

CROSS-BORDER LITIGATION BULLETIN

Summer 2006

MINING COMPANY BARRED FROM STAKING ITS CLAIM IN AN ONTARIO COURT

WHERE LITIGANTS LOOK FOR JUSTICE WILL DEPEND ON WHAT SORT OF JUSTICE THEY SEEK

In a recent ruling, the Ontario Court of Appeal upheld the decision of a motion's judge to stay an action commenced in Ontario on the basis that there was no real and substantial connection between the relief claimed by the plaintiffs and the jurisdiction of the Ontario Court. The decision is notable in its emphasis on the remedy sought by the plaintiff in the determination of whether or not to assume jurisdiction. The holding underscores the importance for those seeking to litigate in Ontario of ensuring that relief they claim is of the type that is capable of enforcement by an Ontario court.

THE DECISION

In *Khan Resources Inc. v. W.M. Mining Co., LLC*, the Ontario Court of Appeal upheld an Order of a motion's judge staying an application commenced in Ontario. The application centred on certain mining rights in Mongolia. The defendants were W.M. Mining Company, LLC, a Colorado corporation, ("WM Mining") and its principal, Wallace Mays, a Colorado resident. Mays was the driving force behind the acquisition and development of the Mongolian mining interests. The mining interests were indirectly held by Khan Resources Bermuda Ltd. ("Khan Bermuda"), a Bermuda corporation that Mays controlled.

As Mays wished to raise equity financing in Ontario for the development of the Mongolian properties, he incorporated the plaintiff company, Khan Resources Inc. ("Khan Ontario") in Ontario. Khan Ontario then acquired all of the issued shares of Khan Bermuda, thus placing the mining interests in Khan Ontario's control. Mays, however, subsequently executed three assignments on behalf of the subsidiaries of Khan Bermuda that purportedly assigned the Mongolian mineral interests to his other company, WM Mining.

Khan Ontario commenced an application against Mays and WM Mining, alleging that Mays' transfer of the mining rights, including mining licences, to his company, WM Mining, was unauthorized by Khan Ontario and was thus of no force and effect. The plaintiffs did not seek monetary damages from the defendants, but rather sought a declaration that the assignments of rights to exploit the property in Mongolia were of no force and effect and an injunction to restrain WM Mining from dealing with those rights in Mongolia.

The appellate court stated that while the plaintiff had a *prima facie* right to have its claim tried in Ontario given the facts of the case, the nature of the damages sought prohibited an Ontario court from properly assuming jurisdiction. The Court found that had the plaintiffs sought monetary damages rather than a declaration and injunction, an Ontario court could have properly asserted jurisdiction over the defendants.

In reaching its determination, the Court cited a principle of international law that prohibits courts from adjudicating on the right and title to lands situated outside of their country. The Court was presented with unchallenged expert evidence that, in accordance with this principle of law, a Mongolian court would not

recognize an Ontario judgment that purported to deal with mining licenses that conveyed an interest in Mongolian land. The Court concluded that it would be pointless for an Ontario court to attempt to resolve the matters at issue in the litigation, given that any orders that it issued in favour of the plaintiff would not be enforced in the jurisdiction in which the property was located and would thus be of no practical force or effect.

The decision underscores the need for those hoping to commence an action in Ontario to understand the limits of an Ontario court's jurisdiction in granting relief. Prospective litigants may be forced to determine whether the benefits of litigating in Ontario rather than in a foreign jurisdiction trump the costs in terms of what can be achieved in the litigation. This will entail consideration of whether monetary damages will sufficiently satisfy the prospective plaintiff's objectives or needs. Plaintiffs that conclude that a monetary judgment cannot resolve their issues may have to be prepared to seek justice in a jurisdiction half a world away.

Written by Lisa Brost and Brett Harrison

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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Lisa is an associate in the firm's Litigation and Dispute Resolution Group. While she has been involved in a variety of complex commercial matters, her focus is in the areas of banking, pension, bankruptcy and insolvency and product liability litigation.

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