

CITATION: Mcdonald v. Guyana Goldfields Inc., 2025 ONSC 2431
COURT FILE NO.: CV-20-00638384-00CP
DATE: 20250423

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IAN MCDONALD, JONATHAN DE VOS, and ANDRE NEUENDORFF,
Plaintiffs

– and –

GUYANA GOLDFIELDS INC. and SCOTT CALDWELL, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Vincent DeMarco and Edwina Mayama*, for the Plaintiffs

Sarah Armstrong and Carolyn Flannigan, for the Defendant, Guyana Goldfields Inc.

Chris Young, for Patrick Sheridan (non-party)

HEARD: April 22, 2025

MOTION FOR NON-PARTY PRODUCTION

[1] The Plaintiffs in this proposed class action claim misrepresentation under Part XXIII.1 of the Ontario *Securities Act* (“OSA”), common law misrepresentation, and oppression against Guyana Goldfields Inc. (“Guyana”) and its former executive Scott Caldwell. The action has encountered some procedural difficulties such that neither the motion for leave to proceed under section 138 of the OSA nor certification under section 5(1) of the *Class Proceedings Act, 1992* (“CPA”) has yet been heard.

[2] The Plaintiffs bring this motion under Rule 30.10 of the *Rules of Civil Procedure* seeking production of certain documents from the founder, former director, and former executive chairman of Guyana, Patrick Sheridan (“Sheridan”).

[3] In 2018, Mr. Sheridan was terminated from his positions as executive chairman and director when the CEO of Guyana at the time, Scott Caldwell (“Caldwell”), alleged that Sheridan had conflicts of interests and failures in management that justified his removal. Subsequent to his

removal, Sheridan, along with a number of other prominent shareholders that Plaintiffs' counsel refer to as "Derivative Complainants" took a number of well publicized steps in an effort to alert shareholders and the trading public to what he alleged was serious misconduct, mismanagement, misrepresentations, and other governance failures.

[4] These allegations for the most part correspond with the Plaintiffs' claims. The Fresh As Amended Statement of Claim of January 28, 2022 alleges false and misleading public statements made by Guyana and Caldwell in both core and non-core documents. The impugned statements relate to the December 2017 to March 2019 expansion of an open-pit gold mine owned by Guyana, the Aurora Gold Mine. These statements are alleged to have essentially falsified the Life-Of-Mine (LOM) of the Aurora mine. The time frame of the mine's expansion is reflected in the Plaintiffs' proposed class period.

[5] Plaintiffs' counsel submit that it is noteworthy that most of the misrepresentations that Guyana is alleged to have made were made during Sheridan's time as executive chairman of Guyana, and, in fact, all of them were made during his time as a director of Guyana. Sheridan is therefore an obvious source of information for both sides of the case.

[6] For several months at the end and just after his tenure on Guyana's board – from January 2019 to April 2019 – Sheridan pursued a public campaign in support of his claims of mismanagement and misconduct by Guyana's senior echelon. Plaintiffs' counsel describe this campaign as being on the verge of releasing to the public internal information about Guyana, and they contend that he gave indications that he was prepared to disclose a number of documents to back up his claims. In fact, he had created a website – the "FixGoldGuy" website – devoted to informing investors of his findings about Guyana and his proposals for governance reform for the company.

[7] Ultimately, however, Sheridan settled with Guyana, and withheld those documents as an aspect, or a fallout, of the settlement. This has resulted in the Plaintiffs and the putative class of investors being left without answers to the questions that Sheridan and the supporting Derivative Claimants raised.

[8] The documents sought by the Plaintiffs are described by counsel as:

- (a) Communications and documents created, prepared or exchanged between [Sheridan] and the 'Concerned Shareholders', identified as those individuals that supported the creation of the FixGoldGuy website and the related shareholder movement "Set the Record Straight On Current Board's Misleading Statements", between October 19, 2018 and April 19, 2019; and
- (b) Communication and documents created, prepared, or exchanged between [Sheridan] and any person, excluding any person or their legal representative(s) of GGI (Guyana), between October 19, 2018 and April 29, 2019 that supported the letter from [Sheridan] to GGI, dated on or about April 10, 2019 (together, the 'Sheridan Documents').

[9] As outlined by Plaintiffs' counsel, the questions to which the Plaintiffs seek answers, and which the requested documents hold out the prospect of containing the answers, include:

- (a) broader governance failures;
- (b) maintenance of separate databases between Technical & Sustainability Committee executives and mine operations' staff in Guyana to conceal poor mining practices;
- (c) internal reports with conflicting data about the Aurora Gold Mine's performance;
- (d) documentation showing inflated production forecasts and concealed shortfalls; and,
- (e) the overestimation of gold content and misleading disclosures to the market and the failure to disclose dependencies on equipment purchases and operational plans.

[10] Plaintiff's counsel point out that the documents sought from Sheridan exclude any communications between him and Guyana. What the Plaintiffs seek is production of documents that Guyana does not have – these are communications that are only in the hands of Sheridan himself. Seeking their production from all parties before seeking them from a non-party, as Guyana's counsel state is the proper procedural approach, would likely be a pointless exercise.

[11] The issues with which Sheridan's communications are concerned are the very issues that are at the centre of the allegations set out in the Fresh As Amended Statement of Claim and that will be at issue in the action. They are central to the cause of action and so will be crucial to the analysis under section 5(1)(a) of the *CPA* in the certification motion, and are equally central to the alleged material misrepresentation and so will also be crucial to the analysis under section 138.8 of the *OSA* in the leave to proceed motion. However, the Sheridan Documents on which Sheridan and his supporters based these same allegations, and which were previously either made public or were on the cusp of being made public, are now unavailable to the Plaintiffs and proposed class.

[12] Sheridan has not produced the Sheridan Documents on request, citing the confidentiality provisions in his settlement with Guyana. As a consequence, the Plaintiffs are left to frame their arguments for leave and certification, in the absence of documents that would otherwise have been part of the public record. Plaintiffs' counsel submit that Guyana shareholders have been left without the information they need to assert their legal rights and pursue any recovery.

[13] Plaintiffs' counsel further argue that, given Sheridan's close involvement with the internal decision-making at the company, his public accusations against the company that he created, and his control over the Sheridan Documents, a non-party production Order is justified. Indeed, they make the point that this may be the only way to achieve a fair adjudication of the leave and certification motions that lay ahead of this action. They state that not only are the Sheridan Documents probative of relevant issues, but they appear to be in the exclusive possession of Sheridan. Guyana does not appear to have them and, as indicated, the Plaintiffs and other investors never got to see them before Sheridan withdrew them from sight.

[14] For its part, Guyana takes the position that the action is at too early a stage to compel this kind of advanced discovery from a non-party. The company’s counsel point out that leave and certification both have a gatekeeping function in a case of this nature, and that full discovery is only available if and when those two hurdles have been crossed. They state that this production motion, which is brought prior to the Plaintiffs obtaining leave to proceed under the *OSA*, is “exactly the kind of ‘fishing expedition’ for facts to support a speculative lawsuit that section 138.8 was intended to preclude.”

[15] More than that, they argue that even if the rules pertaining to discovery of non-parties were applied here – prematurely, they would argue – the Plaintiffs have not met the applicable test. Guyana’s counsel submit that there is no evidence to support the Plaintiffs circumventing the discovery rules which would require them to first seek to obtain the documents from a party to the action before seeking to obtain them from a non-party.

[16] In *Kwong v. iAnthus Capital Holdings, Inc.*, 2022 ONSC 1400, at para. 5, Justice Akbarali summarized the case law to the effect that “[j]urisprudence establishes that plaintiffs seeking leave under s. 138.8 of the *Securities Act* have no entitlement to documentary or oral discovery.” The leave motion is designed to be based on matters which the claimants already know, and not on matters which they may or may not learn during the course of protracted pre-trial proceedings. As Justice Belobaba put it in *Mask v. Silvercorp Metals Inc.*, 2014 ONSC 5727, leave ref’d, 2014 ONSC 7381 (Div. Ct.), the plaintiff on a leave motion is not permitted “to engage in a discovery-like ‘rummage’ through the defendant’s corporate files ‘in the hope of uncovering something helpful to her case.’”

[17] At its most basic, the leave requirement under the *OSA* is designed “to protect defendants against coercive litigation and to reduce their exposure to costly proceedings”: *Ainslie v. CV Technologies Inc.* (2008), 93 OR (3d) 200, at para. 15 (SCJ). Courts have expressed concern that the gatekeeping function of the court under section 138.8 of the *OSA* may be “undermined or thwarted” by an overly literal application of the general production and discovery rules in the context of leave proceedings: *Mask v. Silvercorp Metals Inc.* (2014), 121 OR (3d) 705, at para. 35.

[18] At the same time, the courts have intervened to ensure that evidence known to be in existence is available to plaintiffs. As this Court has repeatedly indicated, it is unfair to require a plaintiff to proceed “without production of the...records at this pre-discovery stage, as the records may be necessary to assist in establishing liability of the defendants...”: *Popov v. Jones*, 2011 ONSC 665, at para. 8, aff’d 2911 ONSC 3595 (Div. Ct.). The Court of Appeal has instructed that it is the task of the court in an *OSA* leave application to “weigh the evidence, without going so far as to embark on a mini-trial, for the purpose of determining whether there is a reasonable possibility that the plaintiff will succeed at trial”: *Peters v. SNC-Lavalin Group Inc.*, 2023 ONCA 360, at para. 111.

[19] The Guyana press releases of January 29, March 7, and March 29, 2019 show that the allegations made by Sheridan establish that a number of Sheridan’s allegations against Guyana and its management were accurate and needed to be addressed by the company. The communications in issue appear to be highly probative and likely will be important in determining

whether the Plaintiffs can or cannot prove their case: *Regional Municipality of Halton v. Ohashi*, 2021 ONSC 6780, at para. 86.

[20] In my view, this is not a fishing expedition by the Plaintiffs, as Guyana’s counsel characterizes it; the Plaintiffs know exactly where to look and are certain that the sought-for documents are there. Sheridan is a non-party, but he is hardly a stranger to the controversy in the action, and he is not being burdened with a search for the unknown in as yet unexplored areas of his files. If this is fishing, the line is not being cast in murky waters where no light penetrates. This is more like “fishing” in the lobster tank at the front of a seafood restaurant.

[21] The communications in issue would be public documents revealed by Sheridan’s own website had the confidentiality provisions of his settlement with Guyana not kicked in. The request for production from Sheridan does not expand the upcoming leave motion by opening up a broad area of discovery; it is designed to do no more than to ensure that the relevant evidence, which is known to exist and defined to be of relevance, be before the court so that the gatekeeping function can take place with a record that is cogent and complete.

[22] With the greatest of respect, Guyana’s argument in these circumstances does not seem to be aimed at preserving the gatekeeping function of the court in the leave motion; it appears more like an attempt to preserve a potential roadblock.

Disposition

[23] Sheridan shall produce the documents as described in the Plaintiffs’ Revised Notice of Motion dated April 22, 2024 and in paragraph 8 above.

[24] Counsel for the Plaintiffs have filed a Costs Outline seeking costs of the motion on a partial indemnity basis in the amount of \$15,112.40, inclusive of disbursements and HST. Counsel for Guyana have filed a Costs Outline in which they would seek, also on a partial indemnity basis, total costs of \$22,547.08 for the motion. Both amounts are within the ambit of reasonable costs for a motion like this; neither request would take the other side by surprise: see Rule 15.01(1)(0.b).

[25] Using round numbers, Guyana shall pay the Plaintiffs costs in the all-inclusive amount of \$15,000.

[26] The Plaintiffs shall reimburse Sheridan for the costs, if any, of photocopying the documents to be produced.

Date: April 23, 2025

Morgan J.