SUPREME COURT OF YUKON

Citation: *Cheng v Glencore plc*, 2023 YKSC 52

Date: 20230911
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	Sage Nematollahi (by video)
Counsel for the Defendant, Glencore PLC	Michael Feder, K.C. and Patrick Williams (by video)
Counsel for the Defendants, Hugh Stoyell and Robert Wardell	Alan Gardner and Joseph Blinick (by video)

REASONS FOR DECISION

OVERVIEW

[1] The plaintiff seeks an order permitting him to question three individuals, either by way of examination, cross-examination, or interrogatories in relation to Glencore plc's application to dismiss this action based mainly on the Supreme Court of Yukon's purported lack of subject-matter and territorial jurisdiction, and the other two defendants' application to dismiss also based on, among other things, this Court's purported lack of subject-matter jurisdiction.

[2] The defendants oppose the plaintiff's application. Glencore plc made written and oral submissions on this application. The other two defendants, Hugh Stoyell ("Stoyell") and Robert Wardell ("Wardell"), former Directors of Katanga Mining Limited ("Katanga"), relied on Glencore plc's submissions.

[3] According to the pleadings and other documents filed before me, the plaintiff was a minority shareholder of Katanga, a mining company incorporated in the Yukon under the *Business Corporations Act*, RSY 2002, c 20 (the "*BCA*") with mining properties and assets in the Democratic Republic of Congo. Katanga was publicly traded on the Toronto Stock Exchange. As a result of a Rights Offering Transaction carried out in November 2019, Glencore International AG, the majority shareholder of Katanga and an affiliate of Glencore plc, became the owner of more than 99% of Katanga's shares. The plaintiff alleges that, ultimately, this transaction resulted in Glencore plc having absolute control over Katanga.

[4] In June 2020, Katanga was amalgamated with another Yukon company, 836074 Yukon Inc, to form Katanga Mining Limited ("New Katanga") and taken private. In December 2020, New Katanga was discontinued in the Yukon and continued into the Isle of Man.

[5] The plaintiff filed this purported representative action on behalf of all Katanga's minority shareholders. The plaintiff alleges the defendants orchestrated and carried out the Rights Offering Transaction in an oppressive manner by circumventing and breaching securities law, and more specifically Part 5 of Multilateral Instrument 61-101 (Protection of Minority Security Holders in Special Transactions) ("Multilateral Instrument") as well as s.195 of the *BCA*. The plaintiff claims the way the transaction

was carried out enabled Glencore plc to take Katanga private, without following the procedure outlined in the Multilateral Instrument or s. 195 of the *BCA* requiring it to give Katanga's minority shareholders an opportunity to vote or to obtain the court's approval. The plaintiff claims that, as a result of how the transaction was carried out, Glencore plc was able to acquire Katanga's shares and take it private for a substantially lower price than what it would have otherwise had to pay. The plaintiff alleges that, upon the announcement of the Rights Offering Transaction, Katanga's shares plummeted by 46% and never recovered thereafter.

[6] The plaintiff seeks financial compensation for himself and Katanga's other minority shareholders, or such other economic measure the Court deems appropriate, as a remedy for the economic harm he claims they suffered as a result of the alleged oppressive conduct of the defendants, pursuant to s. 243 of the *BCA*.

[7] The defendants have filed applications seeking that this action be dismissed based on, among other things, this Court's purported lack of jurisdiction over this case. In the alternative, they seek an order that the proceeding be stayed until the plaintiff complies with the *Rules of Court* of the Supreme Court of Yukon (*"Rules of Court"*).

[8] Glencore plc, supported by the other two defendants on the issues of subject-matter jurisdiction and, in the alternative, a stay of proceeding, raises four arguments in support of its application:

(i) Glencore plc argues it is not a proper defendant in this matter because it is a distinct legal entity from Katanga and New Katanga. According to Glencore plc, it never merged with Katanga (or New Katanga) and is not a successor to Katanga (or New Katanga).

(ii) The Supreme Court of Yukon lacks subject-matter jurisdiction over this proceeding because none of the corporations targeted by this action are governed by the *BCA*. Glencore plc argues the Supreme Court of Yukon can remedy oppression under s. 243 of the *BCA* only if the corporations at issue are governed by the *BCA.* Glencore plc points out that New Katanga was discontinued in the Yukon and continued into the Isle of Man before the plaintiff's claim was filed with the Court.

(iii) The Supreme Court of Yukon lacks territorial jurisdiction over Glencore plc because it is not ordinarily resident in the Yukon and there is no real and substantial connection between the alleged oppressive conduct and Glencore plc.

(iv) In the alternative, Glencore plc argues the plaintiff has contravened the *Rules of Court* by starting this oppression claim by an action rather than by a petition as stipulated by the *Rules of Court*. Therefore, this action should be stayed until the plaintiff complies with the *Rules of Court* or persuade the Court to allow an action to proceed.

[9] Glencore plc filed the affidavit of John Burton, with documents attached as exhibits, in support of its application. The defendants Stoyell and Wardell also rely on Mr. Burton's affidavit in support of their application to dismiss. John Burton is Glencore plc's Company Secretary. He is also a director of Glencore International AG and of New Katanga. A number of corporate documents, including two statutory declarations signed by Gabriel Audebert, General Counsel and Company Secretary for Katanga, are attached to Mr. Burton's affidavit.

[10] It is in that context that the plaintiff filed his application for an order permitting him to:

(i) cross-examine John Burton on his affidavit;

(ii) examine Gabriel Audebert in relation to documents (two statutory declarations he made and an application he filed), some of which are attached to John Burton's affidavit; and

(iii) compel Adam Taylor, lawyer for McCarthy Tétrault LLP and corporate counsel to Glencore plc, to answer interrogatories.

ANALYSIS

(i) Cross-examination of John Burton on his affidavit

[11] Glencore plc filed the affidavit of John Burton in support of its application to dismiss the plaintiff's claim based on the Supreme Court of Yukon's purported lack of territorial and subject-matter jurisdiction over this proceeding.

[12] According to his affidavit, John Burton has been the Company Secretary of Glencore plc since September 1, 2011. He has also been a Director of Glencore International AG since May 2, 2019, and a Director of New Katanga since June 23, 2020.

[13] In his affidavit, John Burton provides a brief description of Glencore plc's and Glencore International AG's respective corporate status. He also provides a brief chronology of Katanga's and New Katanga's corporate history. In addition, he provides some information about the ownership of Glencore International AG, Katanga, and New Katanga.

[14] In his affidavit, Mr. Burton states that neither Glencore plc nor Glencore International AG has ever agreed to the Supreme Court of Yukon having jurisdiction in this proceeding. Also, he states that New Katanga has never agreed to this Court having jurisdiction in this proceeding either.

[15] In addition, Mr. Burton affirms that Glencore plc has never merged with Katanga or New Katanga; Glencore plc, Glencore International AG, and New Katanga remain separate entities.

Position of the plaintiff

[16] The plaintiff submits the defendants' applications to dismiss, which raise the question of whether the defendants can be subject to liability under s. 243 of the *BCA*, turn on mixed questions of facts and law regarding the form, substance, and effects of the transaction at the core of this case, the Rights Offering Transaction, the Going Private Transaction that followed, and the discontinuance of New Katanga in the Yukon.

[17] The plaintiff submits it would be unfair to allow the defendants' applications to proceed without giving him the opportunity to test and clarify the facts upon which they rely to have his claim dismissed.

[18] The plaintiff states that Mr. Burton's affidavit purports to provide the material facts this Court needs in order to determine the defendants' applications to dismiss. However, the plaintiff argues there are evidentiary gaps and inconsistencies in the affidavit of John Burton in relation to those material facts.

[19] The plaintiff submits that cross-examination of Mr. Burton is required to clarify the facts regarding the form, substance, and effects of the transactions by way of which Katanga was ultimately taken private and discontinued in the Yukon because the

defendants rely on those facts to argue that this Court does not have jurisdiction over this action.

[20] In terms of inconsistencies, the plaintiff submits that Mr. Burton's statement that Glencore plc and Glencore International AG never agreed to the Supreme Court of Yukon having jurisdiction in this proceeding is in direct contradiction with the Canadian securities regulators Non-Issuer Forms of Submission to Jurisdiction (the "Forms") that Mr. Burton, as well as other directors and administrators of Glencore International AG, executed and filed at the time of the Rights Offering Transaction (November 15, 2019). These documents are attached to Affidavit #1 of Taek Soo Shin, dated February 23, 2022, and filed by the plaintiff.

[21] Also, the plaintiff submits Mr. Burton affirms that Glencore plc never owned any of Katanga's outstanding shares despite the fact counsel for Glencore plc conceded in their response to this application that Glencore plc indirectly owned the vast majority of Katanga's issued and outstanding shares.

[22] In addition, the plaintiff submits the evidence of Mr. Burton regarding Katanga and 836074 Yukon Inc is hearsay because Mr. Burton was never an officer of these companies before the amalgamation.

[23] Finally, the plaintiff submits that some of the statements made by Mr. Burton in his affidavit refer to legal advice regarding the jurisdiction of the Court as well as the legal relationship between Glencore plc and New Katanga. The plaintiff argues that, in doing so, Mr. Burton put his own state of mind at issue and waived any applicable privilege to such legal advice because, among other things, those same statements were first found in an email Glencore plc's corporate counsel sent to the Court on

March 30, 2021. As a result, the plaintiff submits he should be allowed to cross-examine Mr. Burton on those statements and legal advice.

[24] Finally, the plaintiff submits the statutory declarations filed by Gabriel Audebert at the time New Katanga was discontinued in the Yukon, which are attached to Mr. Burton's affidavit, are inconsistent with Glencore plc's position that this Court has ceased to have jurisdiction over this matter partly because New Katanga is no longer governed by the *BCA*, and he should be authorized to cross-examine Mr. Burton on that disputed issue.

Position of Glencore plc

[25] Glencore plc opposes the plaintiff's application on the basis that the evidence sought by the plaintiff is not relevant to its application to dismiss. In addition, Glencore plc argues its application relies on uncontroversial facts regarding the corporate status of the above-mentioned corporate entities, that the plaintiff has either conceded or that can be readily established from publicly available and uncontroversial corporate records. Glencore plc adds its application does not raise disputed facts, only disputed legal positions. Glencore plc further argues that cross-examination on legal issues serve no useful purpose and should be refused. Finally, Glencore plc submits that most of the information sought by the plaintiff is subject to privilege.

[26] More specifically, Glencore plc submits the Forms referred to by the plaintiff are not relevant to Glencore plc's jurisdictional argument because it was not a signatory to those Forms. Glencore plc also submits there is no alleged agreement between Glencore plc and the plaintiff relevant to territorial jurisdiction. In addition, Glencore plc submits a party cannot consent to granting or enlarging this Court's subject-matter

jurisdiction. Glencore plc argues that, even if the Forms were relevant, it is not disputed they were signed by Mr. Burton and others. Therefore, cross-examining Mr. Burton on his opinion about those Forms would serve no useful purpose as the Court is not bound by his opinion.

[27] Glencore plc submits there is no inadmissible hearsay contained in Mr. Burton's affidavit. As a director of New Katanga and a director of Glencore International AG, Mr. Burton has first-hand knowledge of the facts to which he attested. In the alternative, the facts contained in Mr. Burton's affidavit regarding pre-amalgamation Katanga are not in dispute. In addition, Glencore plc submits it would serve no useful purpose to allow the plaintiff to cross-examine Mr. Burton on statutory declarations made by another person, Mr. Audebert, that were attached to his affidavit for a limited purpose.

Factors to consider in determining whether to allow a party to cross-examine a deponent on an affidavit in the context of an application.

[28] The right to cross-examine a deponent on an affidavit filed in support of an application is not automatic. Rule 50(1), (3) and (9) of the *Rules of Court* provides that the court has discretion to grant leave to cross-examine on affidavit as it directs. Factors to consider in the exercise of that discretion are:

1. whether there are material facts in issue;

2. whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and

3. whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

(*Stephens v Altria Group, Inc*, 2021 BCCA 396 ("*Stephens*") at para. 5, and see also *Hy's North Transportation Inc v Finlayson Minerals Corporation dba Yukon Zinc Corporation,* 2016 YKSC 39 at para. 21)

[29] The question is not whether there are conflicting affidavits, but whether there are conflicting material facts. Therefore, the conflict may also be grounded in the pleadings (*Stephens* at para. 8).

[30] Other factors, such as whether the information sought is available through other means and whether the cross-examination will produce unreasonable delay or generate unreasonable expense, may be considered when appropriate (*Stephens* at para. 5).

[31] Finally, considering the wide range of proceedings to which Rule 50(9) applies, the court must, in making its determination, be sensitive to the context in which the application is brought. As stated by the Court of Appeal for British Columbia in *Stephens* when referring to the equivalent rule in British Columbia:

> [8] …
>
> It is evident from *Brown* and other cases that the question is not whether there are conflicting affidavits, but whether there are conflicting material facts. In my view, that conflict may be grounded in the applicant's pleading. In a jurisdictional challenge, or an application to strike a fraud or conspiracy claim, the plaintiff often will not be in a position to swear to events that are largely within the knowledge of the defendant. It must be remembered that Rule 22-1(4)(a) governs applications to cross-examine on affidavits filed in a wide array of proceedings. The factors to be considered in the exercise of the judge's discretion remain the same, but their application must be sensitive to the context in which the application is brought. As Justice Hunter observed in *H.M.B.*, at para. 61, if the underlying application is one that, if successful, would result in the striking out of the plaintiff's claim without any consideration of its merits, that context may weigh in favour of granting cross-examination.

Analysis

[32] As stated, Glencore plc has brought an application to dismiss the plaintiff's claim against it based mainly on the Supreme Court of Yukon's purported lack of subject-matter and territorial jurisdiction. The defendants Stoyell and Wardell also raise, among other things, the Court's purported lack of subject-matter jurisdiction in support of their application to dismiss the claim against them.

[33] Also, Glencore plc argues that it never merged with Katanga, and/or New Katanga, and that Glencore plc, Glencore International AG and New Katanga are separate corporate entities. In essence, Glencore plc argues the plaintiff has filed his claim against the wrong corporate entity.

[34] Glencore plc's argument regarding the Court's territorial jurisdiction over this matter, pursuant to the *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c.7, is that Glencore plc is not ordinarily resident in the Yukon and there is no real and substantial connection between the alleged oppressive conduct and Glencore plc.

[35] The corporate relationship between Glencore plc, Glencore International AG, Katanga, and/or New Katanga both before and after the alleged oppressive transaction (including their corporate structure(s)), as well as the corporate status and ownership of these corporations, are therefore material facts relevant to some aspects of Glencore plc's arguments in support of its application to dismiss.

[36] I agree with the plaintiff that the facts provided in Mr. Burton's affidavit are far from providing a clear and complete picture of the corporate status and ownership of the corporate entities and of their corporate relationship. For example, in his affidavit, Mr. Burton refers to Glencore International AG as an affiliate of Glencore plc without

saying anything more. Mr. Burton uses similar broad language when referring to the relationship between Glencore plc and Katanga.

[37] Mr. Burton also states, at para. 11 of his affidavit, that: "After the amalgamation, Glencore International AG owned all of New Katanga's shares directly or indirectly" without providing any details about the ownership of those "indirect" shares. Mr. Burton also states, at para. 9 of his affidavit that "[b]efore June 2020, Glencore International AG owned the majority of Katanga's outstanding shares. Glencore plc did not own any of Katanga's outstanding shares".

[38] However, in the Statement of Defence of Mr. Stoyell and Mr. Wardell, Glencore International AG is specifically referred to as "a wholly owned subsidiary" of Glencore plc, not just an affiliate. They also plead in their Statement of Defence that, as a result of the Going Private Transaction, Katanga became "wholly owned" by Glencore International AG.

[39] In his Reply to Glencore plc's Statement of Defence, the plaintiff acknowledges Glencore plc and Katanga are not the same entity. However, he pleads:

> The claims have been asserted against Glencore on its own behalf as the majority shareholder of Katanga at the relevant time, and also in its capacity as successor by merger to Katanga. The term successor by merger does not mean that Glencore and Katanga are the same legal entity, which they are not. Rather, it means that, as a result of the business combination, Glencore is legally the successor to Katanga's liabilities arising out of events that occurred before the acquisition was effected, including the claims advanced in this Representative Proceeding.

[40] In his Reply, the plaintiff also pleads that Glencore International AG is a "wholly owned operating subsidiary" of Glencore plc. In addition, he pleads that New Katanga is

"a wholly-owned subsidiary" of Glencore plc, and that Glencore plc conceded that fact in a related action commenced in the United States.

[41] The plaintiff pleads, in the alternative, that Glencore plc is liable for the oppressive actions described in the Statement of Claim on the basis that New Katanga, and/or Katanga were "alter egos or agents" of Glencore plc with respect to those actions and/or that "the court should pierce the corporate veil as a result of the oppressive conduct" of Glencore plc's wholly-owned subsidiary. The plaintiff claims Glencore plc, Katanga, and New Katanga were "unjustly enriched" as a result of the alleged oppressive actions and the minority shareholders of Katanga "suffered a corresponding deprivation" without any juristic reason for the enrichment. The plaintiff makes similar claims with respect to Glencore International AG.

[42] In the further alternative, the plaintiff pleads Glencore plc "conspired with Glencore International AG, New Katanga and/or Katanga and/or directed" these entities "to take the oppressive corporate actions described in the Statement of Claim" in order to gain "collateral benefits" and "profits". The plaintiff pleads it was foreseeable the minority shareholders would suffer damages as a result of their conduct.

[43] In his Reply, the plaintiff also pleads that Glencore plc played a financial supporting role in the Rights Offering Transaction (that it "backstopped" the transaction), as per the information provided in a corporate news release allegedly published with the consent of Glencore plc at the relevant time.

[44] As a result, I am of the view there are material facts in issue regarding the corporate status of the corporate entities identified in this proceeding as well as their ownership and the corporate relationship between them (including their corporate

structure(s)), both before and after the alleged oppressive transaction took place, that may affect the outcome of the substantive application to dismiss. I am also of the view that cross-examination on these issues will serve a useful purpose in terms of eliciting evidence that would assist in clarifying the facts before the Court regarding ownership and corporate relationship, as well as determining the issue of jurisdiction that will be before the Court on the application to dismiss.

[45] It may well be that the facts regarding the corporate status of those corporate entities, as well as their ownership and the corporate relationship between them can be established through corporate documents. However, not all those documents are before the Court at this stage. In my view, considering Mr. Burton's privileged position as a director of Glencore International AG and New Katanga as well as Company Secretary of Glencore plc, considering as well that he attested to material facts that do not provide a complete picture of the ownership, corporate status, and relationship between the corporations referred to in this proceeding, the plaintiff should be allowed to test and clarify his evidence regarding those material facts through cross-examination. The fact that Mr. Burton is a lawyer and corporate counsel for Glencore plc – as raised by Glencore plc in its outline, even though those facts are not included in Mr. Burton's affidavit – does not preclude his cross-examination on matters related to his work and knowledge as Company Secretary and director that he attested to in his affidavit and that is not protected by privilege.

[46] Also, whether the corporations are signatory to the Forms referred to by the plaintiff or in other manner attorned to Canadian courts' jurisdictions in order to being authorized to proceed with the alleged oppressive transaction, or in relation to that

transaction, is relevant to the substantive application. I am of the view that the plaintiff should be permitted to cross-examine Mr. Burton on the facts surrounding his statement that neither Glencore plc, Glencore International AG, nor New Katanga has consented to this Court having jurisdiction over this proceeding because the plaintiff pleaded facts (see paras. 2 and 3 of his Reply to Glencore plc's Statement of Defence) and filed an affidavit with documents attached that could be found to contradict Mr. Burton's statement.

[47] Without any of the factual context surrounding the signature of the Forms, I am not prepared to accede to Glencore plc's argument that they are not relevant to the jurisdictional issue because Glencore plc is not a signatory to those Forms. I am of the view that cross-examination on the factual context surrounding the signature of those Forms as well as on what Mr. Burton's understanding was at the time he signed them would assist in determining the legal issue the Court will, ultimately, have to decide. I am also of the view that the plaintiff should be allowed to cross-examine Mr. Burton on whether he signed or is aware of other similar documents related to jurisdiction the corporate entities would have executed and/or filed in relation to the alleged oppressive transaction.

[48] The plaintiff is therefore authorized to cross-examine Mr. Burton on the context in which he, and others, signed and filed the Forms; what he understood those documents meant when he signed them; and if he is aware of other forms or documents regarding or mentioning the jurisdiction of Canadian courts he or others would have signed on behalf of Glencore plc, Glencore International AG, or Katanga with respect to the alleged oppressive transaction at issue in this proceeding.

[49] The plaintiff is also permitted to cross-examine Mr. Burton on whether he is aware of other court or legal proceedings where Glencore plc, Glencore International AG, Katanga or New Katanga would have publicly and officially taken position on the jurisdiction of Canadian courts or other courts with respect to transactions related to this matter, as alleged by the plaintiff at par. 3 of his Reply, and whether specific documents were filed in those proceedings on behalf of any of the above-mentioned corporations. However, the plaintiff may not cross-examine Mr. Burton on the substance of the legal position(s) advanced by the corporations in those proceedings, if any, as this is a matter for legal arguments not cross-examination.

[50] In granting permission to cross-examine on the above-mentioned issues, I also take into consideration that, if the defendants' applications to dismiss are successful, they will result in the plaintiff's claim being struck out without any consideration of its merits.

[51] However, granting permission to cross-examine on the above-mentioned material facts in issue does not preclude the defendants, and more specifically Glencore plc, from raising, during cross-examination, any privilege, including solicitor-client privilege, that may apply, as it would be premature for me to rule on the validity of any such objection. As I explain later in my reasons, the simple fact Mr. Burton makes statements that coincide with the position that corporate counsel, Mr. Taylor, put forward on behalf of Glencore plc in an earlier email to the Court does not automatically lead to the conclusion that Mr. Burton refers to legal advice in his affidavit, and that Glencore plc has waived solicitor-client privilege on any legal advice it may have received with respect to those issues, as argued by the plaintiff.

[52] The plaintiff has not articulated why he should be permitted to cross-examine Mr. Burton on hearsay statements the plaintiff argues Mr. Burton makes in his affidavit. If the plaintiff is concerned that Mr. Burton's affidavit contains inadmissible hearsay, he may apply to have it struck out. I note that, as Mr. Burton has been a director of Glencore International AG since May 2, 2019, he would be expected to have some personal knowledge of that company's ownership of or corporate relationship with Katanga and its corporate status.

[53] Also, I do not see how cross-examination of Mr. Burton on the content of someone else's statements or opinions contained in the statutory declarations that were attached to Mr. Burton's affidavit for the purpose of establishing the date and identity of the corporations involved in the amalgamation would serve any useful purpose. The date and identity of the corporate entities involved in the amalgamation are not contested. There is no dispute that, on December 10, 2020, New Katanga was discontinued under the *Act* and continued into the Isle of Man. I note the Court is not bound by any opinion expressed by a third party in those documents.

[54] In addition, while counsel for the plaintiff stated in oral submissions that the plaintiff did not accept several other "statements of facts" contained in Mr. Burton's affidavit, he did not point out where in the Statement of Claim or Reply, the plaintiff pleads facts that conflict with Mr. Burton's statements. For example, the plaintiff states he does not accept Mr. Burton's statement that neither Glencore plc nor Glencore International AG has ever had a place of business in the Yukon. However, the plaintiff does not plead that Glencore plc and/or Glencore International AG have "themselves'' ever had a place of business in the Yukon. What the plaintiff pleads is that Glencore plc

– through its ownership of and corporate relationship with Katanga and New Katanga, which were incorporated under the laws of Yukon – did conduct business or had a place of business in the Yukon at all material times. In my view, aside from the material facts regarding the corporate status, ownership, and corporate relationship(s) between the corporate entities in question (including their corporate structure(s)), which I have already permitted the plaintiff to cross-examine Mr. Burton on, the conflict between the parties regarding Mr. Burton's "other statements of facts" does not revolve around material facts but around the legal effects of those facts, which is a matter for submissions not cross-examination.

[55] Finally, Mr. Burton's affidavit is quite short and does not contain statements relating to:

(i) the conduct of – or absence of involvement of – either Glencore plc, Glencore International AG, Katanga, or New Katanga or their respective directors in the alleged oppressive transaction at the center of this claim; or

(ii) the substance of the alleged oppressive transaction; or

(iii) the specific circumstances surrounding those alleged events.

[56] I am therefore of the view that the plaintiff's cross-examination must be restricted to the subjects contained in Mr. Burton's affidavit and the specific issues on which I granted him permission to cross-examine Mr. Burton.

(ii) Examination of Gabriel Audebert

[57] The plaintiff seeks an order that Gabriel Audebert attend for examination on the contents of two statutory declarations he made on June 2, 2020, in relation to the

amalgamation of Katanga with 836074 Yukon Inc. These two declarations are attached to Mr. Burton's affidavit.

[58] The plaintiff also seeks to examine Mr. Audebert on an application he signed, which was filed with the Deputy Registrar of Corporations of the Yukon on November 24, 2020, in relation to New Katanga's application to continue out of the Yukon and into the Isle of Man, and to which is attached a legal opinion of an Isle of Man lawyer. That document was filed in this proceeding by the plaintiff through Affidavit #1 of Taek Soo Shin, dated February 23, 2022.

The position of the plaintiff

[59] The plaintiff argues that Glencore plc has acknowledged in its response to this application that it was an indirect shareholder of Katanga and is an indirect shareholder of New Katanga, and that Katanga was governed by the *BCA* at the time the alleged oppressive transaction occurred.

[60] The plaintiff states that one of Glencore plc's argument in support of its application to dismiss is that the transactions resulting in Glencore plc taking Katanga private led to this Court ceasing to have jurisdiction to hear the oppression claim brought under the laws of the Yukon. The plaintiff submits that, in raising that argument, Glencore plc put at issue the material facts concerning the form, substance, and effects of the transactions by way of which Glencore plc took Katanga private.

[61] The plaintiff points out that, in his declarations of June 2, 2020, Mr. Audebert states that the Going Private Transaction would not prejudice any creditors of Katanga. In addition, the plaintiff states that the statutory application made by Mr. Audebert in relation to the discontinuance of New Katanga in the Yukon contains representations

that no existing cause of action would be compromised as a result of New Katanga's discontinuance in the Yukon. The plaintiff submits that those statements are inconsistent with Glencore plc's position that the Supreme Court of Yukon has ceased to have jurisdiction over this matter, thereby putting the contents of Mr. Audebert's declarations and application in issue in the substantive applications to dismiss. As a result, he should be permitted to examine Mr. Audebert on the contents of those documents. The plaintiff adds that Mr. Audebert is the only one who can be examined on the contents of those documents.

[62] In addition, the plaintiff submits that, because of Mr. Audebert's role as Company Secretary of Katanga and as a director of 836074 Yukon Inc at the time of the transactions at issue, he has direct and unique information regarding the form, substance, and effects of those transactions that is relevant to the defendants' applications to dismiss based on lack of jurisdiction. The plaintiff points out that, in July 2021, Mr. Audebert swore and filed a declaration in a shareholder action previously pending in the United States District Court for New Jersey in support of an application that the US Court dismiss the claim brought against Katanga, Glencore plc, and their officers and directors. In that proceeding, Mr. Audebert provided evidence regarding the relationship between Katanga and Glencore plc, the corporate structure of Katanga and its connections with Canada. That document is attached as an exhibit to Affidavit #2 of Taek Soo Shin, dated March 23, 2022, and filed by the plaintiff in this proceeding.

[63] The plaintiff argues Rule 28 of the *Rules of Court* authorizes the examination of Mr. Audebert because it would be unfair to require him to proceed with the defendants' applications without examining Mr. Audebert.

[64] The plaintiff acknowledges that Mr. Audebert was also General Counsel for Katanga, and states he is not seeking to examine Mr. Audebert on any matter that is protected by solicitor-client privilege or outside the scope of the documents filed in this proceeding.

Position of Glencore plc

[65] Glencore plc submits that the *Rules of Court* do not provide for, and the plaintiff has not identified any legal basis that permits, the examination of Gabriel Audebert, who has not sworn any affidavit in this proceeding. Glencore plc submits that Rule 28 applies only to cases proceeding to trial not at the application stage. In the alternative, Glencore plc submits the plaintiff has contravened the *Rules of Court* by filing an action rather than a petition without the permission of the Court. Therefore, he should not be permitted to benefit from rules that are aimed at actions, not petitions.

[66] In addition, Glencore plc submits that, even if it does not concede that an order for cross-examination under Rule 50(9) could be made because Mr. Audebert has not filed an affidavit in this proceeding, the plaintiff has not met the threshold that would permit him to cross-examine Mr. Audebert under Rule 50 either.

[67] Glencore plc submits the plaintiff has not identified anything in Mr. Audebert's statutory declarations that is relevant to Glencore plc's application or any of the issues before the Court. In addition, Glencore plc submits the issues raised by the plaintiff do not relate to contested material facts but to diverging legal positions, which the parties can present to the Court at the time its application to dismiss is heard. According to Glencore plc, allowing the plaintiff to examine or cross-examine Mr. Audebert on diverging legal opinions or positions serves no useful purpose.

[68] Glencore plc adds the two statutory declarations on which the plaintiff seeks to examine Mr. Audebert were made outside this proceeding, to support the amalgamation of Katanga and 836074 Yukon Inc into New Katanga. The statements were made on behalf of those separate and non-parties corporate entities, not Glencore plc.

[69] Glencore plc submits that the opinions and beliefs stated by Mr. Audebert in his June 2, 2020 declarations regarding the solvency of Katanga, 836074 Yukon Inc, and New Katanga, as well as his statement that no creditors of Katanga would be affected by the amalgamation have no bearing on Glencore plc's application to dismiss. Glencore plc points out the plaintiff had not filed his claim at the time Mr. Audebert's statements were made. Also, Glencore plc argues the plaintiff was a minority shareholder not a creditor of Katanga. Glencore plc adds that, since the plaintiff does not allege the amalgamation was oppressive, and Mr. Audebert's declarations contain no controversial facts, the plaintiff has not provided any basis to support his application to examine Mr. Audebert with respect to those two declarations. Glencore plc also submits the plaintiff has not shown any inconsistencies between Mr. Audebert's statutory declarations and Glencore plc's position.

[70] In addition, Glencore plc submits that, contrary to what the plaintiff argues, Mr. Audebert did not make any sworn statement or declaration in support of New Katanga's application to be discontinued in the Yukon and continued into the Isle of Man. He only filled out and signed the requisite form, which, Glencore plc argues, contains uncontested facts. Glencore plc also points out that the plaintiff does not allege that the continuance of New Katanga into the Isle of Man was oppressive.

[71] Glencore plc argues the opinion of the Isle of Man lawyer, submitted with the application signed by Mr. Audebert, that any existing cause of action, claim, or liability to prosecution with respect to New Katanga would not be affected by its continuance into the Isle of Man cannot provide a basis to examine Mr. Audebert. Also, Glencore plc argues the legal opinion was not submitted on behalf of Glencore plc. Rather, it was submitted as part of New Katanga's application to be discontinued in the Yukon. Glencore plc submits that, in any event, that legal opinion is not inconsistent with Glencore plc's application to dismiss based on lack of jurisdiction because the opinion does not say that a legal action or claim against New Katanga could be commenced in Canada rather than in the Isle of Man.

Analysis

[72] Gabriel Audebert was General Counsel and Company Secretary for Katanga and a director of 836074 Yukon Inc at the relevant times. Mr. Audebert has not sworn an affidavit or made a solemn affirmation in this proceeding.

[73] The plaintiff seeks to examine Mr. Audebert on two statutory declarations he made on June 2, 2020, for the amalgamation of Katanga and a statutory application he signed in order to discontinue New Katanga in the Yukon and continue it in the Isle of Man. Those documents were filed in this proceeding through the affidavits of other individuals.

[74] I do not need to address Glencore plc's argument that the *Rules of Court* do not provide for the examination of a third party, who has not filed an affidavit in this proceeding, on an application because I conclude the plaintiff has not shown there are

material facts at issue that would warrant the examination or cross-examination of Mr. Audebert in relation to the defendants' applications to dismiss.

[75] It is not disputed that, in June 2020, following the Rights Offering Transaction, Katanga was amalgamated with 836074 Yukon Inc to form New Katanga and taken private. Also, it is not disputed that, on December 10, 2020, New Katanga was discontinued under the *BCA* and continued into the Isle of Man. In addition, it is not disputed that, prior to December 10, 2020, Katanga and New Katanga were incorporated under the *BCA*.

[76] Also, it is not disputed the plaintiff commenced this proceeding on January 21, 2021, which is a date that can easily be established through the court's records.

[77] In addition, I have already permitted cross-examination of Mr. Burton on his affidavit in relation to the corporate status, ownership, and corporate relationship(s) between Glencore plc, Glencore International AG, Katanga, and New Katanga (including their corporate structure(s)).

[78] Therefore, the dispute, as it relates to the information contained in the documents signed by Mr. Audebert, concerns the legal effect on the jurisdiction of the Supreme Court of Yukon of the amalgamation of Katanga with 836074 Yukon Inc to form New Katanga and of New Katanga's discontinuance under the *BCA* in December 2020. Glencore plc's argument is that the Court does not have jurisdiction over this matter because none of the targeted corporate entities are corporations under the *BCA.* Glencore plc also points out that none of them were when the plaintiff commenced this proceeding. The plaintiff's position is that the Court has jurisdiction over this proceeding because Katanga and New Katanga were corporations incorporated under the *BCA* and

governed by Yukon laws at the time the transaction that allegedly gave rise to this proceeding occurred. This is a matter for legal arguments and submissions at the hearing of the defendants' applications to dismiss not for examination or cross-examination of Mr. Audebert.

[79] Also, the Court is not bound by opinions expressed by lawyers or others, and the plaintiff has not identified any material facts at issue on which Mr. Audebert may have relied on when making the statements contained in his June 2020 declarations that would require examination or cross-examination.

[80] In addition, Mr. Audebert is not the author of the legal opinion submitted with the application to discontinue New Katanga in the Yukon, which states, among other things, that "any existing cause of action, claim or liability to prosecution in respect of the Corporation existing prior to its continuance will be unaffected by the Corporation's continuance into the Isle of Man". Therefore, Mr. Audebert is not the right person to seek permission to examine or cross-examine with respect to that legal opinion, even if it can be argued Mr. Audebert relied on that opinion in support of the application he signed.

[81] Finally, nothing prevents the plaintiff from arguing that Glencore plc is bound by the statements made by Mr. Audebert in his June 2020 declarations and by the legal opinion that was relied upon to support the application to discontinue New Katanga under the *BCA*, and that Glencore plc is therefore barred from arguing otherwise to seek the dismissal of this proceeding based on want of jurisdiction. Whether this argument could succeed is not for me to decide on this application.

[82] Therefore, the plaintiff's application for an order that Gabriel Audebert attends for examination is dismissed.

(iii) Service of interrogatories on Adam Taylor

[83] Adam Taylor is a lawyer and partner at McCarthy Tétrault LLP. On March 30, 2021, Mr. Taylor wrote to the Court in this proceeding identifying himself as corporate counsel for Glencore plc and indicating he had been retained for the limited purpose of providing the Court with some information regarding the plaintiff's application for default judgment.

[84] The plaintiff seeks an order from the Court compelling Mr. Taylor to answer interrogatories. The questions the plaintiff requests Mr. Taylor answer are attached as Appendix "A" to these reasons for decision.

Position of the plaintiff

[85] The plaintiff submits the proposed interrogatories are appropriate and within the scope of Rule 29 of the *Rules of Court*.

[86] The plaintiff submits Mr. Taylor, who is corporate counsel for Glencore plc, provided advice on the transactions at issue. Therefore, he has direct knowledge of the form, substance, and effects of those transactions as evidenced by the contents of his March 30, 2021 email to the Court. The plaintiff submits the contents of that email demonstrate Mr. Taylor is the right person to provide evidence relevant to the material facts at issue with respect to those transactions, which are ultimately relevant to the jurisdictional arguments raised by the defendants.

[87] Also, the plaintiff submits that a number of statements contained in Mr. Burton's affidavit, including that Glencore plc has never merged with Katanga, first appeared in

Mr. Taylor's email of March 30, 2021. The plaintiff argues this is evidence that the statements contained in Mr. Burton's affidavit are *prima facie* statements or opinions of Glencore plc's counsel. As a result, Mr. Taylor is the appropriate person to examine on those statements, which are contested and relevant to Glencore plc's application to dismiss.

[88] The plaintiff submits Mr. Taylor is a necessary witness because Glencore plc takes the position that Katanga's corporate online disclosure is inadmissible hearsay. The plaintiff adds that, if the Court were to agree with Glencore plc, the plaintiff would have no source, other than Mr. Taylor, from which he may adduce evidence concerning the conduct or effects of the impugned transactions.

[89] The plaintiff submits that, by retaining and instructing Mr. Taylor to provide evidence and information to the Court in his email of March 30, 2021, Glencore plc has waived, whether expressly or impliedly, through both disclosure and reliance, any privilege that would have otherwise been applicable to Mr. Taylor's file.

[90] In the alternative, the plaintiff submits the information sought by the specific questions of the interrogatories is either not subject to privilege, because it has already been disclosed, or it relates to acts or transactions not communications between counsel and Glencore plc, and, in any event, Glencore plc has waived any applicable privilege with respect to that information.

[91] In the further alternative, the plaintiff submits Mr. Taylor should be directed to answer the interrogatories, and any claim of privilege that may be asserted can be determined by the Court on a question-by-question basis.

Position of Glencore plc

[92] Glencore plc submits that, pursuant to Rule 29, interrogatories may only be issued by a party to an action. Since the plaintiff has contravened the *Rules of Court* by commencing this proceeding by way of an action rather than a petition, he should not be allowed to rely on rules that apply only to actions until his contravention is addressed on Glencore plc's substantive application. Also, Glencore plc submits that, even if Rule 29 applied, interrogatories cannot be addressed to counsel or a witness.

[93] In addition, Glencore plc submits that a party cannot use interrogatories to request documents. Since most of the plaintiff's interrogatories constitute a request for documents, they should be denied. Glencore plc also argues that, in any event, all of the requested information and documents, which relate to the scope of Mr. Taylor's retainer for Glencore plc and his advice, are protected by solicitor-client privilege. Glencore plc argues it has not waived privilege or put its state of mind in issue.

[94] Glencore plc submits the plaintiff has not identified controversial material facts about the form and substance of the Rights Offering Transaction and the Going Private Transactions for the purpose of Glencore plc's application, which, it argues, raises legal issues about jurisdiction based on limited uncontroversial facts.

[95] Finally, Glencore plc submits that Mr. Taylor's opinion on the effects of the transactions is not relevant to its application to dismiss.

Analysis

[96] Rule 29(1) provides that the purpose of interrogatories "is to obtain evidence in a timely and cost effective manner and reduce or eliminate the need of or time required for oral examination for discovery."

[97] The interrogatories may be served on "any other party, or on a director, officer, partner, agent, employee or external auditor of a party if the party" to be examined consents; or the court grants leave (Rule 29(2)).

[98] In *Ross River Dena Council v The Attorney General of Canada*, 2011 YKSC 56 at para. 4, the court reviewed the following summary of principles governing interrogatories set out in *Tse-Ching v Wesbild Holdings Ltd* (1994), 98 BCLR (2d) 92 (SC) at para. 15:

> 1. Interrogatories must be relevant to a matter in issue in the action.
>
> 2. Interrogatories are not to be in the nature of cross-examination.
>
> 3. Interrogatories should not include a demand for discovery of documents.
>
> 4. Interrogatories should not duplicate particulars.
>
> 5. Interrogatories should not be used to obtain the names of witnesses.
>
> 6. Interrogatories are narrower in scope than examinations for discovery.
>
> 7. The purpose of interrogatories is to enable the party delivering them to obtain admissions of fact in order to establish his case and to provide a foundation upon which cross-examination can proceed when examinations for discovery are held.
>
> 8. Interrogatories are only one means of discovery. The court may permit the party interrogated to defer its response until other discovery processes have been completed, including examinations for discovery.

[99] These principles emanating from British Columbia were also found to be instructive in relation to proceedings in the Yukon in *Fine Gold Resources, Ltd v 46205*

Yukon Inc, 2016 YKSC 67 at para. 33 and in *Stuart v Doe*, 2019 YKSC 53 at paras. 69 and 70, even though in both cases the court noted that, in the Yukon, asking for the name of a relevant witness in an interrogatory is not objectionable.

[100] Based on the above-mentioned principles, I agree with Glencore plc that questions: 2, 3(c), 4(b), 5(b), 6(b) and 7 of the plaintiff's proposed interrogatories constitute improper requests for documents and are therefore denied.

[101] I am also of the view that the way the remainder of the plaintiff's proposed interrogatories are framed reveals it is aimed at obtaining Mr. Taylor's legal opinion on the substance and effects of the transaction(s) at issue and legal relationship between Glencore plc, Glencore International AG, Katanga, and New Katanga rather than the material facts and circumstances regarding those transactions and the corporate relationship between the different corporate entities. Again, the Court is not bound by legal counsel or someone else's opinion on the legal effects of a transaction. I do not see how interrogatories aimed at eliciting legal counsel's opinion on these topics would serve a relevant purpose in relation to the defendants' applications to dismiss.

[102] As I have already permitted the plaintiff to cross-examine Mr. Burton on material facts regarding the corporate status, corporate relationship(s) (including corporate structure(s)), and ownership of the above-mentioned corporations before and after the transactions at issue occurred, any interrogatories on these issues, would, in my view, be redundant.

[103] The plaintiff relies on an email dated March 30, 2021, that Mr. Taylor sent to the Court, to argue that Glencore plc has waived solicitor-client privilege on the legal advice Mr. Taylor may have provided in relation to the transactions at issue. 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 the plaintiff's counsel application for default judgment. 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.

[104] As I stated in relation to a previous application in this matter in 2022 YKSC 59:

> [51] … 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. …

[105] I do not see how, by authorizing Mr. Taylor to advance Glencore plc's position with respect to the plaintiff's application for default judgment, Glencore plc would have waived solicitor-client privilege on legal advice it may have received with respect to the transactions at issue.

[106] In addition, neither in its Statement of Defence nor in its application to dismiss does Glencore plc states it relied on legal counsel's opinion or put its state of mind at issue in relation to the form, substance, and effects of the transactions at issue.

[107] Therefore, the plaintiff's application for an order compelling Adam Taylor, lawyer for McCarthy Tétrault LLP and corporate counsel to Glencore plc, to answer interrogatories is dismissed.

[108] Since I dismissed the plaintiff's application to serve interrogatories on Mr. Taylor for the above-mentioned reasons, I do not need to address the procedural arguments raised by Glencore plc with respect to Rule 28.

(iv) Should the defendants' applications to dismiss proceed in two stages?

[109] At the end of his oral submissions, counsel for Glencore plc suggested that, if the Court were inclined to grant all or part of the plaintiff's application on issues related to the Court's territorial jurisdiction, the Court should hear and rule on Glencore plc's application to dismiss based on subject-matter jurisdiction first, because both subject-matter jurisdiction and territorial jurisdiction are required for this case to proceed before this Court. Glencore plc submits proceeding this way would alleviate the need to submit any of the three individuals targeted by this application to unnecessary questioning should the Court find it lacks subject-matter jurisdiction over this case.

[110] The plaintiff opposed this suggestion arguing the orders sought are required on both issues.

[111] I am not prepared to acquiesce to Glencore plc's suggestion that I split the hearing of the applications to dismiss in two stages, because I am of the view that clarity on the corporate status, ownership, and corporate relationship(s) (including corporate structure(s)) of the above-mentioned corporations is required before proceeding with the applications to dismiss. Also, I am not convinced there is any gain in proceeding that way considering the very limited scope of cross-examination I permitted on Mr. Burton's affidavit.

CONCLUSION

[112] John Burton shall make himself available by video for cross-examination by the plaintiff, at a date and time to be agreed to by the parties, on the contents of the affidavit solemnly affirmed by him on December 17, 2021, supporting the application to dismiss of Glencore plc in this proceeding with respect to:

(i) the corporate status, ownership, and corporate relationship(s) (including the corporate structure(s)) of and between the following entities: Glencore plc, Glencore International AG, Katanga, and New Katanga at the relevant times; and

(ii) the circumstances related to or surrounding his statement that neither Glencore plc, Glencore International AG, Katanga, and New Katanga ever agreed the Supreme Court of Yukon having jurisdiction in this proceeding. (See paras. 48 and 49 of this decision)

[113] However, nothing in this order prevents the defendant, Glencore plc, from claiming any privilege applicable to the information sought by the plaintiff. The existence of such privilege is, ultimately, to be determined by the Court. Mr. Burton's attendance for cross-examination shall not exceed three hours, unless as otherwise ordered by the Court or agreed to by the parties.

[114] The plaintiff's application for an order to examine Gabriel Audebert and to serve interrogatories on Adam Taylor is dismissed.

COSTS

[115] The parties shall bear their own costs considering the mixed results of this application.

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CAMPBELL J.

APPENDIX "A"
INTERROGATORIES FOR MR. ADAM TAYLOR,
A PARTNER WITH MCCARTHY TETRAULT LLP

QUESTION 1: In your email to the Court dated March 30, 2021, you stated that you are corporate counsel to Glencore pie. Please confirm if you were retained by or for the ultimate benefit of Glencore pie in relation to:

(a) the Rights Offering Transaction; and

(b) the Going Private Transaction.

QUESTION 2: If your response to both of Question 1(a) & (b) is yes, then disregard Question 2. Otherwise, please answer the following questions:

(a) Please produce the complete, unredacted engagement letter(s) or agreement(s) by way of which you or other McCarthy Tetrault lawyers were engaged to advise in connection with the Rights Offering Transactions.

(b) Please produce statements of accounts or invoices issued by McCarthy Tetrault in connection with the advice it provides in relation to the Rights Offering Transaction. These documents may be redacted with respect to information identifying the nature of work performed and the amounts charges for such services.

(c) Please produce the complete, unredacted engagement letter(s) or agreement(s) by way of which you or other McCarthy Tetrault lawyers were engaged to advise in connection with the Going Private Transaction.

(d) Please produce statements of accounts or invoices issued by McCarthy Tetrault in connection with the advice it provides in relation to the Going Private Transaction. These documents may be redacted with respect to information identifying the nature of work performed and the amounts charges for such services.

QUESTION 3: Please answer the following questions:

(a) Based on your experience and involvement with the Going Private Transaction, does the Management Information Circular of Katanga dated May 4, 2020, at pages 7-9, under the heading "Background to the Amalgamation," accurately described the events, negotiations, agreements and transactions leading up to the Going Private Transaction?

(b) If your answer to Question 3(a) is no, please provide any correction.

(c) If your answer to question 3(a) is no, please provide documentation supporting your answer to question 3(b).

QUESTION 4: Please answer the following questions:

(a) Based on your experience and involvement with the Going Private Transaction, does the Management Information Circular of Katanga dated May 4, 2020, at pages 14-15, under the heading "Effects of Amalgamation," accurately describe the effects of the Amalgamation Agreement?

(b) If your answer to Question 4(a) is no, please produce any memoranda[17] provided to or prepared by McCarthy Tetrault regarding the effects of the Going Private Transaction with respect to the liabilities of Katanga Mining Limited (whether the old or the new Katanga). These documents may be redacted for any information or advice irrelevant to the effects of this transaction on the liabilities (whether actual or contingent) of Katanga Mining Limited (whether the old or the new Katanga).

QUESTION 5: Please answer the following questions:

(a) Based on your experience and involvement with the Rights Offering Transaction and the Going Private Transaction, did you understand Glencore pie to be a shareholder of Katanga Mining Limited, whether directly or indirectly, at the time of those transactions?

(b) If your answer to Question 5(a) is no, please produce any memoranda provided to or prepared by McCarthy Tetrault regarding Glencore's organizational structure and/or its capital structure. These documents may be redacted to the extent that they contain information or advice that would not be relevant to Glencore's organizational or capital structure.

QUESTION 6: Please answer the following questions:

(a) Based on your experience and involvement with the Rights Offering Transaction and the Going Private Transaction, did you understand Katanga Mining Limited to be an entity incorporated under and governed by the *Business Corporations Act of Yukon* as of the completion of the Rights Offering Transaction in November 2019?

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[17] In these interrogatories, the term "memoranda" refers to any written correspondence, communication, executive summary, presentation, report or memorandum, including those that may be stated on their face to be in draft form, for discussion purposes only or which include caveats of such nature.

(b) If your answer to Question 6(a) is no, please produce any memoranda provided to or prepared by McCarthy Tetrault regarding the effect of either or both of the Rights Offering Transaction and the Going Private Transaction on the governing corporate statute with respect to Katanga. These documents may be redacted to the extent that they contain information or advice that would not be relevant to Katanga's governing corporate statute.

QUESTION 7: Please answer the following questions:

(a) Please produce any memoranda provided to or prepared by McCarthy Tetrault regarding the effect of the Non-Issuer Form of Submission to Jurisdiction and Appointment of Agent for Service, executed and filed by Messrs. Glasenberg, Kalmin and Burton as well as Glencore International AG, dated November 15, 2019. These documents may be redacted for advice irrelevant to the effect of the execution and filing of Non-Issuer Form of Submission to Jurisdiction and Appointment of Agent for Service with respect to the jurisdiction of Canadian Courts.

(b) The Affidavit of Mr. Burton bears a document ID code, identifying this document as MTDOCS 42228789v4, which indicates that it was created by McCarthy Tetrault and that it is the fourth version of the document. Please produce unredacted copies of versions 1, 2 and 3 of this document.