

CANADA / JUDGMENT

Yen v. Ghahramani

2024 BCSC 1053

COURT

Supreme Court of British Columbia

DECIDED

8 May 2024

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2024 BCSC 1053 Yen v. Ghahramani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yen v. Ghahramani,

2024 BCSC 1053

Date: 20240508

Docket: S220213

Registry: Vancouver

Between:

Vincent Yen and 0756383 B.C. Ltd.

Plaintiffs

And

Frederick Ghahramani, 0751846 B.C. Ltd.,

airG Employee Share Ownership Plan Ltd. and airG Inc.

Defendants

And

Vincent Yen, Canfleet Logistics Ltd., Studypug Inc., Studypug Holding Inc., Studypug USA Inc.,
Studypug Holding (HK) Limited, Studypug (HK) Limited,

Manitoulin Global Forwarding Inc., airG Services Inc.

and Tai Management Ltd.

Defendants by Counterclaim

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

B.J. Cabott

Counsel for the Defendants Frederick Ghahramani and 0751846 B.C. Ltd.:

J.D. Shields

Counsel for the Defendant airG Inc.:

K.F. Milinazzo

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

May 8, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 8, 2024

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The application before the court today is for an order that the defendants, Mr. Ghahramani and 0751846 BC Ltd. (the "Ghahramani Parties"), produce an affidavit of documents with respect to this matter in which trial is scheduled to commence in a short period of time, that being on June 10, 2024.
- [3] The history giving rise to this litigation has been set out and summarized in various decisions, including the decision of Associate Justice Bilawich indexed at 2023 BCSC 2081, and myself at 2023 BCSC 1421. In the interests of time, I will not repeat that full history.
- [4] In summary, this matter involves complex commercial litigation which has been described by the parties in various application materials as essentially being a shareholder dispute involving claims of oppression and breach of contract, which have expanded to include not only issues as between the shareholders and the company, airG Inc. ("airG"), but also allegations that other named parties are beneficiaries of, or were involved in, various

wrongdoings of the shareholders in respect of the operations of airG Inc. As such there have been more than one groups of parties who have prepared and delivered a list of documents to date.

- [5] Specifically, while quantity does not necessarily mean quality, to date the disclosure has been extensive, in that some 7,599 documents have been disclosed by the plaintiffs, 34,784 documents by airG, and 429 documents by the Ghahramani Parties.

The Application

- [6] Here, the nub of the dispute on this application, as characterized by the plaintiffs, is that the Ghahramani Parties have "sloughed" off their obligations to comply with the Rules of Court with respect to document disclosure by leaving it to airG to disclose all relevant documents. In this respect the plaintiffs point to the correspondence and the demands made by them to the Ghahramani Parties by which they have sought further document disclosure from the Ghahramani Parties, and specifically Mr. Ghahramani who remains a director of airG and, as such, has care and control of airG documents.

- [7] A further demand for disclosure was made by the plaintiffs by way of letter dated February 10, 2023. In that letter, which complies with R. 7-1(11) of the Rules of Court, the plaintiffs properly particularized which documents they believe ought to have been produced by the Ghahramani Parties, or Mr. Ghahramani personally. Those documents are divided into 26 different categories.

- [8] In response to that letter, counsel for the Ghahramani Parties responded on March 7, 2023, and stated as follows:

my client is not going to duplicate what Faskens [counsel for airG] has done. Such would be a great waste of time, money, resources and is the very opposite of proportional, inexpensive, or prudent.

Of course, where my client has documentation which has not been produced by Faskens, or is his own property, he has listed, or will list, accordingly, as and if required.

My client used the airG facilities for correspondence and documentation.

Such were kept by airG and airG has made discovery of large amounts of material.

- [9] In the March 7, 2023 letter, counsel for the Ghahramani Parties referred the plaintiffs to a February 23, 2023 letter written by counsel for airG which set out the process undertaken in complying with their own disclosure obligations, specifically in response to an accusation by the plaintiffs that airG had essentially done a "document dump".

- [10] The February 23, 2023 letter described airG's disclosure process, noting:

The issues raised by the pleadings span two decades. Over 4 million potentially relevant documents were identified. The task of reviewing them was daunting, and expensive. E-Discovery consultants were engaged to assist counsel and airG in this task.

Three preliminary points bear mention.

1. As your letter accepts, it is not necessary (or practical, reasonable, or justifiable) for counsel to lay eyes on 4 million documents in "document-heavy, complex litigation".
2. Some of the documents which you complain are, on their face, material. For example, the very first document appended to your letter - AIR00008943.
3. "Rolls Royce" production has been provided to you, with an electronic and searchable collection of documents. If you believe there is a 'chaff' remaining in the production, which is an invariable reality when one starts with an enormous dataset, a few clicks of a mouse can resolve any issues you perceive.

[11] Counsel for the airG then concluded as follows with respect to its disclosure process:

The process utilized by counsel to general airG's list of documents can be summarized as follows:

- Over 4 million client documents were initially received, belonging to more than 20 custodians. After processing by a third party consultant, approximately 2.5 million documents were ingested into Relativity. Documents were further culled through email threading, applicable date range, and domain filtering, resulting in a review population of about 1.2 million documents.
- Approximately 860,000 of the 1.2 million documents were suitable for machine learning. Those documents were fed into a TAR tool called Continuous Active Learning ("CAL") that helps to quickly organize data and predict which documents most likely to be relevant or not relevant. CAL learns continuously from coding decisions made by reviewers. To train the CAL model, an initial eyes on review of thousands of documents was performed by counsel.
- Based on those coding decisions, CAL plotted documents on a scale of 1 to 99. Documents ranked 1 are highly unlikely to be Relevant and documents ranked 99 are highly likely to be Relevant. After counsel review, a Cutoff Rank of 58 was selected. Counsel then conducted further tests involving the eyes-on-review of documents to confirm the appropriateness of the selected Cutoff Rank.
- Separately, there were over 390,000 documents that were eligible for TAR. To identify the relevant documents within that dataset, we applied targeted search terms and counsel reviewed those returned hits for relevancy and inclusion in the production.
- Paper documents were also gathered, scanned, and reviewed.
- Once the initial Schedule A population was identified, further privilege was performed by counsel.

- [12] In its March 7, 2023, counsel for the Ghahramani Parties provides a specific response to each of the requested categories of documents being sought in the initial demand. Although each answer was worded slightly different with some referencing more or less detail as to what had occurred with respect to the documents referenced therein, most had the comments: "Faskens has made extensive disclosure of material documentation relating to this request," and that Mr. Ghahramani does not "have anything further".
- [13] Thereafter, on July 10, 2023, the issue was raised again with a further request being made by counsel for the plaintiffs and further dialogue with respect to specific categories of documents with the overall tenure of the plaintiffs' position being that it was not appropriate for the Ghahramani Parties to rely simply on the disclosure of airG in place of their own obligations.
- [14] In the interests of time I will not repeat the content of each of the letters. Suffice it to say, the parties engaged in extensive discussions by letter, without any movement by either party as to their position as to the Ghahramani Parties' obligations to disclosure further documents.
- [15] In essence, the position of the plaintiffs is that the Ghahramani Parties have not complied with their document disclosure obligations and cannot simply refuse to do so on the basis that another party has produced such documents, and the position of the Ghahramani Parties being that their disclosure obligations did not compel them to duplicate the efforts of airG, which had included, as noted, a significant document mining of all of the records that were within the corporate records, using the assistance of professionals in that regard including Deloitte.

Analysis

- [16] This application is an interesting one in that the case authority being relied upon is in the context of what could be described as standard or ordinary litigation where there is little overlap between the parties. Various authorities were put before me in respect of the obligations of each party to individually comply with their disclosure obligation. No one took any issue with those general principles.
- [17] The requirement to disclose documents in the course of litigation is an important and a necessary one, in which each party has an independent obligation, as commented on in the various decisions referenced by the plaintiff, including *Allied Signal Inc. v. Dome Petroleum Ltd.*, [1995] A.J. No. 1097, at para. 10; *British Columbia (Director of Civil Forfeiture) v. Day*, 2019 BCCA 160, at paras. 14 and 48.
- [18] However, as noted in *Thornton v. Swirski-Cowndon*, 2016 ABQB 88, at para. 29 a party is not obligated to adopt as their evidence the evidence of a third party whom they do not control in their personal capacity.

- [19] Counsel relied on various decisions of the Alberta court. Our court should approach the decisions of the Alberta court with some caution with respect to an application for an affidavit of documents, however, as the process for document disclosure in Alberta is significantly different than B.C. in that initial disclosure in Alberta is to be done by an "affidavit of records" in a prescribed form which includes confirmation that the party does not and has never had any other relevant records under its control.
- [20] Regardless, I agree with the comments made in those cases that it is not an answer for any party to refuse to disclose documents on the basis that the opposing party already has them.
- [21] However, the case law being relied upon by the plaintiffs where such comments have been made are generally not in the context before the court today, that being that the documents have been disclosed by another party such that disclosure has been undertaken in accordance with the Rules of Court for the purpose of this specific litigation or matter and, in what has been described as a vary full and detailed disclosure process. Rather, the cases involve scenarios where the disclosing party simply believes that all relevant documents should be in the demanding parties' possession already regardless of the litigation.
- [22] In my view, that is a distinction that is worth the difference in this matter.
- [23] The Rules of Court, and in particular as counsel for the Ghahramani Parties note, the 2010 amendments brought into focus proportionality in respect of the obligations for document disclosure by creating the two-tier process.
- [24] While the obligation to disclose all relevant documents remains, the process now provides the second tier obligation where a party believes that documents have been omitted from disclosure, which are relevant. Here, notably, the application is not one for production of documents that have been so omitted. Although, the demand was made in accordance with the R. 7-1(11) requirements, this application is one to compel the Ghahramani Parties to produce an affidavit of documents.
- [25] Counsel for the plaintiffs advise that the reason the application has taken this form is because the plaintiffs simply have no trust that the Ghahramani Parties have fulfilled their obligations to list all relevant documents because it is clear on its face that the Ghahramani Parties' list of documents does not include a number of documents that are otherwise in Mr. Ghahramani's possession or control, in his capacity as director of airG.
- [26] The plaintiffs rely on *Lamb v. Sun Life Assurance Company of Canada*, 2024 BCSC 201, at para. 23, to support that documents in airG's possession are within Mr. Ghahramani's possession and control and therefore ought to be disclosed by him:
- [23] As discussed in more detail below, Mr. Lamb and DKL submit that the documents requested are not in their possession, power, or control. Those three terms are defined in *Nikolic v. Olson*, 2011 BCSC 125, as follows:

- (1) a litigant is in possession of a document where they have a proprietary interest in it. Mere custody is not sufficient.
- (2) a litigant is in control of the document where they have an enforceable right to obtain the document from the person who has actual possession of it.
- (3) a litigant has power over documents when the litigant has access to the documents, which includes documents in the hands of third parties but to which the litigant has a right of access.
- [27] That may be, but again, the application today is for an affidavit of documents.
- [28] It is clear on the materials that have been filed by airG that they have done a fulsome document disclosure; in fact, so fulsome that they were accused of it being a "document dump."
- [29] There is nothing in the evidence before the court today that leads me to conclude that there is a document, or class of documents, which has not been disclosed in these proceedings. While they may not have been disclosed by the Ghahramani Parties, the explanation by them as to why that is does not lead to the conclusion that significant documents have been omitted. Further, while there were a handful of documents that were not initially disclosed, such as certain agreements that should have been disclosed under the first tier or discovery, once they were requested at the examination for discovery, those documents were provided.
- [30] I agree with counsel for the plaintiffs that document disclosure is to be fulsome; however, the threshold is not one of perfection. In complex litigation such as this it is possible that a document will not be disclosed under the first tier, and in the course of examinations for discovery further documents will be identified and demand made. For the most part, that is what occurred in this matter, with the only exception being the refusal to re-list the documents fully disclosed by airG.
- [31] In other words, the process set out in the Rules of Court has worked, with the relevant documentation being disclosed.
- [32] At para. 38 of *Centura Building Systems v. Blackcomb Mountain Development Ltd.*, 2007 BCSC 939, the court noted:
- an affidavit [of documents] will not be ordered where there has been a genuine dispute about what is producible. [Citation omitted.] Where a case involves a large number of documents, some flexibility may be required. [Citation omitted].
- [33] I agree with that sentiment today.
- [34] The only reason that documents have not been disclosed by the Ghahramani Parties is a dispute as to the necessity to duplicate the list of documents prepared by airG. Notably, counsel for the plaintiffs made no suggestion that the airG disclosure was lacking, but rather rests this application on his view that the Ghahramani Parties had not done the same deep

dive and document mining that airG had, the effect of which was to create distrust that the Ghahramani Parties had met their disclosure obligation. In particular, counsel for the plaintiffs was clear that he is not taking the position that the Ghahramani Parties were required to duplicate the list of documents, but rather that the failure of him to do so somehow creates some spectre of distrust as to the adequacy of the disclosure to date.

- [35] With respect, that is not the test for an affidavit of documents, as commented on in *Gardner v. Viridis Energy Inc.*, 2012 BCSC 1816:
- [52] Rule 7-1(8) permits a court to order that a party provide an affidavit verifying its list of documents when in the absence of any adequate explanation, relevant documents have been omitted from a list of documents. Such an order may also be made where a party has shown a "dilatory and casual attitude to production of documents" leading to an inference that "either deliberately or by wilful indifference relevant documents may be hidden". Rule 7-1(8) should not be rigidly applied in a case involving very large numbers of documents. There must be evidence showing relevant documents have been omitted or that the disclosure has been inadequate: *Copithorne v. Benoit*, 2010 BCSC 130 at paras. 11-14.
- [36] I am unable to conclude that the Ghahramani Parties have shown a dilatory or casual attitude towards their document production, or have not provided a reasonable explanation that is in keeping with the overall objectives of proportionality as to why they did not list the documents in airG's possession, even though they may technically also be in the care and control of Mr. Ghahramani. As commented upon by the court in *Gardner*, R. 7-1(8) ought not be rigidly applied, particularly where there is a complex and extensive level of disclosure as has been made in this case.
- [37] The application is dismissed.
- [38] Costs?
- [SUBMISSION ON COSTS]
- [39] THE COURT: Costs will be in the cause.
- [40] CNSL J. SHIELDS: Can I say, thank you to you and the clerks, two of them today. We are blessed for sitting late and dealing with this matter so expeditiously.
- [41] CNSL J. CABOTT: Yes, thank you.
- [42] THE COURT: And I echo that thanks.
- "Associate Judge Robertson"

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