

CANADA / JUDGMENT

First Majestic Silver Corp.

2015 BCSC 1517

COURT

Supreme Court of British Columbia

DECIDED

27 August 2015

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2015 BCSC 1517 First Majestic Silver Corp. (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: First Majestic Silver Corp. (Re), 2015 BCSC 1517 Date: 20150827 Docket: S156491 Registry: Vancouver Re: First Majestic Silver Corp. Before: The Honourable Mr. Justice Myers Corrected Reasons: The cover page and header of these reasons were corrected on August 28, 2015 Reasons for Judgment Counsel for the Petitioner: Howard Shapray, Q.C. Brad Cramer Counsel for Hector Davila Santos and Minerales y Minas Mexicanas, S.A. de C.V.: David P. Church, Q.C. Ian Schildt Place and Date of Hearing: Vancouver, B.C. August 17, 2015 Place and Date of Judgment: Vancouver, B.C. August 27, 2015

- [1] In 2013, I found Mr. Davila liable for breach of fiduciary duty and awarded the plaintiffs equitable compensation of \$US 93.84 million: 2013 BCSC 717. (The petitioner, First Majestic Silver Corp., was one of the two plaintiffs in action S078106.) I found his company and co-defendant Minerales y Minas Mexicanas, S.A. de C.V. ("MMM") to be jointly and severally liable. After further hearings I ordered that the compensation be converted to the Canadian equivalent of \$96,308,000. In addition, I awarded both pre-judgment and post-judgment interest. All items were dealt with in one order.
- [2] Mr. Davila resides in Mexico and MMM is a Mexican company. They have no assets in British Columbia. There is no treaty for the enforcement of judgments between British Columbia or Canada and Mexico: Mexico is not a reciprocating state under the Court Order Enforcement Act, R.S.B.C. 1996 c. 78, and Canada is not a signatory to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 8 May 1979, 1439 UNTS 87, 18 ILM 1224.
- [3] First Majestic commenced enforcement proceedings in Mexico. On June 19, 2015, the Court of the State of Jalisco declined to enforce the judgment. It said: it should be stated that one of the main requirements for undertaking a proceeding for recognition and enforcement of a foreign judgment is that the judgment for which extraterritorial execution is sought must be transmitted by way of formal petitions of the judge or letters rogatory which include the necessary notices for the parties to appear before the receiving Mexican court. And: the exhibits produced with the claim do not include a formal petition or international letters rogatory made by the competent foreign court requesting recognition and enforcement of

the judgment in question, and the claimants have thus not complied with one of the necessary procedural requirements for prosecution of this motion.

- [4] First Majestic then brought this petition and asks that, using the inherent jurisdiction of this Court, I issue a letter of request to the Mexican court in the following form: LETTER OF REQUEST
1. This Court requests that the proper Court with jurisdiction in Mexican United States ("the Mexican Court") recognize and enforce this Court's final and enforceable Order of April 24, 2013 ("April 24th Order") as the Mexican Court considers to be appropriate.
 2. A copy of this Court's April 24th Order is attached hereto and marked Schedule "A".
- [5] First Majestic sought to have this heard *ex parte*; however counsel for Mr. Davila and MMM arrived at the hearing. I refused to order that the file be sealed and refused to order a publication ban. I directed that the petition be heard several days later with short leave, with argument from both sides.
- [6] Counsel for both sides have not found any authority directly on point. First Majestic argues that what I am being asked to do is similar to a letters rogatory request, which the courts have regarded as within their inherent jurisdiction, although the area is now dealt with in statutory regimes. For example, in *A-Dec Inc. v. Dentech Products Ltd.*, [1988] B.C.J. No. 1875 (S.C.), Bouck J. stated: Letters Rogatory are sometimes known as Letters of Request. They constitute a request from one judge to another asking for the examination of a witness by commission in the jurisdiction which is foreign to the requesting court: Jowitt's Dictionary of English Law, 2nd Ed., Vol. 2, page 1588. While the procedure for making an order in this province is now governed by statute, it seems the Supreme Court of British Columbia also possesses an inherent authority to respond to a request for such an inquiry in the absence of statute: *Wigmore On Evidence*, McNaughton Rev., Vol. 8, page 92; "Although the power today is frequently expressed in statutes, it should not be doubted that any domestic court has inherent power at common law to issue and to honor letters rogatory."
- [7] In *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, Ch. 1992 P. No. 8711, the court in England was asked to issue a letter of request to a court in the United States for assistance in compelling the discovery of documents. The defendant argued that the court had no jurisdiction to issue the request. This was so because the relevant rule authorised the examination of a person as a witness before a foreign court and that person can be required to produce documents, but it did not provide for a letter of request for document production only. Nicholls V.-C rejected that argument. At p. 149, he concluded that the request was within the court's inherent jurisdiction: In my view the court's power to issue a letter of request stems from the jurisdiction inherent in the court. Inherent in the court is power to do those acts which the court needs must have to maintain its character as a court of justice: see Lord Diplock in *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd.* [1981] A.C. 909, A 977. It is important to keep in mind that when a letter of request is issued, the English court is doing no more than make a request to a foreign court

for assistance. It is not making an order. It is not making an order addressed to a foreign court or to witnesses. Further, the subject matter on which assistance is sought, the obtaining of evidence, is one over which the court has long exercised close control.

- [8] Mr. Davila and MMM argue that there is no scope for inherent jurisdiction where there is a comprehensive statutory regime in place and the Court Order Enforcement Act is such a scheme: section 30 allows this Court to issue a certificate for registration of its judgment in a foreign reciprocating state.
- [9] I accept the proposition that inherent jurisdiction may be removed by a comprehensive legislative scheme. However, the Court Order Enforcement Act is not such a comprehensive scheme. The Act itself recognises this in section 38: 38 (1) Nothing in this Part deprives a judgment creditor of the right to bring action on the judgment, or on the original cause of action,
- (a) after proceedings have been taken under this Part, or
 - (b) instead of proceedings under this Part.
- (2) The taking of proceedings under this Part, whether or not the judgment is registered, does not deprive a judgment creditor of the right to bring action on the judgment or on the original cause of action. Under the common law, Canadian courts regularly enforce judgments from non-reciprocating states by way of an action on the foreign judgment. Further, the Act does not prevent a successful litigant enforcing a judgment of this Court in a foreign non-reciprocating state.
- [10] Mr. Davila and MMM highlight the obvious difference between a letters rogatory type of request and what is being asked for here, in that I am not requesting a foreign court for assistance in an ongoing case in this jurisdiction. In response, First Majestic points to the fact that courts have frequently said they have an interest in seeing their judgments enforced. That is correct; however, the question becomes whether that goes so far as to merit what the petitioner is asking for here.
- [11] The principles of judicial comity and order and fairness dictate that foreign judgments will, under the common law, be recognised here if jurisdiction was properly taken and there was no breach of natural justice or fraud in procuring the judgment: *Beals v. Saldanha*, 2003 SCC 72. The same principles justify an expectation that judgments of this Court will be recognised by foreign courts.
- [12] What is being asked for here is merely a request for recognition. It is, in essence, a formality. While it is different than a letters rogatory request, it is sufficiently analogous to allow me to conclude that the Court does have the necessary inherent jurisdiction.
- [13] The next question is whether I should exercise the jurisdiction. The Court of Appeal has dismissed Mr. Davila and MMM's appeal and the Supreme Court of Canada has denied leave to appeal that decision. There is therefore no doubt that the decision is final. There is also

no doubt that if the circumstances were mirrored, such that a foreign court granted a judgment in similar circumstances, this Court would recognise and enforce it. To refuse to provide the request with the result that a multi-million judgment cannot be enforced in a foreign jurisdiction where Mr. Davila and MMM reside would not comply with order and fairness. It would be overly formalistic and risk bringing the justice system into disrepute.

- [14] Mr. Davila and MMM argued that if I was willing to sign a letter of request, the word "enforceable" should be removed or that it should read "enforceable in British Columbia" to make it clear that I am not stating the order is enforceable in Mexico. I was somewhat inclined to remove the word altogether, since the court should not provide opinions on the law to foreign courts: *Pro-Sys v. Microsoft*, 2015 BCSC 1516. However, the enforceability and finality of the order were part of my reasoning in concluding that the letter should be issued. I think it is obvious that the letter does not refer to enforceability in Mexico, so I have signed the letter in the requested form, which is attached as Schedule 1.
- [15] Since the letter is not a court form, to avoid uncertainty, I also direct the Registry to stamp the form and put it in the court file. "E.M. MYERS, J." SCHEDULE 1 No. Vancouver Registry In the Supreme Court of British Columbia In the matter of First Majestic Silver Corp. and the issuance of a Letter of Request with respect to this Court's Order dated April 24, 2013) THE HONOURABLE) BEFORE) MR. JUSTICE MYERS) AUGUST , 2015)) LETTER OF REQUEST
1. This Court requests that the proper Court with jurisdiction in Mexican United States ("the Mexican Court") recognize and enforce this Court's final and enforceable Order of April 24, 2013 ("April 24th Order") as the Mexican Court considers to be appropriate.
 2. A copy of this Court's April 24th Order is attached hereto and marked Schedule "A". By the Court Registrar No. S078106 Vancouver Registry In the Supreme Court of British Columbia Between: First Majestic Silver Corp., First Silver Reserve Inc. and Minera el Pilo, S.A. de C.V. Plaintiffs And Hector Davila Santos and Minerales y Mina Mexicanas, S.A. de C.V. ORDER AFTER TRIAL) THE HONOURABLE) BEFORE) MR. JUSTICE MYERS) APRIL 24, 2013)) THIS ACTION AND COUNTERCLAIM coming on for trial at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on April 17-20, 2012; April 23-24, 2012; April 30, 2012; May 1-4, 2012; May 7-11, 2012; May 28- 31, 2012; June 1, 2012; June 4-8, 2012; June 11-15, 2012; June 18-22, 2012; June 25-29, 2012; July 20, 2012; November 26-30, 2012; December 3-7, 2012; December 10-14, 2012; January 14-17, 2013; and February 21, 2013; and on hearing Howard Shapray, Q.C., Brad Cramer and Francis Lamer on behalf of the Plaintiffs and David P. Church, Q.C. and Martin Buhler on behalf of the Defendants; AND JUDGMENT being reserved to April 24, 2013: AND UPON SUPPLEMENTAL REASONS FOR JUDGMENT being issued on June 25, 2013 after receipt of written submissions: THIS COURT ORDERS that:
 1. The Plaintiffs are required to elect between the alternative remedies available to them prior to delivery of the reasons for judgment herein.

2. The Defendants Hector Davila Santos ("Davila Santos") and Minerales y Minas Mexicanas, S.A. de C.V. ("MMM") are ordered to pay the Plaintiff First Majestic Silver Corp. ("First Majestic") the amount of \$96,308,000.00 ("Damages Award").
3. Davila Santos and MMM are ordered to pay First Majestic prejudgment interest in the amount of \$260,711.54 pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 ("Interest Award").
4. Davila Santos and MMM are ordered to pay First Majestic the costs of this proceeding pursuant to Scale C in Appendix B of the Supreme Court Civil Rules ("Costs Award") after assessment.
5. Davila Santos is hereby awarded, as against First Majestic, the amount of \$64,583.19 pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 representing simple post-judgment interest on the amount of \$623,579.49 owed by First Majestic to Davila Santos pursuant to this Court's Order dated July 16, 2009, provided however that both of the said amounts of \$64,583.19 and \$623,579.49 shall be wholly paid by being set off against the Interest Award and the Damages Award. This shall operate to pay the Interest Award in full and partially pay the Damages Award by the amount of \$427,451.14.
6. Davila Santos' counsel, Church & Company, shall pay in trust to First Majestic's counsel, Shapray Cramer LLP, the amount of \$14,850,188.26 ("Partial Payment") out of funds held in trust by Church & Company pursuant to the Orders of this Court dated July 16, 2009 and February 23, 2010.
7. The Partial Payment shall operate to partially pay, by the said amount of \$14,850,188.26, the Damages Award.
8. The Plaintiffs' claim with respect to the processing of tailings by the Defendants is dismissed.
9. Davila Santos and MMM are ordered to pay First Majestic post-judgment interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, calculated based upon the annual simple interest rate that is equal to the prime lending rate of the banker to Her Majesty in right of the Province of British Columbia, on the sum of \$95,880,548.86 from April 24, 2013 until June 26, 2013, being \$496,477.36, and thereafter on the sum of \$81,030,360.60 commencing June 27, 2013 ("Post-Judgment Interest Award").
10. Each of Davila Santos and MMM are jointly and severally liable to pay the Damages Award, the Interest Award, the Costs Award and the Post-Judgment Interest Award to First Majestic.
11. Davila Santos' counter-claim for costs and expenses against First Majestic pursuant to the Promissory Note between Davila Santos and First Majestic dated May 30, 2006 is dismissed. THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT: By the Court "Signed" Registrar

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