

CANADA / JUDGMENT

Jorgensen v. San Jose Mines et al

2004 BCSC 1653

COURT

Supreme Court of British Columbia

DECIDED

26 November 2004

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2004 BCSC 1653 Jorgensen v. San Jose Mines et al

Citation:

Jorgensen v. San Jose Mines et al

Date:

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2004 BCSC 1653

Docket:

L023369/

S036753

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

The Honourable Mr. Justice Pitfield

Pronounced in Chambers

November 26, 2004

BETWEEN:

RONALD JORGENSEN, TRANS AG LTD.,

LINDA JORGENSEN, BARBARA LAATSCH, and GEORGE KACHUK

PETITIONERS

AND:

SAN JOSÉ MINES LTD., and
YVONNE COUTU, in her personal capacity
and as Executrix of the Estate of LEO COUTU, Deceased

RESPONDENTS

BETWEEN:

SAN JOSÉ MINES LTD. and WINSTOCK MINING CORPORATION (U.S.)

PETITIONERS

AND:

YVONNE COUTU as Executrix of the Estate of
Leo Coutu, deceased, YVONNE COUTU, MICHAEL HOLLAND,
LEOCO ENTERPRISES, MULTIPLE VIDEO SERVICES LTD.,
IAN BEARDMORE and MOEN and COMPANY

RESPONDENTS

Counsel for San José Mines:

J. Sullivan

Counsel for Yvonne Coutu:

G.D. Dallas

Counsel for R. Jorgensen, Trans AG and 324247 B.C. Ltd.:

I.D. Mackie

Counsel for B. Laatsch and

G. Kachuk:

J. Adelaar

Counsel for I. Beardmore and Moen and Company

M. Hewitt

S. Robertson

- [1] THE COURT: This is an application in action S036753, brought by or on behalf of the defendants, Mr. Beardmore and Moen and Company, whose application is endorsed by the other defendants in the action.

- [2] The application seeks delivery to the defendants of the electronic database which has been used to compile the list of documents delivered by the plaintiffs to the defendants in the action.
- [3] The nature of the "electronic version" to which reference is made is a reference to the application, if you like, of the software program marketed by Summation Blaze, I believe it is called, which was used by the plaintiffs to compile or accumulate and record information in respect of many documents. Some of the particulars recorded are the page numbers of each, about which I will say more presently; the document date; the document type; the author; the co-author and the recipient, where such information can be gleaned from the documents.
- [4] The application arises in the following circumstances. Since December 2002, the court has been engaged in one aspect or another of several disputes relating to the affairs of San José Mines Ltd., Winstock Mining Corporation, Winstock Mining Corporation (U.S.) and a number of individuals, including Ms. Coutu as executor of her late father's estate; Ms. Coutu personally; her husband, Mr. Holland; the companies Leoco Enterprises Ltd. and Multiple Video Services Ltd. in which Ms. Coutu is alleged to have interests, and the alleged participation or involvement of accounting firms and individuals in respect of the affairs of those persons.
- [5] The applications with which the court has been concerned arise out of a basic dispute. It centres firstly on the question of who, among many, are shareholders of the company and in what numbers; what assets are owned by the companies San José Mines Ltd. and Winstock Mining Corporation, a British Columbia company, and Winstock Mining Corporation (U.S.); and the manner in which the affairs of some or all of those companies have been administered, whether properly or improperly, for the benefit of shareholders or those who are not shareholders of the companies.
- [6] The litigation to this point has been, if I can say, vigorously contested. I would say at this point that there does not appear to be much sign of the vigour with which the litigation is pursued abating to any significant degree.
- [7] At the heart of the allegations, whether they be right or wrong at the end of the day, is a claim that Ms. Coutu and others have mismanaged the affairs of one or more of the companies, who are the plaintiffs in the 753 action. At the end of the day, there will be a trial in respect of the issues that are raised by the companies as against those defendants.
- [8] The accountants, Ian Beardmore and Moen and Company, are involved by virtue of the allegation that they have provided accounting advice to one or more of the defendants over a period of time.

- [9] There is mistrust on the part of the defendants towards those who are now in control of the affairs of the plaintiff companies, that control having been gained as a result of the execution, if you like, of court process which resulted in the conduct of an annual general meeting, the election of a board of directors, and the subsequent appointment of officers in those companies.
- [10] "The Court," by which I mean "me" or "I," has been concerned to try to balance the interests of the parties given the hotly expressed opposition of the persons who are now directors and officers of the plaintiffs, towards the conduct of the defendants, and the reciprocal harshly and hotly advanced protestations made by the defendants in relation to the conduct of the plaintiffs.
- [11] I think I can safely say that nobody has been pleased with the course, or at least the process, which has been followed, whether it be the litigants or me, but I would at least say that some progress, more than had been made to December 2002, has been made.
- [12] I continue to be concerned about ensuring that neither side obtain an advantage over the other except as permitted by law. In particular, I am concerned that one side not be advantaged or disadvantaged by the disappearance of documents which are relevant to the issues that have been raised in the litigation, the origin of which goes back to the summer of 1985.
- [13] The processes in which I have been involved to this point have resulted in me taking steps to ensure that documents, to the extent they are still available, have been secured, and safely secured, for benefit of all parties. That initially required the delivery by Ms. Coutu, who was then in control of the affairs of San José Mines Ltd., of all documents in her personal possession and in the possession of the company or companies related to San José Mines Ltd., to Miller Thomson, who were then acting as solicitors for one or other of the parties involved in the many applications which have been before the court.
- [14] Those documents were safeguarded, as far as I am aware and I have no reason to think the contrary, by Miller Thomson, until such time as the firm of Harper Grey Easton became involved in the litigation on behalf of San José Mines Ltd. The involvement of that firm arose from the fact that an application had been brought to remove counsel of record, Mr. Adelaar, from the record on behalf of San José Mines Ltd. because of his involvement with persons alleged to be principals of San José Mines Ltd. and who subsequently became directors. As a result of orders that I made, one of which has been modified by a ruling of the Court of Appeal, Harper Grey Easton became involved as solicitors on behalf of the company.
- [15] The involvement of Harper Grey Easton on behalf of the company required me to accommodate the transfer of documentation from a firm which was no longer involved with the litigation to one which was, but on terms which would ensure a level playing field for all sides. I therefore provided an order in February 2004 which set forth a process by which documents were to be transferred from Miller Thomson to Harper Grey Easton.

- [16] The order was granted February 5, 2004, and subsequently entered on April 8, 2004 with the parties having approved the order as to form.
- [17] In substance, the order provided that Miller Thomson would assume the responsibility in the presence of representatives of Ms. Coutu and representatives of San José Mines Ltd., to number each of the documents that had been delivered by Ms. Coutu to Miller Thomson for safekeeping, pursuant to an earlier order.
- [18] Ms. Coutu was then afforded a period of time in which to inspect the documents so that she could extract therefrom any in respect of which she claimed privilege. The documents were thereafter to be delivered to Harper Grey Easton, who were charged with the responsibility of preparing a list describing each of the documents by numbered page which had been received by them, with a copy of that list to be made available to the parties involved in the litigation.
- [19] I am advised that the numbering process was completed by Miller Thomson. Ms. Coutu exercised, or did not, the opportunity to inspect, but in any event on the assumption that she exercised the opportunity to inspect, did not claim privilege in respect of any of the documentation. The documents were transferred in their entirety from Miller Thompson to the Harper Grey Easton firm.
- [20] That firm chose to compile its list using a database program, which is the Summation Blaze program. The result is that it had the capacity to produce the list. It also had the capacity, by virtue of the application of its software program, to massage the list so as to select and organize documents whether by date, author, recipient or any of a number of other opportunities or alternatives made available by the various field sorts that are available in the program.
- [21] The list of the documents which has been produced by the Harper Grey firm and supplied to the defendants is some 466 pages in length and embraces in excess of 14,000 documents. The documents, by virtue of the order I had earlier made, are to be retained in the original form received from Miller Thomson by the Harper Grey firm. The order which I had provided contemplated that any document that was released from the accumulation of documents would be replaced by a certified copy in order to accommodate the delivery of share certificates, and any other documents that anybody required were to be copies of the originals.
- [22] It follows that the Harper Grey firm is in part in the position of custodian of the documents as well as counsel on behalf of San José Mines Ltd.
- [23] The complaint advanced by the defendants is that the document or the electronic database exists, it has been prepared by Harper Grey Easton, it provides the background to the list, and it should be produced.

- [24] The requirement that I imposed was the production of a list in accordance with a routine that I had described in the order. The routine has been respected in spirit and in substance by all parties.
- [25] It is my opinion that the use by Harper Grey Easton of a software program to facilitate the production of the list is a choice that it made and it is part of that firm's work product.
- [26] I understand that there may be lots of reasons why the defendants should want to have access to the same material as that compiled by Harper Grey Easton, and I can understand the reason and logic that is associated with the claim that everybody would be aided by access to the database compiled by the Harper Grey firm.
- [27] However, I am not prepared to order that solicitors who are opposed in interest have a right to the firm's work product other than the list itself, any more than persons adverse in interest have a right to any other aspect of the material compiled by counsel for use in the course of litigation.
- [28] Harper Grey Easton is prepared to share their work product, but only on the basis that those who acquire it participate in the cost of its preparation. The cost of preparation is not specified in the material before me, but the number of hours associated with the preparation is specified in the material. I think it reasonable to conclude that by virtue of the obligation which the firm had under the order and which it was prepared to accept, some cost would have been incurred in the preparation of the list.
- [29] I am equally satisfied that less cost would have been incurred had the list been prepared in some manner other than that which the firm chose to use to assist it in the conduct of the litigation.
- [30] The order which I am prepared to make in all of the circumstances is that Harper Grey Easton will be obliged to deliver its database and the electronic version thereof to the defendants upon the defendants jointly tendering the sum of \$4,000 to the firm, which represents roughly two-thirds of what one might reasonably expect to be the cost of the work that has been performed to date.
- [31] Each of the parties, or any defendant who pays or contributes to that cost will be permitted, and I so rule, to include that cost as a disbursement of a reasonable amount incurred for the purposes of conducting the litigation in action S036753, such that in the event an order of costs or for costs is obtained by any of them, the amount of the disbursement will be recoverable from other parties.

- [32] Beyond that, I am not prepared to go, with a single exception. That is that one of the complaints made by the defendants is that the document list produced is not organized in chronological form. That results from the fact that the list was prepared in the manner I directed, which was that it conform to the numerical sequence of the documents, which again was directed primarily at avoiding issues of continuity and allegations that documents that were material to the resolution of this litigation had gone missing or been destroyed.
- [33] I am prepared to order that upon request from the defendants, the plaintiffs shall be obliged to provide a revised list, reorganized to the extent the database permits, so as to enumerate the documents in chronological order. Except to the extent I might be regarded as having ruled in any manner in favour of the applicants, the remainder of the application is dismissed.
- [34] The costs of the application will be in the cause.

"I.H. Pitfield, J."

The Honourable Mr. Justice I.H. Pitfield

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