SUPREME COURT OF YUKON

Citation: *Beets v Cowan*, 2023 YKSC 21

Date: 20230427
S.C. No. 17-A0059
Registry: Whitehorse

BETWEEN:

TONY BEETS

PLAINTIFF

AND

HAYDEN COWAN

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff — André W.L. Roothman

Counsel for the Defendant — J.J. McIntyre

REASONS FOR DECISION

OVERVIEW

[1] The plaintiff, Anto “Tony” Beets, is a placer miner working in the Dawson City area. Mr. Beets purchased two dredges in July 2015: the first was located on a mining claim on Thistle Creek; the second was located on a mining claim on Henderson Creek. A “claim” is a parcel of land that is granted for placer mining.

[2] When Mr. Beets bought the dredges they had not been used for decades. Nevertheless, the Thistle Creek dredge was in good condition, except for its pontoons, which were broken. The Henderson Creek dredge was disassembled but had only a few components missing. Mr. Beets intended on using the Thistle Creek dredge to mine his claim. He bought the Henderson Creek dredge to use as parts for the Thistle Creek

dredge. In particular, the Henderson Creek dredge pontoons would be required to render the Thistle Creek dredge operational.

[3] The defendant, Hayden Cowan, is also a placer miner. He mines the Henderson Creek claim. He does not own the claim in fee simple, but has, through legislation, certain rights to it.

[4] Mr. Beets alleges that between July 2015 and the summer of 2016, Mr. Cowan removed seven pontoons from the Henderson Creek dredge and used them for his own purposes. He is therefore suing Mr. Cowan for conversion. He makes no allegations about the Thistle Creek dredge.

[5] Mr. Cowan agrees that he took seven pontoons. However, he claims that Mr. Beets has not proved that he owns the Henderson Creek dredge. He also submits that the Henderson Creek dredge is abandoned. Finally, even if Mr. Beets owns the Henderson Creek dredge, Mr. Cowan alleges that he took the pontoons before Mr. Beets bought it.

[6] Mr. Cowan brought a counterclaim against Mr. Beets. However, the counterclaim was abandoned at trial.

[7] As a part of his case, Mr. Cowan sought to introduce documents that had been downloaded from the internet. Mr. Beets opposed their admission. I determined in a decision from the bench that the documents are not admissible, with reasons to follow. Thus, I will first give my reasons on the admissibility of the documents. I will then address the merits of the case.

[8] With regard to the merits, the parties raised several issues during the course of this trial, both factual and legal. In the end, however, I believe that Mr. Beets' claim can

be decided on the issue of abandonment. For the reasons below, I conclude that the dredge was abandoned before July 2015. Therefore, Mr. Beets has no legal interest in the Henderson Creek dredge.

ISSUE

a. Are the documents downloaded from the internet admissible as evidence?

b. Was the Henderson Creek dredge abandoned?

ANALYSIS

a. Are the documents downloaded from the internet admissible as evidence?

[9] Mr. Cowan seeks to introduce two documents: "Yukon Mineral Industry, 1941-1959", downloaded from the Government of Canada website; and the Yukon Gold Placers, Limited Prospectus, downloaded from the Ministry of Energy, Mines and Petroleum Resources, British Columbia, website. They were downloaded through Google and provided as attachments to an affidavit. Mr. Cowan's counsel seeks their admission pursuant to the *Electronic Evidence Act*.[1]

[10] Counsel to Mr. Beets argues that the documents are hearsay and should not be admitted under the *EEA*.

[11] I conclude that the documents are not admissible as evidence.

[12] The *EEA* has not been judicially considered. However, the *Canada Evidence Act*[2], has an equivalent provision (ss. 31-31.8). Indeed, other than being structured slightly differently, ss. 31-31.8 and the *EEA* use almost identical language. Thus, case law interpreting ss. 31-31.8 of the *CEA* is instructive in interpreting the *EEA.*

[1] RSY 2002, c. 67 ("*EEA*").
[2] RSC, 1985, c. C-5 ("*CEA*").

[13] In my opinion, the purpose of the *EEA* is to provide a mechanism through which the best evidence rule and authentication is addressed.

[14] Section 3 of the *EEA* addresses authentication. Pursuant to s. 3, authenticity is proved by providing "evidence capable of supporting a finding that the electronic record is what the person claims it to be". It is a codification of the common law rules for authentication. The threshold for authentication is a low one, requiring only some evidence that the record is what it purports to be.[3]

[15] Sections 4 and 5 of the *EEA* are concerned with the best evidence rule. Section 5 provides for circumstances in which the integrity of an electronic document will be presumed. The focus of s. 5 is not the electronic record itself. Rather, it identifies factors related to the production or retrieval of the record that support the inference of integrity.

[16] In the case at bar, Mr. Cowan's lawyer submits that the documents meet the *EEA* requirements and are therefore admissible.

[17] Mr. Beets' lawyer submits that the documents are not covered by the *EEA*. He argues that the intent of the legislation is to capture digital records, such as emails, social media posts and messages, and text messages. It is not meant to capture documents that are created as hard copies and then uploaded to websites or computers. Because the *EEA* does not apply, the documents must be admissible under the common law or the Yukon *Evidence Act*.[4] Mr. Cowan's documents contain hearsay and are therefore inadmissible.

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[3] *R v CB*, 2019 ONCA 380 at paras. 65-68.
[4] RSY 2002, c. 78.

[18] I conclude that the *EEA* applies to Mr. Cowan's documents. The *EEA* applies to "electronic record[s]", which the legislation defines as: "data that is recorded or stored on any medium in or by a computer system … that can be read … by a person … It includes a display, printout or other output of that data …" (s. 1). "Data", in turn, means "representations, in any form, of information or concepts". The definition is very broad. It includes not only digital records, but also records that have been uploaded to the internet or stored on a computer from a hard copy.

[19] Here, Mr. Beets' lawyer did not question whether the documents met the *EEA* requirements. I will therefore proceed on the basis that the documents do comply with the *EEA*.

[20] Turning to the question of hearsay, Mr. Cowan concedes that the documents contain hearsay. He submits, however, that as the documents are admissible under the *EEA*, the issue of hearsay goes to weight, rather than admissibility.

[21] However, the *EEA* concerns itself only with the question of authenticity and the best evidence rule: it does not provide for the ultimate admission of electronic documents. The evidence must also meet other evidentiary requirements, such as complying with hearsay rules.[5] The *EEA* states this explicitly at s. 2, saying:

> This Act does not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence.

[22] Thus, meeting the requirements of the *EEA* is only one step in determining the admissibility of electronic documents. Mr. Cowan meets the requirements of the *EEA*,

[5] *R v Ball,* 2019 BCCA 32 at para. 68.

but has not established that the documents are admissible despite being hearsay. They are therefore not admitted.

b. Was the Henderson Creek dredge abandoned?

[23] Mr. Beets alleges that Mr. Cowan converted the Henderson Creek pontoons. Mr. Cowan, however, submits that the Henderson Creek dredge was abandoned. I conclude that the Henderson Creek dredge was abandoned.

[24] Conversion concerns the wrongful interference with an owner's chattels.[6] Abandonment is a defence to the allegation of conversion. It is defined as: ""a giving up, a total desertion, and absolute relinquishment" of private goods by the former owner …".[7]

[25] The party alleging abandonment has the burden of proof. They must establish that the owner intended to abandon the chattels.[8] The factors used to determine abandonment include: "the passage of time, the nature of the property, the conduct of the owner and the nature of the transaction".[9]

[26] In the case at bar, Mr. Cowan submits that the dredge was abandoned at some point before Mr. Beets purported to purchase it. Because the dredge was abandoned, the company that sold the dredge to Mr. Beets had no interest to transfer to him. Mr. Beets, therefore, could not acquire any legal interest in the dredge.

[27] Because Mr. Cowan is not alleging that Mr. Beets abandoned the dredge, but that it was abandoned by a previous owner, it is necessary to establish who owned the Henderson Creek dredge when it was alleged to have been abandoned.

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[6] *Simpson v Gowers* (1981), 121 DLR (3d) 709 (Ont CA) ("*Simpson*") at 711.
[7] *Dean v Kotsoopoulos*, 2012 ONCA 143 ("*Dean*") at para. 17, citing *Simpson* at para. 6.
[8] *Dean* at para. 18.
[9] *Ibid.*

[28] The Henderson Creek dredge was first owned by Yukon Gold Placer Ltd. It transferred the dredge to Queenstake Resources Ltd., although it is unclear when this happened. Queenstake mined the Henderson Creek claim until the late 1980s. At some point Queenstake stopped mining in the Yukon altogether although, again, it is not clear when that occurred. Queenstake then amalgamated with Veris Gold. It was Veris Gold that entered into the agreement to sell the dredge to Mr. Beets. Veris Gold has not mined the Henderson Creek claim. Because Queenstake mined the claim upon which the Henderson Creek dredge is found, and Veris Gold did not, Queenstake is the most recent owner with the strongest connection to the dredge. I will therefore assess whether Queenstake abandoned the dredge.

[29] No evidence was presented about the nature of the transaction between Queenstake and Yukon Gold. I will therefore examine the other three factors for determining abandonment.

Passage of Time

[30] The passage of time suggests that the dredge has been abandoned.

[31] Mr. Beets testified that the Henderson Creek dredge was used until about 1956 or 1957. It was disassembled in the 1960s and never used again as a dredge. Mr. Cowan provided no evidence about Queenstake's care and maintenance of the dredge while it mined the Henderson Creek claim. Because Queenstake stopped mining the claim in the late 1980s, and based on the pictures of the dredge, which show rusted pieces left in apparent disarray, I find that Queenstake did not use or care for the dredge since at least the 1980s. The dredge was therefore left sitting in pieces for almost thirty years before Mr. Beets expressed an interest in them.

Nature of the Property

[32] The nature of the property also suggests that the dredge has been abandoned.

[33] Dredges are not currently used in mining. Miners stopped using them in the 1950s, as the price of gold was low and it was not economical to use them. Additionally, regulations were enacted which restricted the use of dredges, including by prohibiting their use in fish bearing streams. Ultimately, dredges became obsolete. This also meant that the ability to maintain them became more difficult, as, for example, replacement parts were no longer produced.

[34] Mr. Beets became interested in using dredges in the 2010s. To that end, he purchased the Thistle Creek dredge and Henderson Creek dredge, along with a third dredge. He did use the third dredge for some time, but his water licence to use it expired three years ago and he has not renewed it. Dredges, therefore, have very limited use, if any, as machinery for mining.

[35] Dredges are also large and heavy. Mr. Cowan estimated that one of the dredges Mr. Beets purchased is 200-300 feet long, 50 feet wide, and 30-40 feet tall. Moreover, the Henderson Creek dredge is located in a remote area of central Yukon. The time, labour, and money required to transport the dredge even for salvage would be considerable.

[36] Mr. Beets' counsel argued that the dredge's size and location suggest that is not abandoned and relies on *Chieftain Metals Inc v Tulsequah Wilderness Adventures Inc.*[10] in support of his submission. In *Chieftain Metals*, the defendant purchased assets from a camp in Northern British Columbia, but, after about four years, had not yet moved

[10] 2014 BCSC 1251 ("*Chieftain Metals*").

them. As in the case at bar, in *Chieftain Metals* the assets were cumbersome and located in a remote area. In that case, these factors militated against finding that the assets were abandoned, as the judge concluded that the owner would need time to relocate the machinery.[11] However, in *Chieftain Metals* four years had lapsed since the assets were left at the site, rather than thirty. Moreover, in *Chieftain Metals* the assets were still useful. I conclude that the cases are distinguishable.

[37] Thus, dredges are no longer used and moving them for salvage is likely uneconomical. While the dredges may be valuable to Mr. Beets, they otherwise have little worth.

Conduct of the Owner

[38] This factor overlaps with the factor of the passage of time. Above, I found that Queenstake did nothing with the Henderson Creek dredge since the 1980s. Queenstake did not use the dredge for mining, for parts, and did not maintain the dredge. This neglect is consistent with the intention to abandon the chattel.

CONCLUSION

[39] All three of the factors point to the conclusion that Queenstake abandoned the Henderson Creek dredge: it was unused for almost thirty years; it is not useful as machinery, nor does it have other value; and, after the 1980s Queenstake did not use or maintain the dredge. I find that Queenstake's abandoned the dredge: it's interest in the dredge was extinguished. Since Queenstake's interest in the dredge was extinguished, it could not transfer any rights to Veris Gold. In turn, Veris Gold had no legal interest in

[11] *Chieftain Metals* at para. 83.

the dredge to transfer to Mr. Beets. Mr. Beets does not own the dredge and his claim in conversion fails.

[40] I dismiss Mr. Beets' action.

[41] Costs may be spoken to in case management if the parties are unable to agree.

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WENCKEBACH J.