SUPREME COURT OF YUKON

Citation: *Cheng v Glencore plc*, 2022 YKSC 59

Date: 20221117
S.C. No. 20-A0119
Registry: Whitehorse

BETWEEN:

Libei Cheng

Plaintiff

AND

Glencore plc (in its own capacity and as successor by merger to Katanga Mining Limited), Hugh Stoyell and Robert Wardell

Defendants

Before Justice E.M. Campbell

Counsel for the plaintiff — Eli Karp and Sage Nematollahi

Counsel for the defendant Glenore plc — Michael Feder and Shane D'Souza

REASONS FOR DECISION

INTRODUCTION

[1] The plaintiff applies for an order removing lawyers from McCarthy Tétrault LLP ("McCarthy Tétrault") as counsel of record for Glencore plc, one of the defendants in this proceeding, based on conflict of interest.

[2] This application is brought in the context of an oppression claim filed by the plaintiff on behalf of Katanga Mining Limited ("Katanga") minority shareholders with respect to transaction(s) that preceded the privatization of Katanga. According to the pleadings and the evidence filed on this application, Katanga was, and still is, a company with refined copper and cobalt mining operations in the Democratic Republic

of Congo. Up until June 2020, Katanga was a publicly traded company incorporated in the Yukon under the *Business Corporations Act*, RSY 2002, c. 20 ("*BCA*"). Katanga's securities were publicly traded on the Toronto Stock Exchange until it became private. Glencore International AG was a majority shareholder and creditor of Katanga. The plaintiff was one of its minority shareholders. In June 2020, Katanga was amalgamated with another Yukon company and privatized. In December 2020, it was discontinued in the Yukon and continued in the Isle of Man ("new Katanga"). New Katanga is a wholly owned subsidiary of Glencore International AG. Glencore International AG is an affiliate of Glencore plc.

[3] The plaintiff argues McCarthy Tétrault lawyers should be removed on the basis they provided legal advice to Glencore plc on the transaction(s) at issue and, therefore, McCarthy Tétrault has a vested interest in the outcome of this proceeding. In addition, the plaintiff argues McCarthy Tétrault lawyers should be removed because they are likely material witnesses in this case.

BACKGROUND

[4] The pleadings as well as the evidence filed by the parties on this application reveal that on or about November 7, 2019, Katanga announced a Rights Offering Transaction by which it offered to its shareholders the right to subscribe to additional common shares, on a pro rata basis, to be issued by Katanga at $0.1295 per share. At the time of the Rights Offering, Glencore International AG was Katanga's majority shareholder and an important creditor of Katanga. Katanga announced that Glencore International AG, an affiliate of Glencore plc, had agreed to purchase, at the subscription price, any shares otherwise issuable under the Rights Offering Transaction that had been offered but not acquired by Katanga's other shareholders. The

subscription price for the shares obtained through the Rights Offering Transaction was to be set off against Katanga's debt to Glencore International AG. The Rights Offering Transaction was completed on or about December 19, 2019. The plaintiff alleges that, as a result of the Rights Offering Transaction, Glencore plc (through Glencore International AG) became the owner of approximately 99.5% of Katanga's shares, exceeding the 90% threshold that gave it absolute control over Katanga and enabled it to take Katanga private without the need to seek and obtain the approval of Katanga's minority shareholders. The plaintiff alleges that, prior to the Rights Offering Transaction, Glencore plc (through Glencore International AG) held approximately 86.3% of Katanga's shares. The plaintiff alleges that, within 24 hours of the Rights Offering Transaction being announced, Katanga's shares price plummeted by 46% and never recovered thereafter.

[5] The plaintiff alleges that, in April 2020, Katanga announced it had entered into a definitive agreement with Glencore plc for a transaction to take Katanga private.

[6] In June 2020, Katanga was amalgamated with another Yukon registered company and privatized. In December 2020, the amalgamated company was discontinued in the Yukon and continued in the Isle of Man.

[7] The plaintiff alleges the depreciation in the market price of Katanga's shares allowed Glencore plc to take over Katanga at a nearly 50% discount. The plaintiff alleges the minority shareholders were bought out at approximately $0.16 a share. The plaintiff also alleges that Glencore plc had significant influence over Katanga's business affairs because several of its employees held positions on Katanga's Board of Directors and three of its employees served as Katanga's chief executive officers at times relevant to this action.

[8] On January 21, 2021, the plaintiff filed a representative proceeding on behalf of Katanga's minority shareholders based on s. 243 of the *BCA*. The plaintiff claims the defendants engaged in oppressive conduct that was unfairly prejudicial to or that unfairly disregarded the interests of Katanga's minority shareholders by:

(i) violating the requirements of Multilateral Instrument 61-101 - Protection of Minority Security Holders in Special Transactions ("MI 61-101") promulgated to protect the interests of minority shareholders in transactions such as the Rights Offering Transaction; and

(ii) by circumventing the statutory process provided under the *BCA* and failing to carry out the Rights Offering Transaction pursuant to a court-approved plan of arrangement (s. 195 of the *BCA*).

[9] The plaintiff claims the Rights Offering Transaction was a related party transaction in which Glencore plc was an interested party who received collateral benefits (including, but not limited to, the repayment of Katanga's debt to Glencore International AG – ultimately to Glencore plc – ahead of schedule). Therefore, the plaintiff claims Part 5 of MI 61-101 required that the defendants provide a formal valuation and obtain the approval of the minority shareholders as a precondition to undertaking the Rights Offering Transaction, which they did not do. The plaintiff claims the Rights Offering Transaction was a recapitalization transaction negotiated between Katanga and Glencore plc to address Katanga's debt to Glencore plc. The plaintiff claims, as a result, the Rights Offering Transaction ought to have been carried out by way of and pursuant to a process involving the court's approval in accordance with s.

195 of the *BCA*. The plaintiff claims the defendants circumvented the statutory process to the detriment of the minority shareholders.

[10] The plaintiff claims he and the other minority shareholders are entitled to compensation for the economic harm they suffered as a result of the defendants' oppressive conduct. He claims the defendants unfairly disregarded the minority shareholders' interest and deprived them of the fair economic return of their investment in Katanga's shares and realized a profit at their expense.

[11] Glencore plc, one of the named defendants, is a multinational company based in Switzerland. Glencore International AG is an affiliate of Glencore plc. As stated earlier, the plaintiff claims, at all material times, Glencore plc was the majority shareholder of Katanga and a related party of Katanga within the meaning of the securities laws and regulations. The plaintiff claims that, since the Going Private Transaction, Katanga, and now new Katanga, have been privately owned by Glencore plc. The plaintiff also claims Glencore plc is the successor by merger of Katanga.

[12] The other defendants, Hugh Stoyell and Robert Wardell, were directors of Katanga at the relevant time. They were on Katanga's special committee created in relation to the Rights Offering Transaction and the Going Private Transaction. Their legal representation is not at issue in this application.

[13] While the timeline of the transaction(s) at issue does not appear to be in dispute, the context surrounding the Rights Offering Transaction that preceded the Going Private Transaction as well as any liability arising from the transaction(s) are at issue. In addition, the legal implications of the transaction(s) with respect to Katanga and New Katanga's legal status and ownership as well as the corporate entity(ies) that could be found liable in this proceeding are at issue.

[14] The defendants have filed an application to dismiss the plaintiff's claim based on, among other things, lack of jurisdiction. The plaintiff has filed an application to examine one of McCarthy Tétrault's lawyers in the context of that application. In addition, the plaintiff has filed an application for the determination of point(s) of law. Those applications have not yet been heard and/or decided.

[15] It is in that context that I consider the plaintiff's application.

ISSUES

[16] The plaintiff advances two grounds in support of his application for an order removing McCarthy Tétrault lawyers from acting for Glencore plc in this proceeding:

(a) McCarthy Tétrault may be liable to Glencore plc for advice it may have given to Glencore plc about the Rights Offering Transaction of Katanga; and

(b) lawyers for McCarthy Tétrault may be called as witnesses in this proceeding;

THE LAW

[17] The Court has inherent jurisdiction to remove a lawyer from the record based on conflict of interest (*McDonald Estate v Martin*, [1990] 3 SCR 1235 at 1245 ("*McDonald Estate*")).

[18] Courts have recognized that parties to a court proceeding have an "important right […] to retain and instruct counsel of their choice" (*Miller et al. v Government of Yukon et al*, 2010 YKSC 22 at para. 9).

[19] An order removing counsel of choice has been described as an "extraordinary remedy to be approached with great caution and rarely invoked" (*Gichuru v Purewal*, 2017 BCCA 281 at para.17, citing *Brown v Silvera*, 2006 ABQB 647).

[20] In considering an application to remove counsel of record based on conflict of interest, the task of the court is to uphold and preserve the integrity of the justice system while ensuring that litigants are not deprived of their counsel of choice without good cause (*McDonald Estate* at 1243; *1914699 Ontario Ltd v Metrolinx*, 2021 ONSC 8528 ("*Metrolinx*") at para. 19; *Andersson v Aquino*, 2018 ONSC 852 ("*Andersson*") at para. 13; *Elkay Management Inc v Law Studio Professional Corporation*, 2021 ONSC 3181 ("*Elkay*") at para 17).

[21] Courts should be alive not only to the effects of such an order on a litigant, but also to concerns regarding the importance of maintaining the high standards of the legal profession and the integrity of the justice system:

> [14] … deprivation of preferred counsel imposes inherent hardship on a litigant, and such relief therefore should be ordered only where it is necessary to prevent the imposition of a more serious injustice, and the risk of real mischief.
>
> [15] However, the courts' respect for preferred representation is tempered by ongoing concern to maintain the high standards of the legal profession and the integrity of the justice system, and this includes the courts' inherent jurisdiction to remove from the record lawyers who have a conflict of interest. [footnotes omitted] (*Andersson*)

[22] Therefore, the overarching question to determine on an application to remove counsel from the record is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice requires the removal of the lawyer. This determination is objective, fact-specific, and based on an examination of all factors in the case. See *Elkay* at para 18 citing *Mazinani v Bindoo*, 2013 ONSC 4744 ("*Mazinani*") at para. 60, citing *Karas v Ontario*, 2011 ONSC 5181 ("*Karas*") at para. 26; *Metrolinx* at para. 18; and *RT v Alberta*, 2020 ABQB 655 at para. 49.

[23] Concerns regarding a lawyer's conflict of interest may arise in varied circumstances. One of those circumstances arises when a lawyer is also a material witness in the proceeding.

[24] Courts are not bound by the codes of professional conduct that guide lawyers in the exercise of the legal profession and the provision of legal services. However, as stated by the Supreme Court of Canada in *Macdonald Estate* at 1246 "… an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy."

[25] The *Code of Conduct* adopted by the Law Society of Yukon contains a general "lawyer as witness" prohibition:

> 5.2 THE LAWYER AS WITNESS
>
> Submission of Evidence
>
> 5.2-1 A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

[26] The Commentary to Rule 5.2 sets out that:

> [1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status. (my emphasis)

[27] The wording of the Yukon Law Society's *Code of Conduct* on this issue is very similar to the provisions of the codes of conduct referred to in other decisions filed by the parties (*Andersson* at para. 17 and *Elkay* at para. 18 citing *Mazinani* at para. 60).

[28] Legitimate concerns arise from lawyers simultaneously acting as counsel and witness in a proceeding. The reasons behind those concerns were mentioned in *Mazinani* at paras. 60 and 61:

> …
>
> (v) The court's concern of a lawyer appearing as a witness is that (i) there may be a conflict of interest between the lawyer and client and (ii) the administration of justice can be impaired by a conflict between the lawyer's obligations of objectivity and detachment which are owed to the court and the lawyer's obligation to his or her client to present evidence in as favourable a light as possible. In *Urquhart v. Allen Estate*, [1999] O.J. No. 4816 (S.C.J.) ("*Urquhart*"), Gillese J. (as she then was) held (*Urquhart*, at paras. 27-28):
>
> > When counsel appears as a witness on a contentious matter, it causes two problems. First, it may result in a conflict of interest between counsel and his client. That conflict may be waived by the client, as indeed, was done in this case. The second problem relates to the administration of justice. The dual roles serve to create a conflict between counsel's obligations of objectivity and detachment, which are owed to the court, and his obligations to his client to present evidence in as favourable a light as possible. This is a conflict that cannot be waived by the client as the conflict is between counsel and the court/justice system.
> > Counsel are independent officers of the court. The trial judge must be able to rely upon plaintiffs' counsel for a high degree of objectivity. The overriding value, in these circumstances, is concern for the proper administration of justice. A distinction must be drawn between the role of counsel as an independent officer of the court and the role of a witness whose objectivity and credibility are subject to challenge.

[29] However, the provision of legal advice prior to litigation does not necessarily disqualify a lawyer from being involved as counsel in the formal litigation proceeding. In addition, the mere potential that a lawyer will be called as a witness in the proceeding is not a sufficient basis to disqualify them (*Gardner v Viridis Energy Inc*. 2012 BCSC 19 at para. 33, citing *Salley v Salley*, 2011 BCSC 473). While establishing with certainty that a lawyer will be called as a witness is not required, the applicant must establish there is a real basis to believe counsel can likely, or probably, provide material evidence in the proceeding. See *Elkay* at para. 18, citing *Mazinani* at para. 60 citing *Graham v. Ontario*, [2006] O.J. No. 763 (Ont SCJ) at para. 35 and *Ontario Realty Corp. v P. Gabriele & Sons Limited*, [2006] OJ No 4497 (Ont SCJ) at paras. 33-35.

[30] As stated in *Andersson* at paras. 34 to 37:

> Parties regularly act on the recommendations and advice of lawyers, who frequently communicate decisions made and positions adopted by their clients. Corporations, in particular, routinely rely on corporate counsel to assist in the orderly and proper management of the corporation's affairs; e.g., to assist directors and shareholders, (usually lay persons), in understanding corporate law governing what fundamentally is an artificial entity permitted, created and governed by that law.
>
> Lawyer involvement in that sense does not necessarily disqualify continued lawyer involvement if a dispute evolves into formal litigation. Otherwise, a great many litigants automatically would be deprived of their preferred legal representation, in which they have invested considerable time and expense.
>
> For similar reasons, the simple fact that a lawyer or law firm may have represented a corporate client in previous unrelated litigation does not preclude the lawyer or law firm from accepting a similar litigation retainer.
> However, the situation is different when disputes as to what that lawyer or law firm may or may not have done or witnessed lie at the substantive heart of a litigation dispute between the parties, and/or when evidence of that lawyer or firm

> realistically may be very relevant, necessary and/or decisive in resolving critical and contentious factual issues

[31] In addition, if the evidence can be obtained in a different way, without the lawyer, then the lawyer need not be a witness (*Mazinani* at para. 60; *TSCC No 2519 v Emerald PG Holdings Ltd*, 2022 ONSC 3916 at paras. 17 and 18).

[32] The "lawyer as witness" conflict of interest concern does not only arise at trial. It may arise in the context of a contested application (*Andersson* at para. 42).

[33] Rather than an all or nothing approach, the case law filed by the parties reveal that a facts specific and flexible approach to the "lawyer as witness" conflict of interest concern has been adopted to determine if a lawyer should be removed on that basis. Each case must be considered on its own merits, based on a "variety of factors", which may include, but are not limited to, the following:

a. the stage of the proceedings;

b. the likelihood that the witness will be called;

c. the good faith (or otherwise) of the party making the application;

d. the significance of the evidence to be led;

e. the impact of removing counsel on the party's right to be represented by counsel of choice;

f. whether trial is by judge or jury;

g. the likelihood of a real conflict arising or that the evidence will be "tainted";

h. who will call the witness; and

i. the connection or relationship between counsel, the prospective witness and the parties involved in the litigation.

(See *Andersson* at para. 19; *Mazinani* at para. 61)

ANALYSIS

(a) Should McCarthy Tétrault lawyers be removed based on the plaintiff's assertion that they may be liable to Glencore plc for advice they may have given to Glencore plc about the Rights Offering Transaction of Katanga?

[34] The plaintiff submits that documents issued contemporaneously to the transaction(s) at issue in this case, reveal that Glencore plc was at the centre of the Rights Offering Transaction. The plaintiff also submits that corporate disclosures of Katanga suggest McCarthy Tétrault lawyers advised Glencore plc, its directors, and officers, on the Rights Offering Transaction and the manner in which it was conducted. The plaintiff alleges the Rights Offering Transaction was carried out in violation of Canadian law, including part 5 of M1 61-101 and s. 195 of the *BCA*. The plaintiff submits that, in that context, McCarthy Tétrault is reasonably expected to be exposed to professional liability, if the Court finds that the Rights Offering Transaction violated Canadian law. The plaintiff also submits it is reasonable to assume McCarthy Tétrault lawyers advised Glencore plc on whether an oppression claim under the *BCA* could be brought against Glencore plc and whether Glencore plc could be liable as a successor by merger of Katanga. The plaintiff submits that McCarthy Tétrault lawyers have an interest in proving that the advice they provided on the transaction(s) at issue was correct and effective, and, therefore, an interest in the conduct and outcome of this proceeding. The plaintiff submits that, consequently, McCarthy Tétrault's own interests are contingent in the outcome of this proceeding, and, as such is implicated by a conflict of interest. The plaintiff submits that, in the eyes of a fair-minded reasonably informed member of the public, a proper administration of this proceeding would require the removal of McCarthy Tétrault lawyers.

[35] In support of his application the plaintiff filed news releases issued by Katanga contemporaneously to the transactions at issue in this case. The news releases contain statements that identify Glencore plc, together with its affiliates, as being the majority shareholder of Katanga. For example, a November 18, 2019 news release states that:

> Glencore plc, together with its affiliates ("Glencore"). … Glencore, which owns approximately 86.3% of the Company's issued and outstanding common Shares. …"
>
> …
>
> Early Warning disclosure
>
> Glencore currently holds 1,646,613,928 Common shares, representing approximately 86.3% of the issued and outstanding Common Shares.
>
> …

[36] Another news release from Katanga, dated November 7, 2019, contains the following statements, which, the plaintiff argues, demonstrate that Glencore plc's advisors were involved in the Rights Offering Transaction:

> An affiliate of Glencore plc ("Glencore"), which owns approximately 86.3% of the Company's outstanding Common Shares, will provide a standby commitment such that all Common Shares available for purchase under the Rights Offering will be fully subscribed. …
>
> …
>
> The Company's decision to undertake the rights offering is the result of analysis, discussions and negotiations by and among representatives of the company, a special committee of independent directors of Katanga (the "special committee"), Glencore, and their respective advisors to address the Company's overall indebtedness to Glencore under the Glencore's Loan Facilities.

[37] However, none of the corporate documents filed by the plaintiff in this application identify McCarthy Tétrault as one of the companies' advisors in relation to the

transactions at issue in this matter. The fact that Glencore International AG (together with its subsidiaries) identified McCarthy Tétrault as its agent for the purpose of service in Canada for the Rights Offering Transaction is not sufficient to conclude that McCarthy Tétrault lawyers provided legal advice with respect to that transaction or other matters raised by the plaintiff. This is still the case even if read in conjunction with the other corporate documents or news releases filed on this application.

[38] Adam Taylor, a lawyer and partner at McCarthy Tétrault, identified himself as Glencore plc's corporate counsel in an email to the Court dated March 30, 2021. In that email, Mr. Taylor advanced his client's position on a number of topics. However, he did so in the context of the plaintiff's application for default judgment in this proceeding. I note the plaintiff also filed a copy of Mr. Taylor's professional biography posted on the website of McCarthy Tétrault. This document suggests Mr. Taylor provided legal advice in relation to Katanga's Rights Offering Transaction. The document indicates Mr. Taylor acted as counsel for Glencore plc on several recent commercial transactions. In addition, the biography specifically lists an article entitled "Glencore backstops C$7.6B rights offering as it increases shareholdings in Katanga Mining", which clearly refers to the Rights Offering Transaction at issue, as part of Mr. Taylor's recent professional experience. However, the document does not provide any details regarding any involvement Mr. Taylor may have had with respect to that transaction.

[39] As a result, I am of the view this is fairly thin evidence upon which advancing an application to remove McCarthy Tétrault lawyers as counsel of record based on conflict of interest. I find a fair-minded reasonably informed member of the public would not conclude the proper administration of justice requires their removal as counsel of record on that basis.

[40] In addition, even if the record conclusively revealed McCarthy Tétrault lawyers had provided legal advice to Glencore plc with respect to the Rights Offering Transaction, or, potentially, other legal issues as raised by the plaintiff, I am of the view it would not automatically lead to the conclusion that they should be removed due to a conflict of interest.

[41] This proceeding is at an early stage. At this juncture, Glencore plc denies being the proper defendant in this matter. In addition, Glencore plc does not plead or advance it relied on any legal advice it may have received from McCarthy Tétrault lawyers, or others, as part of its defence to the claim before the Court. I am not prepared to assume, based on conjectures, that McCarthy Tétrault lawyers may have an interest in this proceeding that may diverge from their client's and/or that may impact their representation of Glencore plc and/or their duties as officers of the court.

(b) Are the lawyers for McCarthy Tétrault likely witnesses in this proceeding?

[42] The plaintiff submits McCarthy Tétrault lawyers are necessary witnesses because they have spoken to disputed facts in this proceeding that are properly subject to proof by way of evidence and cross-examination. The plaintiff submits McCarthy Tétrault lawyers are necessary witnesses on the following contentious issues:

(i) the form, substance and legal effects of the transaction(s) that preceded Katanga being taken private; and

(ii) matters concerning the appearance of Katanga and scope of representations of Katanga in this proceeding

(i) The form, substance and legal effects of the transaction(s) that preceded Katanga being taken private.

[43] The plaintiff submits McCarthy Tétrault lawyers are likely witnesses in this proceeding because they made assertions regarding disputed facts that are directly related to contentious issues that will have to be decided in this matter.

[44] In support of his position, the plaintiff relies on a letter dated January 27, 2022, sent to the Court by Michael Feder, K.C. (counsel of record for Glencore plc and a lawyer at McCarthy Tétrault), as well as the email sent by Mr. Taylor in March 2021.

[45] The plaintiff argues that, in the January 2022 letter, Mr. Feder made factual assertions regarding contested facts without making it clear to the Court he was expressing his client's positions as opposed to his own. In addition, the plaintiff submits the letter is misleading with respect to the actual content of the Statement of Defence and contains a number of factual assertions that are contradicted by contemporaneous corporate records.

[46] The January 27, 2022 letter was sent to my attention, with copy to counsel of record for the other parties to this proceeding, in advance of a case management conference scheduled for the next day. After review, I do not see how this letter could be interpreted as suggested by the plaintiff. The letter is no different than many this Court receives from counsel in advance of a case management conference in more complexed and/or highly contested civil matters where parties set out the issues they want to address and briefly describe their position. This type of correspondence, when use properly, allows the court to better understand the matters at issue between the parties and make appropriate and timely orders, mainly procedural in nature.

[47] At the time the letter was provided to the Court, applications had been filed by the plaintiff and the defendants. The defendants had filed applications to dismiss this proceeding and the plaintiff an application for the determination of point(s) of law. A case management conference was scheduled to discuss and determine the order and timeline of those applications. In my view, in the January 2022 letter, counsel does nothing more than setting out the position he intended to advance on behalf of his client at the upcoming case management conference. I understand plaintiff's counsel takes issue with Glencore plc's counsel characterization of the facts and of Glencore plc's legal relationship with Katanga and new Katanga. However, this is a matter for arguments and, ultimately, is to be decided by the Court. In any event, I do not see, at this early stage of the proceeding, how Mr. Feder, K.C., or the other counsel of record for Glencore plc who are also McCarthy Tétrault lawyers, could be called as witnesses on this issue other than to provide their own legal assessment or opinion on an issue that, ultimately, is to be decided by the Court. In all likelihood, this type of "expert evidence" would be found inadmissible. *See Boily v Canada*, 2017 FC 1021 at para. 32; *Murray v Galuska*, 2002 BCSC 1532 at para. 15; *R v Mohan*, [1994] 2 SCR 9; *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23. Based on the pleadings and the limited record before me on this application, if evidence regarding the corporate structure and legal relationship, or lack thereof, between Glencore plc and Katanga (old and new) is led at trial, it would likely consist of corporate records and, if necessary, the testimony of corporate directors or officers, not defendant's counsel. Glencore plc did not plead that it relied on McCarthy Tétrault lawyers' legal advice in its defence to the plaintiff's claim. In addition, there is nothing before me that could lead me

to conclude that Glencore plc has waived solicitor-client privilege in relation to any legal advice it may have received from McCarthy Tétrault lawyers in relation to this matter.

[48] The plaintiff also relies on the email dated March 30, 2021, sent to the Court by Adam Taylor to submit that Mr. Taylor is likely a witness in this matter.

[49] In the email, Mr. Taylor informs the Court he is corporate counsel for Glencore plc. He also states he has been retained for the limited purpose of addressing plaintiff's counsel application for default judgment. Mr. Taylor is not counsel of record in this proceeding. The email contains a number of statements such as: (i) Glencore plc is not the successor by merger to Katanga; and (ii) Glencore plc's subsidiary, Glencore International AG, acquired Katanga.

[50] The plaintiff submits that, in making those statements, Mr. Taylor made assertions regarding disputed facts and matters at issue that are for the Court to decide. The plaintiff submits that whether Glencore plc merged with Katanga and whether Glencore plc is the successor by merger of Katanga, are disputed issues to be decided by the Court based on proper evidence. The plaintiff argues this includes the evidence of Mr. Taylor, who, the plaintiff asserts, was directly involved with the transactions at issue in this proceeding and has direct knowledge of their form, substance, and effect. The plaintiff submits that Mr. Taylor specifically put these issues and his knowledge or opinion thereof, in issue in his email of March 30, 2021. In addition, the plaintiff submits he has filed an application to examine Mr. Taylor in relation to the defendants' application to dismiss the plaintiff's claim.

[51] The arguments put forward by the plaintiff in relation to Mr. Taylor are similar to the ones he made with respect to the letter Mr. Feder sent to the Court in January 2022. The difference is there is some evidence, which I earlier qualified as fairly thin, that

Mr. Taylor would have provided legal advice in relation to Katanga's Rights Offering Transaction. Without prejudging the outcome of the plaintiff's application to examine Mr. Taylor on the defendant's application to dismiss the plaintiff's claim, as the plaintiff may advance arguments and/or file evidence that are not before me on this application, I am of the view that, in his March 30, 2021 email, Mr. Taylor did nothing more than advancing his client's position regarding (i) the plaintiff's application for default judgment; (ii) the lack of proper service of the Statement of Claim on Glencore plc; and (iii) Glencore plc's views regarding its legal relationship or lack thereof with Katanga or new Katanga. Mr. Taylor also informed the Court he had no instructions to accept service of the Statement of Claim on behalf of Glencore plc. I note that the plaintiff's application for default judgment was rejected by the Court due to lack of proper service.

[52] Whether the position put forward by Mr. Taylor, as corporate counsel, in that email is based on a correct interpretation of the pleadings, the facts, and the law is a matter for arguments and, ultimately, a decision by the court. In addition, I do not see how counsel indicating they have no instructions to accept service of the Statement of Claim for Glencore plc, is a matter at issue that needs to be determined in this case. I understand the plaintiff takes issue with Mr. Taylor's characterization of some underlying facts and matters at issue in this proceeding. However, ultimately, this is a matter for arguments. Again, counsel referring to contested facts and matters in issue to advance their client's position does not make them potential witnesses.

[53] If evidence regarding the transactions at issue and corporate relationship, or lack thereof, between Katanga, new Katanga, Glencore International AG and Glencore plc is required, that evidence would likely consists of corporate records and, if necessary, the testimony of corporate directors or officers, not defendant's counsel. At this early stage

of the proceeding, while there is some thin evidence that Mr. Taylor may have provided legal advice in relation to the Rights Offering Transaction, there is no evidence that he may have done or witnessed something in relation to that transaction that "lie[s] at the substantive heart of the dispute between the parties" or that he could provide "relevant, necessary and/or decisive" evidence with respect to the factual matters at issue between the parties (*Andersson* at para. 37). At this stage of the proceeding, the record does not substantiate the plaintiff's assertion that Mr. Taylor and/or any other lawyer from McCarthy Tétrault would likely be a material witness in this proceeding.

(ii) Matters concerning the appearance of Katanga and scope of representations of Katanga in this proceeding

[54] The plaintiff takes the position that Katanga has appeared in this proceeding through Glencore plc's appearance. The plaintiff's position is based on the wording of the appearance form filed by Glencore plc in this matter. The appearance form identifies the defendant as "Glencore plc, in its own capacity and as a successor by merger to Katanga Mining Limited". The plaintiff submits his position regarding Katanga's appearance is without prejudice to Glencore plc's defence that it is not the successor of Katanga's liabilities. The plaintiff further submits that McCarthy Tétrault has put the scope of their legal representation at issue by stating in Glencore plc's outline, filed in response to this application, that "McCarthy never acted for Katanga".

[55] The plaintiff submits that whether Katanga has appeared in this proceeding and whether it is represented by McCarthy Tétrault lawyers is a contentious issue that turns on mixed questions of fact and law to be resolved on the following evidence: (i) the content of the management services agreement between Glencore and Katanga; (ii) the

corporate ownership structure between Glencore and Katanga; and (iii) the terms of Glencore's counsel retainer in relation to this proceeding.

[56] According to the plaintiff, McCarthy Tétrault lawyers are necessary witnesses in relation to this issue, with respect to the terms of their retainer in this proceeding. The plaintiff stated he intends to call them as witnesses at the appropriate time when the Court is required to decide the issue.

[57] In my view, the plaintiff's position is based on an overly technical reading of documents filed in this proceeding that is not grounded in the pleadings.

[58] The record reveals that, on July 27, 2021, Grant Macdonald, K.C. (a lawyer with Macdonald and Company, a Yukon law firm) entered an appearance on behalf of Glencore plc. In doing so, Mr. Macdonald replicated word for word the description the plaintiff ascribed to the defendant in the style of cause of his Statement of Claim.

[59] On January 27, 2022, a Notice of Appointment or Change of Lawyer was filed indicating that Mr. Feder, K.C., Mr. D'Souza, and Mr. Williams of McCarthy Tétrault had been retained to act as lawyers for Glencore plc in this proceeding. The form identifies the defendant as Glencore plc. Mr. Macdonald, K.C. signed the appearance form for new counsel of record. Macdonald and Company's address remained the defendant's address for service in the Yukon.

[60] In its Statement of Defence, filed on August 10, 2021, Glencore plc specifically denied being the successor by merger to Katanga, or its corporate equivalent. Glencore plc specifically pleaded that Katanga and Glencore plc are two separate entities.

[61] The plaintiff has been aware of Glencore plc's position on this issue since, at least, the email Mr. Taylor sent to the Court on behalf of Glencore plc to oppose the plaintiff's application for default judgment in March 2021.

[62] Therefore, the plaintiff cannot reasonably rely on the description he ascribed to Glencore plc in his Statement of Claim and the wording of Glencore plc's July 2021 appearance form to argue McCarthy Tétrault lawyers are likely to be called as witnesses on the issues of whether Katanga has appeared in this proceeding and whether Katanga is represented by McCarthy Tétrault lawyers. In this context, filing an appearance that simply reflects the style of cause of the Statement of Claim does not amount to accepting the plaintiff's characterization of the defendant's legal status or relationship with other corporate entities. Glencore plc's statement of defence makes it clear that it does not accept that description. In addition, the position advanced by McCarthy Tétrault lawyers in the defendant's outline regarding their legal representation of Glencore plc is entirely consistent with the position they have put forward on behalf of Glencore plc since even before Glencore plc formally appeared in this matter. Therefore, I see no merit in the plaintiff's overly technical reading of Glencore plc's first appearance form and his argument that McCarthy Tétrault lawyers could be called as witnesses with respect to the extent of their retainer on the basis he advanced on this application.

[63] I note it is for the plaintiff to decide, notwithstanding his stated position that Glencore plc is the proper named corporate defendant in this matter, if other corporate entities, including new Katanga, should be added as named defendants in this proceeding, and take the step(s) he believes are required to advance his claim.

[64] As a result, based on the evidence before me, I find the plaintiff has not established McCarthy Tétrault lawyers are likely or probably material witnesses in this proceeding. I am of the view a fair-minded reasonably informed member of the public would not conclude that the proper administration of justice requires the removal of McCarthy Tétrault lawyers.

COSTS

[65] Glencore plc seeks special costs of this application in any event of the cause, payable forthwith.

[66] The defendant submits it is entitled to special costs because (i) the plaintiff relied on speculations in support of his application to have McCarthy Tétrault remove as counsel for Glencore plc; (ii) even if the plaintiff's speculations had been substantiated, they would not have provided a basis to remove McCarthy Tétrault as counsel in this proceeding; and (iii) the plaintiff only raised the removal application shortly prior to a case management conference scheduled to determine the order of the parties' respective preliminary applications, after having known of McCarthy Tétrault's involvement for a year.

[67] The defendant submits the plaintiff's conduct in this matter has been scandalous, vexatious, and reprehensible. Therefore, an award of special costs is warranted.

[68] The plaintiff submits the application was brought on valid grounds, in good faith, and in a timely manner. The plaintiff submits that, if costs were to be granted on this application, they should be awarded in accordance with the court's usual practice. The plaintiff submits special costs are not warranted.

[69] New Supreme Court of Yukon *Rules of Court* (the "new *Rules*") came into effect on October 31, 2022. The new *Rules* came into force after this application was heard but before my decision was rendered.

[70] I am of the view the new *Rules* apply to the issue of costs of this application.

[71] New Rule 1(18) provides that: "Unless the court otherwise orders, all proceedings, whenever commenced, shall be governed by these rules."

[72] While new Rule 60, which governs the award of costs, does not contain specific transitional provisions, Appendix B of the new *Rules*, entitled Party and Party Costs, does. The transitional provisions specify that the new Appendix B applies to costs orders made on or after October 31, 2022, whereas Appendix B of the previous *Rules of Court* continues to apply to costs orders made prior to October 31, 2022.

[73] Therefore, the combined application of new Rule 1(8) and the transitional provisions of new Appendix B lead me to conclude the new *Rules* apply to a determination of costs made after the coming into force of the new *Rules* even if the costs application was made and/or heard prior to October 31, 2022. This interpretation ensures consistency between the application of the rule guiding the award of costs, and the assessment of those costs.

[74] While the new *Rules* have brought in modifications to previous Rule 60, the general underlying principles guiding an award of costs remain the same.

[75] An award of costs is discretionary.

[76] Costs in a proceeding usually follow the event, meaning that costs are generally awarded to the successful party (*Cobalt Construction Inc. v Kluane First Nation*, 2014 YKSC 40 at para. 56).

[77] Where costs are awarded to a party, they shall be assessed as party and party costs under Appendix B unless the court orders otherwise.

[78] Special costs may be awarded when a party has acted in a reprehensible, scandalous, or outrageous manner. (New Rule 60 (1.1) and *Golden Ventures Limited Partnership v Ross Mining Limited and Norman Ross*, 2012 YKSC 18 at paras. 4-9, decided under the previous *Rules*).

[79] An award of special costs is to be used sparingly (*K.A.M. v. B.M.M.*, 2018 YKSC 14 at para. 96; *Fine Gold Resources Ltd. v 46205 Yukon Inc*., 2016 YKCA 15 at paras. 54-55).

[80] Special costs are awarded to sanction reprehensible conduct that is deserving of the court's rebuke. "The fact a proceeding has little merit is not in itself a reason for awarding special costs" (*Dyer v Dyer*, 2016 BCSC 1115 ("*Dyer*") at para. 53).

[81] Also, the court may order increased costs when it is of the view that, due to unusual circumstances, an award of costs on a given scale may be inadequate or unjust (new Rule 60 (1.2); see *Maraj v Commissioner of the Yukon Territory*, 2022 YKSC 40 at paras. 10-11, issued before the *new Rules* came into force).

[82] In *Dyer*, Pearlman J. reviewed three costs decisions with respect to removal application. Long delays in bringing the application, the potential consequences to the responding party of being deprived of their chosen counsel shortly before trial, the tactical aspect of the application, and the speculative nature of the application were identified as factors warranting an award of special costs.

[83] In addition, serious but unfounded accusations of misconduct may also lead to an award of special costs (*Song v Westwood Plateau Golf & Country Club*, 2016 BCCA 95 at paras. 25, 27-29).

[84] The defendant successfully defended the plaintiff's application to have its counsel of choice removed from this proceeding. I am therefore of the view it is entitled to an award of costs.

[85] The plaintiff brought his application early in the proceeding, a few months after the pleadings were closed. However, the fact that plaintiff's counsel only advised Glencore plc's counsel of their intention to bring a removal application shortly prior to a case management conference scheduled for January 28, 2022, to set a timeline for the hearing of other applications that had been filed, after having known of McCarthy Tétrault's involvement for quite some time, is questionable. I note the plaintiff had been in possession for some time of, at least, a number of documents he relied on in support of his application, including Mr. Taylor's email of March 30, 2021. Some of those documents were filed in support of the plaintiff's application for substituted service, which I heard in June 2021 (Katanga's prospectus and Non-Issuer Forms of Submission to Jurisdiction and Appointment of Agent for Service of Process for example).

[86] In addition, I have found that the plaintiff's application was based on a thin evidentiary basis and an interpretation of documents (correspondence from counsel and appearance form) that could not be sustained.

[87] While the questionable timing of the application and the thin evidentiary record deserve special consideration, I am unable to find they reach a level that justifies awarding special costs. However, I am of the view, based on the foregoing considerations coupled with the nature of this application and its possible consequences for Glencore plc, that the circumstances of this application are sufficiently unusual to conclude an award of costs on a given scale would be inadequate, and an award of increased fixed costs is justified.

[88] In addition, this application relates to a discrete issue that is separate and apart from the substantive issues raised by the plaintiff's oppression claim. As a result, I am of the view an award of costs in any event of the cause is appropriate. (*Dyer* at paras. 49-51; *Marko Trucking v Delta Western*, 2000 YTSC 533 at paras. 14-15).

[89] As a result, increased costs, to be assessed by the Court, are awarded to the defendant, Glencore plc, in any event of the cause, payable forthwith when assessed. Counsel for Glencore plc shall submit their bill of costs with the court registry on or before December 16, 2022, along with their written submissions. The plaintiff shall file his written submissions in response, if any, by January 20, 2023. The parties' written submissions shall be no longer than 10 pages. The assessment of increased costs will be made on the basis of the draft bill of costs and the parties' written submissions.

CONCLUSION

[90] The plaintiff's application for the removal of McCarthy Tétrault lawyers as counsel of record for the defendant, Glencore plc, is dismissed. Increased costs, to be assessed by the Court, are awarded to the Defendant Glencore plc, in any event of the cause, and will be payable forthwith when assessed.

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CAMPBELL J.