

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cicada Ventures Ltd. v. KGHM Ajax Mining Inc.*,
2023 BCSC 1746

Date: 20231006
Docket: 52937
Registry: Kamloops

Between:

Cicada Ventures Ltd.

Plaintiff

And

KGHM Ajax Mining Inc.

Defendant

Before: The Honourable Justice Hori

Reasons for Judgment

Counsel for Plaintiff:

A.W. Bayley

Counsel for Defendant:

R.W. Millen

Place and Date of Hearing:

Kamloops, B.C.
August 2–3, 2023

Place and Date of Judgment:

Kamloops, B.C.
October 6, 2023

Introduction

[1] This action arises out of a mining project proposed by the defendant, KGHM Ajax Mining Inc. (“KGHM”), at a site just outside of Kamloops, British Columbia. The plaintiff, Cicada Ventures Inc. (“Cicada”), held mineral claims within the area proposed for the mine site.

[2] Cicada was the beneficial owner of the mineral claims prior to September 17, 2014. The registered owner of the mineral claims prior to September 2014 was Larry Sookochoff who held the mineral claims in trust for Cicada. On September 17, 2014, Cicada and Mr. Sookochoff reached an agreement whereby Cicada became the registered owner of the mineral claims.

[3] Cicada alleges that by an agreement dated December 30, 2013, it agreed to sell its mineral claims to KGHM for \$1,350,000 and KGHM’s agreement to conduct mineral exploration within the Cicada mineral claims (the “Agreement”). Cicada alleges that KGHM breached the terms of the Agreement.

[4] Cicada filed its notice of civil claim in this action on May 13, 2016. KGHM filed its response to civil claim on June 16, 2016. On May 11, 2023, Cicada filed an amended notice of civil claim without leave of the court pursuant to Rule 6-1(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*].

[5] KGHM applies, in this application, for an order that the amendments made by Cicada on May 11, 2023, are a nullity because:

- a) Cicada made the amendments without leave of the court;
- b) The amendments raise new causes of action; and
- c) Those causes of action are statute barred by the *Limitation Act*, S.B.C. 2012, c. 13 [*LA*].

[6] In response to this application, it is Cicada’s position that:

- a) The amendments do not raise any new causes of action;

- b) If the amendments raise new causes of action, those causes of action are not statute barred; and
- c) If the amendments raise new causes of action, the court should exercise its discretion and grant Cicada leave to amend the notice of civil claim.

Amendments to Pleadings

[7] Rule 6-1(1)(a) of the *Rules* provides that a party may amend a pleading once without leave of the court at any time before service of the notice of trial, except to change parties or to withdraw an admission.

[8] In this case neither party had served a notice of trial and the amendments in question did not add parties or withdraw admissions. However, KGHM alleges that the amendments filed by Cicada plead new causes of action after the expiry of the limitation period. Therefore, KGHM submits that Cicada required leave of the court to amend the notice of civil claim.

[9] The requirement to have leave of the court to amend pleadings to allege a cause of action which is statute barred by the *LA* arises, not from the *Rules*, but from s. 22(5) of the *LA* which provides:

(5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 21, be commenced with respect to that claim.

[10] In *Allarmcom Ltd. v. Canwest Broadcasting Corp.*, 1988 CanLII 2897 (BCCA), the Court held that s. 4(4) of the *Limitation Act*, R.S.B.C. 1979, c. 236, (now s. 22(5) of the *LA*) required a party to have leave of the court to amend a pleading to allege a new cause of action after the expiry of the limitation period.

[11] The court in *Brach v. Great-West Life Assurance*, 2018 BCSC 784 and in *Manterra Technologies Inc. v. Verathon Medical (Canada) ULC.*, 2022 BCSC 98, held that the failure to obtain leave to allege a new cause of action outside the limitation period renders the amended pleading a nullity.

[12] Accordingly, if Cicada’s amended notice of civil claim alleges new causes of action outside the limitation period, the amended pleading is a nullity.

New Causes of Action

[13] The first question is whether the amended notice of civil claim alleges new causes of action.

[14] In my view, the facts upon which the plaintiff seeks a legal remedy define the cause of action not the remedy sought by the plaintiff. The Ontario Court of Appeal in *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848, accepted the definition of a “cause of action” from Morden & Perell, *The Law of Civil Procedure in Ontario*, 2nd ed. at para. 20:

[20] In Morden & Perell, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis Canada Inc., 2014), at p. 142, the authors state:

A new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based. [Footnotes omitted.]

[15] Our Court of Appeal came to a similar conclusion in *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122, at paras. 27–31:

[27] Aon contends that the chambers judge’s decision to permit the amendment rested on his erroneous conclusion that the proposed amended pleading did not raise a new cause of action. Aon relies on the definition of “cause of action” found in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54:

A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.).

[28] Camarin relies on *Letang v. Cooper*, [1965] 1 Q.B. 232 at 242–43, in which Lord Diplock defined a “cause of action” as “a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.” I see little difference between these two descriptions of a “cause of action”.

[29] In *Wells Cartage*, this Court found that the chambers judge erred in principle in finding that the plaintiff’s proposed amendment raised a new

cause of action. The plaintiff's original pleading alleged negligent manufacture and breach of an implied warranty of fitness. After pleadings were exchanged, the defendants produced an expert report asserting that the plaintiff had used the product in question incorrectly. The plaintiff subsequently applied to amend its pleadings to allege that the defendants failed to warn the plaintiff of the limitations on the product's use described in the expert's report.

[30] This Court concluded that "the proposed amendments raise nothing which can realistically be called a new cause of action": para. 19. The Court acknowledged that, as against one of the defendants, the amendments may "take the cause of action from being one entirely in contract to being one also in tort": para. 23. However, the amendment did "not change the substance of the issues": para. 23. In coming to this conclusion, the Court noted that the proposed amendment was a "natural, almost inevitable response" to the expert's assertion that the plaintiff had pushed the product beyond its limits: para. 22.

[31] In *North Elgin* at paras. 20–21, the Court suggested that a new cause of action does not arise if a party merely pleads a new or alternative remedy based on the same facts already pleaded.

[16] Therefore, in order to assess whether the amended notice of civil claim alleges new causes of action, I must compare the factual basis in the original pleading to the factual basis in the amended pleading.

The Original Notice of Civil Claim

[17] The original notice of civil claim alleges the following material facts:

- a) Cicada was, at all material times, the beneficial owner of ten mineral claims located near the KGHM project;
- b) In or about December 2013, the parties entered into the Agreement;
- c) The Agreement provided that in exchange for a 100% interest in the mineral claims, KGHM would:
 - i. pay \$1,350,000;
 - ii. pay a 20% net profit interest royalty in favour of Cicada; and
 - iii. conduct mineral exploration within the mineral claims;

- d) In or about October 2014, KGHM entered upon some or all of the mineral claims without Cicada's permission and conducted mining activity as defined by the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 and, in particular, conducted mineral exploration including drilling, the removal of core samples and testing of those core samples for mineralization;
- e) In line with the intentions of KGHM, the results of its mineral exploration were not supportive of further mineral exploration or development around the areas drilled;
- f) The results of the mineral exploration conducted by KGHM were and continue to be useful to KGHM in demonstrating that the areas drilled would be suitable for particular forms of mining activity such as a waste dump;
- g) Exploration for the purpose of showing a lack of mineralization is referred to as condemnation drilling;
- h) Since December 12, 2014, KGHM has continued to conduct condemnation drilling within the mineral claims for the purpose of establishing that there is no value to all or at least parts of the mineral claims;
- i) As a result of the actions of KGHM described in the notice of civil claim, Cicada has suffered and will continue to suffer costs and losses including:
 - i. non-payment of \$1,350,000 under the terms of the Agreement;
 - ii. loss of payment towards and the value of promised exploration work;
 - iii. costs of settling with Mr. Sookochoff; and
 - iv. loss of the value of the 20% net profit interest royalty.

[18] Based on these facts, Cicada claims the following relief in the original notice of civil claim:

- a) Damages for breach of contract for failing or refusing to pay the \$1,350,000 it agreed to pay under the Agreement and for failing or refusing to conduct *bona fide* mineral exploration within the mineral claims;
- b) Damages for wrongfully conducting mining activities on the mineral claims by obtaining core samples from within the mineral claims;
- c) Damages for trespass to chattels related to KGHM obtaining and using core samples from within the mineral claims;
- d) Damages for conversion related to KGHM obtaining and using core samples from within the mineral claims for their own purposes;
- e) Damages for unlawfully interfering with economic interest by obtaining and using core samples from within the mineral claims; and
- f) Compensation for the unjust enrichment of KGHM as a result of its failure to pay the consideration under the Agreement and its failure to conduct *bona fide* mineral exploration.

[19] In my view, the focus of Cicada’s claim, as framed in the original notice of civil claim, is that KGHM failed to fulfill the terms of the Agreement and it unlawfully conducted mineral exploration and condemnation drilling within the mineral claims from October 2014.

Amended Notice of Civil Claim

[20] The amendments made by Cicada to its notice of civil claim are extensive. I will not set them out in detail in these reasons but I will summarize the nature of the amendments generally. I have divided the nature of the amendments into three distinct categories:

- a) Allegations that KGHM conducted mining and drilling activities within the mineral claims before the Agreement date of December 2013 without Cicada’s knowledge or consent;

- b) Allegations that Cicada provided confidential information to KGHM during the negotiations on the Agreement which KGHM used for its own benefit;
- c) Allegations that KGHM obtained confidential information from its mining and drilling activities within the mineral claims and used that information for its benefit; and
- d) Allegations that KGHM withheld information from or misrepresented information to Cicada during their negotiations on the Agreement.

Pre-Agreement Mining Activities

[21] Cicada alleges that KGHM conducted mining activities and drilling within the mineral claims in or around July 2010 and November 2011 without its knowledge or consent. The allegation is that KGHM conducted these activities for the purpose of assessing the feasibility and configuration of the mining project.

[22] Cicada submits that this amendment is merely a further particularization of the benefits received by KGHM through its unlawful mining activities.

[23] I could accept Cicada’s submission had it limited these allegations to the mining and drilling activities alleged in the original notice of civil claim. However, the allegations particularize benefits realized by KGHM even prior to the Agreement. In my view, this amendment expands the scope of the original pleading. The original notice of civil claim pleads facts related to the Agreement and pleads remedies flowing from the breach of that Agreement. The amended pleadings seek to allege misconduct by KGHM prior to the parties entering into the Agreement.

[24] Even though the amendments related to pre-Agreement mining activities may support a claim for compensation for unjust enrichment, the facts giving rise to this amended claim are fundamentally different than the facts supporting the unjust enrichment claim in the original notice of civil claim.

[25] Accordingly, I find that the allegations related to mining and drilling activities within the mineral claims before December 2013 raise a new cause of action.

Use of Confidential Information from Negotiations

[26] Cicada alleges that during its negotiations with KGHM, it disclosed confidential information about the mineral claims to KGHM for the purposes of the negotiations and not for the purpose of furthering the mining project. The allegation is that KGHM used the confidential information to assess the feasibility of the mining project and to reconfigure the mine.

[27] Cicada alleges that KGHM realized a cost saving in excess of \$150 million as a result of the reconfiguration.

[28] The amended claim seeks to recover compensation for the profits and benefits derived by KGHM by the unlawful use of this confidential information.

[29] The factual foundation for the allegations in the original notice of civil claim is that KGHM breached the terms of the Agreement and that it unlawfully conducted mining activities within the mineral claims. There are no facts alleged in the original notice of civil claim that relate to the use of confidential information obtained by KGHM from Cicada.

[30] The allegations that KGHM improperly used confidential information for its own benefit are allegations that expand the factual basis for Cicada’s claims and fundamentally change the nature of the cause of action against KGHM. Accordingly, I find that these allegations raise a new cause of action.

Use of Confidential Information from Mining Activities

[31] The amended notice of civil claim alleges that KGHM obtained confidential information from its mining activities within the mineral claims without Cicada’s knowledge or consent. Cicada alleges that KGHM wrongfully used this confidential information without any compensation to Cicada by:

- a) Disclosing the information to government agencies and to the public;
- b) Using the information to secure approvals of and amendments to permits for its mining project; and

- c) Using the information to advance the project.

[32] In my view, these amendments extend the allegations in the original notice of civil claim to include allegations of specific mining activities undertaken by KGHM after the Agreement and allegations of how those mining activities benefited KGHM. However, in my view, these amendments do not expand the scope of Cicada's claims such that they are fundamentally different than the claims set out in the original pleading.

[33] The original notice of civil claim alleged that KGHM wrongfully conducted mining activities within the mineral claims after the Agreement. The amendments provide particulars of:

- a) Where and when KGHM undertook those mining activities;
- b) How KGHM used the results of those mining activities; and
- c) What benefit KGHM derived from those mining activities.

[34] KGHM submits that with respect to wrongful mining activities, the original notice of civil claim confines Cicada's claims to wrongfully conducting condemnation drilling. I do not read the notice of civil claim in that way. Paragraph 7 of the original notice of civil claim refers to KGHM entering onto "some or all of the Cicada Mineral Claims" to conduct "mining activity as that term is defined in the *Mineral Tenure Act*." In paragraph 13 of the original notice of civil claim, Cicada also refers to KGHM "conducting mineral exploration and condemnation drilling within the Cicada Mineral Claims".

[35] In my view, this category of amendments does not expand the factual scope of Cicada's claims beyond that of the original pleading. They may provide more details of the mining activity alleged to be wrongful and the benefit derived by KGHM, but they do not fundamentally change the nature of the claim.

[36] Accordingly, I find that the amendments alleging that KGHM derived a benefit from using confidential information obtained by mining activities within the mineral claims after the Agreement do not raise new causes of action.

Misrepresentation and Non-Disclosure

[37] The amended claim by Cicada alleges that KGHM failed to disclose material information about the mining project within their knowledge to Cicada during the negotiation of the Agreement. The amended claim also alleges that KGHM misrepresented the configuration of the project to Cicada in their negotiations.

[38] The original notice of civil claim makes no allegations with respect to the negotiation of the Agreement. It does not allege any wrongful conduct on the part of KGHM during the negotiation of the Agreement. As a result, I conclude that there is not a connection between the original allegations and the allegations of non-disclosure and misrepresentation in the amended pleading.

[39] Accordingly, I find that the claims of misrepresentation and non-disclosure are new causes of action.

Limitation Period

[40] Having decided that the amended notice of civil claim alleges new causes of action, the question is whether those new causes of action are statute barred by the *LA*.

[41] Neither party addressed the specific provisions of the *LA* that are applicable to the new causes of action. They also did not address how the transitional provisions of the *LA* affected the limitation period issue. However, the key issue on the limitation period is when Cicada discovered or ought to have discovered that it had a cause of action.

[42] I should note here that the running of time on the limitation period may be the date on which Cicada knew or ought to have known that the wrongful conduct resulted in a detriment to Cicada or a benefit to KGHM. The running of time may not

necessarily begin when KGHM undertook the mining activity or when it obtained the confidential information.

[43] I am unable to determine when Cicada knew or ought to have known that it had a claim against KGHM arising out of the new causes of action based on the evidence before me on this application. Cicada claims that it did not discover the information it required to determine whether it had the new causes of action until after May 11, 2021. KGHM challenges Cicada's claims as to when it discovered the information as lacking credibility. However, I cannot make credibility findings based only on the affidavit evidence in this application.

[44] KGHM alleges that the information necessary for Cicada to assess these new causes of action was contained in documents available to the public and publicized in the media well before 2021. However, neither the evidence nor the submissions of KGHM provide sufficient detail about whether those public documents would reasonably have come to the attention of Cicada or, even if they did, whether the contents of those documents would have alerted Cicada to its potential claims.

[45] Therefore, I cannot decide whether the new causes of action are statute barred by the *LA* in this application.

Leave to Amend the Notice of Civil Claim

[46] Cicada has not made application for leave to amend its notice of civil claim, but both parties made submissions on whether I should grant leave to amend. Therefore, I will decide whether it is appropriate for Cicada to have leave to amend its notice of civil claim.

[47] Where a limitation period has expired, the discretion to allow an amendment that raises a new cause of action arises from s. 22(5) of the *LA*.

[48] The Court of Appeal in *Teal Cedar Products (1979) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 [*Teal Cedar*] and *Letvad v. Fenwick*, 2000 BCCA 630 [*Letvad*], established the following factors that the court is to consider in exercising its discretion under s. 22(5) of the *LA*:

- a) The extent of the delay in making the application;
- b) The reasons for the delay;
- c) Any explanation put forward to account for the delay;
- d) The degree of prejudice caused by the delay; and
- e) The extent of the connection, if any, between the existing claims and the proposed new cause of action.

[49] However, more recently, the Court of Appeal in *Chouinard v. O'Connor*, 2011 BCCA 161, at para. 21, held that the factors listed in *Teal Cedar* and *Letvad*, are not exhaustive and that the overriding concern is whether the proposed amendments are “just and convenient”.

[50] In dealing with an application for leave to amend pleadings where there may or may not be an accrued limitation period, Justice Milman, in *Manterra Technologies Inc. v. Verathon Medical (Canada) ULC*, 2022 BCSC 98, relied upon the options set out by the Court of Appeal at para. 47 of *Strata Plan No. VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329. Justice Milman listed those options at para. 32:

- a) if it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to allow the amendment to be made, notwithstanding the defendant will lose that defence, applying the *Letvad* non-exhaustive list of factors;
- b) if the parties disagree as to whether there is an accrued limitation defence, and the court cannot determine this issue on the application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to allow the amendment, even though the result will be the elimination of that defence; and
- c) alternatively, when the limitation issue cannot be determined on the application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the *Act*, judicial discretion may

be exercised to permit the amendment on terms that the limitation defence would be preserved and determined at trial.

[51] In my view, a balancing of the factors established by *Teal Cedar* and *Letvad*, leads me to adopt the third option outlined by Justice Milman.

[52] With respect to prejudice, whether I grant leave to amend or not, one of the parties will suffer prejudice. If Cicada is allowed to amend its notice of civil claim and the limitation period for the new causes of action have expired, then prejudice to KGHM is presumed. Further, KGHM submits that the length of time that has passed from the alleged wrongful conduct is prejudicial to it because the mine project is shut down and many of the people that would have been involved are no longer employed by KGHM.

[53] However, if leave to amend is not granted to Cicada and the limitation periods have not expired, then Cicada will be prejudiced by being foreclosed from pursuing its claims against KGHM.

[54] The delay in pleading the new causes of action is significant. However, Cicada may be able to explain the delay when the court resolves the issue of when Cicada knew or ought to have known that it had a cause of action.

[55] While I found that the factual basis for the new causes of action are different than the factual basis for the original claim, there is a connection between them. Both the original claims and the new causes of action arose out of the same transaction. All of the claims arise out of the relationship between the parties and their interests in the mineral claims. In that sense, all of the claims have a common origin.

[56] Accordingly, after balancing all of the factors, I find that it is just and convenient for Cicada to have an opportunity to pursue the new causes of action and for KGHM to establish a defence to the new causes of action based on the *LA*. Therefore, I will grant leave to Cicada to amend its notice of civil claim in its current form with the preservation of KGHM's limitation period defence.

Abuse of Process

[57] KGHM argues that the amendments made by Cicada are an abuse of process and that I should not allow them on that basis. The abuse of process submission is based on the following:

- a) The amendments followed upon the court dismissing Cicada’s application for production of documents because the documents sought were not relevant to the issues pleaded in the original notice of civil claim; and
- b) Cicada made the amendments to delay or eliminate KGHM’s summary trial application.

[58] KGHM submits that it is an abuse of process for Cicada to amend its notice of civil claim to address the gaps in its notice of civil claim that were exposed by the court in the document production application. I see no abuse of process in a party attempting to remedy a deficiency in its pleadings after those deficiencies are pointed out by the court.

[59] KGHM argues that Cicada abuses the court process by amending its notice of civil claim to delay or eliminate KGHM’s summary trial application. In support of this argument, KGHM submits that it set down a summary trial application in November 2022. Six weeks before the summary trial hearing, Cicada purported to amend its notice of civil claim by significantly expanding the scope of the litigation.

[60] I also see no abuse of process in Cicada seeking to amend its claim prior to the summary trial. There is no evidence to support the conclusion that Cicada made the amendments with the intention of frustrating KGHM’s summary trial application. In fact, Cicada denies such motive.

[61] Accordingly, I am not satisfied that Cicada has abused the court’s process.

Costs

[62] If the parties cannot agree on the issue of costs for this application, they have leave to make submissions. If a costs application is necessary, the parties will, within the next 30 days, schedule a costs hearing.

“D.K. Hori J.”

HORI J.