of any court authority or rule other than the general rule about court's official conduct on its own process that would allow someone to allow for particularization of a claim made in an application as opposed to a pleading, the relief sought in this notice of application in paragraphs 1B(1) through (6) are all dismissed.
- [10] I would further add that in regards to tab 1B(5), I know of absolutely no authority for a party to identify who a proposed new party would be in an "as-of-yet" filed proceeding. That just creates a public mischief and creates a circumstance where someone has to disclose who a party may be in litigation, for litigation they may not ever advance. In any event, for the reasons noted, paragraphs 1B(1) through (6) are all dismissed.
- [11] Turning to paragraph 2 in the notice of application of the defendant filed June 15, 2020, that is an application that the implied undertaking application set for July 16 and 17 be adjourned. I see no basis here for that. It seems to me to be a relatively straightforward application. There are three applications set for two days. It is an application which would require the defendant to review some of its own documents, something it would no doubt be doing in anticipation of trial in any event. I do not see the basis to adjourn that application. Counsel will simply have to put the resources to mind, and they have two days for three applications, and it does not appear to me that any basis has been made out for adjourning in advance that application. It may very well be that there may be some reason which gives rise to an adjournment application that can be put forward to the chambers judge hearing this matter on July 16 and 17, but on the basis of the materials before me, I do not see any basis for the adjournment application. Paragraph 2 of the notice of application is dismissed.
- [12] Costs of this application will be in the cause. "J.R. Groves J." GROVES J.

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