

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20101126  
Docket: S107260  
Registry: Vancouver

Between:

**Jung J. Moon and SMG Canada Gold Corp.**

Plaintiffs

And:

**Golden Bear Mining Ltd., Ernest McLean,  
Golden Bear Exploration Inc., Frances  
Grace McLean and Shawn McGroarty**

Defendants

Before: The Honourable Mr. Justice Groves

## **Oral Reasons for Judgment In Chambers**

Counsel for the Plaintiffs:

M.J. Hewitt

Counsel for the Defendants Ernest McLean  
and Frances Grace McLean:

N. Ellegood

Place and Date of Hearing:

Vancouver, B.C.  
November 26, 2010

Place and Date of Judgment:

Vancouver, B.C.  
November 26, 2010

[1] **THE COURT:** Two of the defendants in this action, Ernest McLean and Frances Grace McLean, apply by way of motion to vary the *ex parte* order which I granted in Chambers on the 1<sup>st</sup> of November 2001.

[2] The order of the 1<sup>st</sup> of November 2001, was, as noted, an *ex parte* order, and there is always dangers in *ex parte* orders, or without notice orders. Courts are often forced, based on the information before them, to take certain actions based on the allegations, contained in this case in a number of affidavits, and it is often the case that upon either sober reflection or additional reflection that some modifications of the order are necessary. It is also not uncommon for the order to be completely set aside, upon hearing from both sides.

[3] Additionally, the two applicants, Ernie and Frances McLean, argue that if the without notice (*ex parte*) injunction is not set aside, that there should be modifications to it so as to allow the continuous funding of the main defendant, Golden Bear Mining Ltd., to allow for the renewal of the various mineral tenures which, it appears on balance, are the substantial assets of Golden Bear Mining Ltd.

[4] They further seek of the court an ending to the court-appointed monitor, which is a fundamental part of the order of the 1<sup>st</sup> of November 2001, and they seek to relieve Mr. McLean of the obligations founded in the *ex parte* order to file an affidavit setting out the financial activities of Golden Bear Mining Ltd.

[5] The facts as presented at the time of the *ex parte* order on the 1<sup>st</sup> of November 2001, are very similar, if not completely similar, to the facts present today.

[6] There is a suggestion in the materials before the court now, as there was on the 1<sup>st</sup> of November, that the plaintiffs in this matter had advanced to the various defendants the sum of \$800,000 so as to allow the development of the mineral tenures of Golden Bear Mining Ltd. on what is known in the materials as the Settea claim. These are mineral tenures which have gold as the base metal which they seek to extract. The \$800,000 was advanced, it was alleged by the plaintiffs, with certain conditions. The conditions which they say the parties agreed to were that of

the \$800,000, approximately \$650,000 of that had to specifically be spent on the Golden Bear Mining Ltd. operation at the Settea Mine claim, and there was provision that a sum of around \$150,000 was available to be spent on a Yukon project.

[7] Through either a monitoring process of their investment or a concern, the evidence before me on the 1<sup>st</sup> of November suggested, and the evidence today suggests, that the plaintiffs through their investigation were able to determine that well in excess of \$200,000 of the money they advanced was in fact spent on an Atlin project. The evidence today in regards to the Atlin project is not much more detailed than on November 1<sup>st</sup>, but it is clear that this Atlin project is a former mining project of Mr. Ernest McLean and that funds were spent literally to clean up the problems associated with that claim.

[8] It appears to have been, from the evidence before me, a mining operation that has gone awry. The Ministry of Mines, who monitors this, and perhaps the Ministry of Environment had concerns about what Mr. McLean had and had not done and that considerable funds, as well as considerable time, were spent in Atlin dealing with Mr. McLean's previous mining activities. These are mining activities which are not the responsibility of Golden Bear Mining Ltd. They are not owned by Golden Bear Mining Ltd., but they are in fact Mr. McLean's other problem.

[9] It appeared on the 1<sup>st</sup> of November 2010, and it appears today that monies were advanced by agreement between the plaintiffs and Golden Bear Mining Ltd. and the various defendants for a specific purpose, and that it appears that these monies were in fact diverted for something not specifically purposed in their agreement, and that, the plaintiffs allege, is tantamount to fraud.

[10] The main way in which *ex parte* injunctions are set aside completely is based on an applicant's failure to disclose all relevant facts to the court. There is an obligation on a party seeking an *ex parte* injunction not only to put their best foot forward, but to put both or all their feet forward in any court application and explain to the court not only the material facts which they are aware of which support their

claim, but also any material facts which do not support their claim or question their claim.

[11] It is a high onus placed on applicants obtaining *ex parte* injunctions and it is a high onus for a good reason. Again the courts are left to rely on the word of one party. Often courts are asked for, and they often do grant based on that word substantial interfering injunctions, which often have immediate and almost certainly have negative consequences on those who are affected by it. The main case relied on by counsel for the defendants in support of this very well-known proposition is the decision of *Evans v. Silicon Valley*, 2004 BCCA 149.

[12] I have reviewed the materials both during the process in anticipation of this matter as well as during the course of the matter and over lunch, and I have concluded that though there is some evidence to support an allegation that all evidence might not have been before the court that could have been, there are, in my view, no material facts in the knowledge of the plaintiffs that were not put before the court.

[13] To use my terribly inappropriate analogy, the plaintiffs in bringing on their application put both feet forward and presented as best they could, considering their lack of knowledge, being only investors, what they knew about the project. Any documents which were not put forward were, in my view, effectively summarized.

[14] In my view, there is nothing in the realm of a failure to disclose relevant material which would justify the application sought by the defendants to set aside the injunction *nunc pro tunc*.

[15] Having found that there has been no misleading or material non-disclosure, it is now the responsibility of the court to consider the merits of the injunction that it gave on the 1<sup>st</sup> of November based on both parties having an opportunity to present their case. In other words, it is now the responsibility of the court to consider the matter *de novo*.

[16] Any injunction requires an analysis of whether or not there is a strong *prima facie* case for the claim and then an analysis of the balance of convenience. What does the injunction that is sought do and how does that convenience or inconvenience the parties and is there a fair balance to be struck?

[17] Turning to the issue which is whether or not there is a strong *prima facie* case of fraud, again the allegations, without repeating it at length, are that \$800,000 was advanced by the plaintiffs to the various defendants on strict conditions, trust conditions essentially, that the money was to be used by the defendant for a specific purpose.

[18] I am satisfied on the evidence before me today that there is a strong *prima facie* case that a substantial portion of these funds was used by Mr. McLean for purposes not associated with the operation of Golden Bear Mining Ltd., and though he may wish to argue at trial that cleaning up his previous problems with the Department of Mining was crucial for him to get on with the Settea project, that is clearly not the purpose for which the funds were advanced.

[19] Interestingly, though Mr. McLean has had an opportunity to respond and has had the materials for some time, he has really provided no answer to these allegations. I do however accept that perhaps time and inability to access documents has made that difficult for him. But the facts simply are that there is at this time a strong *prima facie* case which has not seriously been challenged.

[20] Having concluded that, I now turn to the issue of the balance of convenience. A balance of convenience again requires the court to analyze what the injunction proposed or in place does and determine whether or not there are high levels of inconvenience to some which should be moderated in order to provide the protection that the court ultimately does want to provide when there is a strong *prima facie* case, in this case of a fraud.

[21] I agree to some degree with Mr. Hewitt's analysis in this regard, in that we should look at the mining claims, the shares and the activities of Golden Bear as three factors which could potentially give rise to inconvenience.

[22] In regards to the shares, one of the things that have brought on this application was Mr. McLean's expression to the principals of the plaintiff and to Mr. Moon that he intended to sell his shares in Golden Bear Mining Ltd. for \$10 million.

[23] There is nothing in the order which is currently in place which prohibits Mr. McLean from doing so, other than requiring him to abide by what is argued by the plaintiff to be the existing contractual arrangement between the plaintiffs and Mr. McLean, that is, that the plaintiffs have a right of first refusal of the shares.

[24] The injunction, on its face, provides that Mr. McLean can sell his shares, but he must do so with proper notice and if he was to do so, I am sure the extent to which the court would require him to secure certain proceeds of those sale of shares would simply be for the amount of this claim, which is \$800,000.

[25] He says that he had someone available to buy his shares for 10 million. If he does have that available, he should bring on that application, if an application is necessary, and I am sure the court would let him sell his shares, provided that the plaintiffs' claim is somehow secured. So there is no inconvenience to Mr. McLean or Mrs. McLean by the order restricting a sale of the shares.

[26] Secondly, there is the effect of inconvenience or convenience on the mining claims. The mining claims here are frozen, and on the material before me today, there is additional good reason for that.

[27] There is some material before the Court today that suggests that a company operated by the defendant Mr. McGroarty and the defendant Mr. McLean with a similar name is in fact advertising itself as a company which holds mineral claims in this area, the Settea area of British Columbia. That company is called Golden Bear

Exploration Ltd., and before the court is an advertisement for that company which claims that that company owns mineral tenures in this area.

[28] That more than convinces me that there is the necessity of maintaining and securing and freezing the mining claims which I believe and the evidence suggests are the property of Golden Bear Mining Ltd. so as to prohibit the majority shareholders of Golden Bear Mining Ltd. from transferring those shares to a related company.

[29] There is a small issue of renewal of the mining tenures. That was resolved prior to this court application and can be resolved as the renewals come up, either by court application or agreement.

[30] I thirdly turn to the issue of the operation of Golden Bear Mining Ltd. as an asset and an ongoing business. Nothing in the injunction that is proposed and currently in place prohibits Golden Bear Mining Ltd. from continuing its operation as a business. In fact, the injunction allows it to spend money in its ordinary course and, as such, there is no inconvenience to the defendant Golden Bear Mining Ltd.

[31] I have concluded that it is appropriate for the injunction which I issued on the 1<sup>st</sup> of November, for the reasons I have stated, to stay in place. I will however raise a number of issues and make certain direction which can if circumstances change give any of the defendants liberty to apply to vary the order.

[32] Dealing with the issue of the operation of Golden Bear Mining Ltd., they may have expenses which they need to pay and they may not have money to pay it. If they need some cash infusion and they need a court order to set the terms of that, they are welcome to apply to the court for an exemption around this injunction for that purpose.

[33] I would expect, without ruling in advance, that any such application would show the need for the money, how the money is to be raised or who the money is to be received from, and who is going to ensure that the money is spent in accordance with the need as evidenced. So in that regard should there be issues concerning

Golden Bear Mining Ltd.'s need for capital or further capital investment there is liberty to apply.

[34] Secondly, in regards to the monitor's activities, which was in the alternative a challenge of the applicants, as circumstances have played out and particularly as the evidence in regards to Mr. McGroarty has grown, I see more need for a monitor than I did before.

[35] In my view, the provisions of the *Business Corporations Act* which deal with the monitor have been complied with. Section 248 sets out the basis on which the court can appoint a monitor, and the court may make an order under s. 248(3) if the court has reasonable grounds to believe that the business of the company is being or has been carried on with the intent to defraud any person. And having established a *prima facie* case of fraud, the plaintiffs have established the necessary prerequisite under s. 248 of the *Business Corporations Act* to allow a monitor to be in place. Once the monitor has prepared his report, there is liberty to any party to apply for further directions in that regard.

[36] There is also the issue of whether or not Mrs. McLean is even a party to this. That is urged upon me by counsel for Mrs. McLean, but there is an absence of evidence. There is a suggestion that Mrs. McLean by virtue of records produced only owns four mineral claims and is not a shareholder of the defendant Golden Bear Mining Ltd. Those mineral claims are simply numbered. If Mrs. McLean wishes to be removed from this litigation, she must by affidavit evidence disclose greater detail as to what mineral claims she holds and if it turns out none of them have anything to do with this Golden Bear Mining Ltd. operation in the Settea area as it has been referred or none of them are Settea-related mining claims, then the Court may in fact remove Mrs. McLean from the litigation. Further information is required. She has liberty to apply.

[37] Finally, there is an argument that the effect of this order is that the minority shareholder, the plaintiffs, have effectively seized control of the majority interest. In my view, that is not the case. Shares can still be sold in this company, although the

court would monitor the process. The company can still maintain business activities, but it is effectively not allowed to borrow in the absence of some court application which would be based on need for the funds.

[38] So, in my view, what has happened here is not minority getting control but a minority who alleges that they have been defrauded placing restrictions on further activities of the defendants.

[39] With those comments in mind and those liberties to apply granted, again I conclude that there is nothing before me which would justify a *nunc pro tunc* removal of this injunction, and based on my analysis on a *de novo* basis of a strong *prima facie* case and a balance of convenience, it is my direction that the order remain in effect.

[40] Now, the final issue is Mr. McLean and his obligation to provide an affidavit. How much more time does Mr. McLean need, Mr. Ellegood?

[41] MR. ELLEGOOD: Well, My Lord, I've received some bank records that Mr. McLean has been able to obtain. Some information that he would need to provide the affidavit requested has already been turned over to the inspector. We've agreed to the end of Monday, but I think the end of next week would be a more reasonable goal.

[42] THE COURT: Mr. Hewitt, any problem with that?

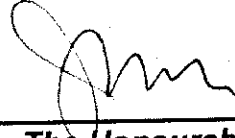
[43] MR. HEWITT: No, that's fine. The issue it raises that I mentioned before is the inspector I think will want more time too, which is again fine. The only issue there is not all parties here are represented, but perhaps we can agree – or you can make the order extending –

[44] THE COURT: I will make the order extending the time for Mr. McLean to file his affidavit to the close of business on the 6<sup>th</sup> of December 2010. If the monitor needs time and the parties of record cannot agree, they have liberty to apply.

[45] All right. Thank you.

[46] MR. HEWITT: Thank you.

[47] MR. ELLEGOOD: Thank you, My Lord.



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***The Honourable Mr. Justice Groves***