

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

KINGSGATE RESOURCES INC.

Plaintiff

and

JOSEPH KINGSLEY ANNAN,
AMIR HIRANI,
SHIVJIT KENNY SINGH BRAICH,
ZAIN EBRAHIM,
FRANCIS ACQUAH,
KINGSGATE RESOURCES INC.,
AVO MINING COMPANT LIMITED,
ANNAN RESOURCES LIMITED,
GOLD COAST RESOURCES INC.,
KINGSGATE ENERGY CORPORATION,
ROBERT S. MANNOCH,
BRYANT E. BEHRMANN,
PATRICK HANNON,
MINETECH INTERNATIONAL LIMITED,
TERRY KNIGHT,
KEN PHILLIPS,
GOWLING LAFLEUR HENDERSON LLP and
BALLEM MACINNES LLP

Defendants

PROCEEDINGS

Calgary, Alberta
December 10, 2012

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2 _____
3 December 10, 2012 Afternoon Session

4
5 Master Mason Court of Queen's Bench of Alberta

6
7 S. Dhillon Agent for the Plaintiff

8 G. F. Scott, Q.C. For the Defendants

9 S. Lucas Court Clerk

10 _____

11

12 THE MASTER: Good afternoon. Please be seated. Okay,
13 Mr. Scott, application for long delay.

14

15 **Submissions by Mr. Scott**

16

17 MR. SCOTT: Yes, Madam Master. As you'll recall, we are
18 here pursuant to your directions of October 17th, when we were last here, that the matter
19 would be peremptorily heard today. The application is for dismissal of action number
20 050117830, where -- wherein Kingsgate Resources Inc. is the plaintiff.

21

22 I'm seeking a dismissal onby -- only on behalf of the last four defendants.

23

24 THE MASTER: Yes.

25

26 MR. SCOTT: I've called them the lawyer defendants.

27

28 THE MASTER: M-hm.

29

30 MR. SCOTT: So I am ready to proceed. I was served today
31 with a couple of other applications, but we'll deal with those in due course. One was to
32 have Fraser Milner Casgrain removed from the file. The other was, I think, to
33 cross-examine Mr. Phillips on his affidavit in support of this application. But I'll let
34 Mr. Dhillon speak to those in due course.

35

36 THE MASTER: Okay.

37

38 MR. SCOTT: My application is very straightforward, Madam
39 Master. The action was commenced on December 20th, 2005, over seven years ago. It
40 relates to events that occurred in 2000 and 2001. And I see Mr. Dhillon is standing.

41

1 THE MASTER:

Mr. Dhillon?

2

3 MR. DHILLON:

Hi. Before he begins, could I have a couple

4 minutes?

5

6 THE MASTER:

Mr. Scott, have a seat. I will hear from you
7 briefly, Mr. Dhillon. I presume you'd like to make a preliminary application?

8

9 MR. DHILLON:

Yes, I would. Okay, so a couple a days -- last
10 week, Mr. Mistry (phonetic), a lawyer, had emailed Mr. Scott. And he is practising in
11 Mumbai and couldn't make it. I believe Kingsgate Resources has retained Mr. Jomshed
12 (phonetic) Mistry. And so he was here for two weeks. And he reviewed over the
13 material. And if you'd like, I could just pass up the email itself so you could take a look
14 at it and response that Mr. Scott had given him.

15

16 THE MASTER:

All right.

17

18 MR. DHILLON:

All right.

19

20 THE MASTER:

Okay, I've read it, sir.

21

22 MR. DHILLON:

Okay. And further to that, here's an email
23 that -- and here's a copy for you. Here's an email that was sent to me that you can
24 review.

25

26 THE MASTER:

From whom?

27

28 MR. DHILLON:

That's from --

29

30 THE MASTER:

I don't want to be reading communications
31 from your lawyer that he's giving you advice.

32

33 MR. DHILLON:

No, this isn't -- it's -- he's given me advice.
34 But this particular piece of communication, it would be easier -- or I can read it into the
35 record.

36

37 THE MASTER:

Well, I don't know if you should be doing
38 either. Mr. Scott?

39

40 MR. SCOTT:

Well, it's the first time I've seen this
41 communication --

1
2 THE MASTER: Okay.
3
4 MR. SCOTT: -- the one just handed up. And --
5
6 THE MASTER: Well, I don't know if he should be looking at it
7 either. This is just -- I -- the concern, of course, is not to disclose --
8
9 MR. DHILLON: Yeah. No, that's okay, we're fine with
10 disclosing --
11
12 THE MASTER: -- unless you want to.
13
14 MR. DHILLON: We're fine with disclosing what's here. I just
15 handed it up to you.
16
17 THE MASTER: Mr. Scott, do you want an opportunity to look
18 at that --
19
20 MR. SCOTT: No.
21
22 THE MASTER: -- before I look at it?
23
24 MR. SCOTT: Well, at best, it's a representation by someone
25 who's not present in court --
26
27 THE MASTER: Okay.
28
29 MR. SCOTT: -- to make the representations.
30
31 THE MASTER: Okay.
32
33 MR. SCOTT: It's -- if it's a lawyer's representations, he or
34 she should be making them. If it's an affidavit, it should be in affidavit form.
35
36 THE MASTER: All right, fine.
37
38 MR. DHILLON: Okay.
39
40 THE MASTER: Go ahead, sir.
41

1 MR. DHILLON: So he sent this. He can't be here. He's got a
2 court date in Mumbai. We haven't retained counsel. And he's outlined the seriousness
3 and he's reviewed over the documents. It's thousands of pages. There's a defe --
4 co-defendant serving time in prison. He was ordered to pay of \$38 million in restitution.
5 The FBI investigated the matter jointly with the IRS.

6

7 And so this -- I just wanted it to be on the record. So now that I've passed this up is this
8 on the record we need it if the hearing goes forward for an appeal?

9

10 THE MASTER: Your -- your representations are being recorded,
11 sir.

12

13 MR. DHILLON: Okay. So the letter itself, do I need to read it
14 into the record, or is it good enough that I passed it up to you?

15

16 THE MASTER: It doesn't form part of the record, sir.

17

18 MR. DHILLON: Okay.

19

20 THE MASTER: And I've -- the gist of it is, is that you're --
21 you've got a ca -- you've got -- you've -- you purport to have retained someone else and
22 you're not ready to proceed today, right?

23

24 MR. DHILLON: Correct, but it's not that simple. So can I read
25 it into the record then?

26

27 THE MASTER: Okay, go ahead, sir.

28

29 MR. DHILLON: Okay. So this letter is from Jomshed Mistry, a
30 lawyer that Kingsgate Resources has retained. And his email to me reads: (as read)

31

32 I have reviewed over much of the materials that have been filed in
33 this matter. And upon my review, it is clear that this matter will
34 take much longer than the two hours that is currently allotted for
35 it. I'm in receipt of the response to my email seeking an
36 adjournment from opposing counsel, which has been copied to
37 you. Unfortunately, I am unavailable on December 10th, 2012, at
38 2 PM to attend the hearing, as I am a practising -- as I am
39 practising in Mumbai, India, and have confirmed commitments
40 before the bench of the Honourable Chief Justice at the Bombay
41 High Court.

1
2 On December 10th, it should be brought to the attention of the
3 Master that this matter is very complex, despite what opposing
4 counsel has stated in court, and cannot be dealt with summarily.
5 Just one of the facts of many that should be pointed out to the
6 court to underline the seriousness of the fraud and crimes the
7 defendants have committed is that one of the co-defendants in this
8 matter has pled guilty to money laundering charges in federal
9 court in the United States and was ordered to pay over \$38 million
10 US in restitution and is currently serving a six-year prison
11 sentence.

12
13 The Master should also be informed that this particular defendant
14 was in direct contact with Mr. Scott's clients and the case was
15 jointly investigated by the FBI, IRS Criminal Investigation
16 Division, and the US Postal Inspection Service and is related to
17 the above-noted matter, as the evidence before the court clearly
18 indicates.

19
20 It would be in the interest of justice if the court does not allow the
21 current application to proceed until a proper amount of time is
22 allotted so that all the issues may be brought to the forefront and
23 until you, as the client, have your counsel available to canvass all
24 of the issues at bar. There have been several attempts on your
25 part to expedite proceedings, and the court needs to be made
26 aware of them prior to making any final decisions.

27
28 Also, due to the sensitive nature of some of the ongoing
29 investigations, perhaps the Master should only be made privy to
30 those details in private chambers by counsel and not in open court.
31 As the materials before the court indicate, this is a
32 multibillion-dollar lawsuit, and the defendants themselves would
33 have to acknowledge this as their letterhead was once used to
34 solicit an offer of US \$250 million for the Mining Division alone.
35 This was almost ten years ago, when the price of gold was
36 approximately \$370 US per ounce. Currently, the price of gold is
37 approximately \$1,700 per ounce. Just the mining asset itself has
38 over 12 million ounces of gold in it.

39
40 And it should be noted, as stated in the claim, the damages you
41 seek includes an energy and forestry division, both of which add

1 substantial value. If this matter does go ahead without counsel
2 present on your behalf, you would certainly be severely
3 prejudiced. And in the event a decision is pronounced against
4 Kingsgate, my advice would -- to you would be to forthwith
5 prefer -- prefer an appeal.

6
7 You should also bring to the Master's attention that in a previous
8 hearing you had offered to pay the costs if opposing counsel
9 would voluntarily withdraw its current application and allow a
10 continuation of the cross-examinations of the defendants. At the
11 hearing it is also imperative that you inform the Master that
12 Kingsgate Resources Inc. and the Paragon Trust (phonetic) have
13 each filed an application that is to be heard at the end of January
14 2013.

15
16 Upon conclusion of the hearing, please do not hesitate to contact
17 me at your earliest convenience. Jomshed Mistry.

18
19 And just so it's on the record, there's two motions currently filed to be heard at the end
20 of January. One is to have Fraser Milner Casgrain removed for conflict of interest. And
21 the other is to cross-examine Mr. Ken Phillips on the affidavit which he has sworn on
22 May 31st, 2012, which this application is relying on.

23
24 And also, it should be noted that Mr. Scott himself will most likely be subpoenaed in
25 upcoming racketeering litigation that will be brought on from the United States. And it is
26 our belief that when taking into account the spirit of the law and the foundation and the
27 principles of the law, that the application today should not be -- should not go forward
28 and we should have an adjournment of the matter.

29
30 And I'd like to just stop there now and ask if that in fact will be the case.

31
32 THE MASTER: Okay, thank you. Have a seat. And I'll hear
33 from Mr. Scott if you have anything to add in reply.

34
35 MR. SCOTT: Well, I think maybe I should rethinking my
36 plans about going to the United States next week if I'm going to be subpoenaed for
37 racketeering. I don't know if it was a slip of the tongue that I'm going to be subpoenaed
38 as opposed to someone else, but that's just an aside.

39
40 My Lady -- Madam Master, all of what we just heard is -- is scandalous, to begin with.
41 But leaving that aside, it's totally irrelevant to why we're here today. No counsel would

1 stand up and make those representations. They're representations of fact and . . . But
2 what we're here to do today is simple: to determine whether any step, as defined in the
3 rules, any material has taken place that has advanced this lawsuit within the last five
4 years.

5
6 The evidence is clear that there's been none. The affidavit files attaches a court record
7 card and shows nothing to have occurred. The affidavit swears that nothing has happened
8 in the lawsuit. The voluminous material filed before you shows absolutely nothing -- and
9 I say that unequivocally -- in respect to anything having -- having happened in this
10 lawsuit in the last five years.

11
12 There's all sorts of interesting material about other lawsuits in British Columbia involving
13 bankruptcy of people who are not parties to the lawsuit, of some criminal proceedings in
14 the United States of a professional negligence la -- la -- action against an accountant,
15 which makes no sense at all. So we -- we don't need to go through that. The evidence is
16 nothing has happened. The rule is clear. It's a must -- a mandatory rule requiring the
17 dismissal of an applica -- of an action if nothing has been done.

18
19 And I can take you through, if you'd like, the various affidavits that have been filed in
20 opposition to this to point out, as I've just submitted, that there is nothing in them. But
21 I -- if you've even perused them, I -- I'm confident that you would have reached the same
22 conclusion.

23
24 What the affidavit in support of this matter shows is that in 2006 a statement of defence
25 was filed in this action. There is -- there was a related action by another plaintiff called
26 Paragon Trust. That action was struck some time ago by order of, I believe, Master
27 Prowse, on one of the earlier proceedings here. So there's only the one outstanding. But
28 the two of them proceeded in concert for a while. Some cross-examinations on affidavits
29 occurred. Some applications were brought to strike the proceedings. A case management
30 judge was appointed, Ma -- Judge -- Justice Clark in the spring of 2007, and nothing
31 happened since. So the file has been totally devoid of any action since the spring of
32 2007.

33
34 The appointment of the case management judge in itself might not be sufficient to satisfy
35 the rules, but it doesn't matter. That was more than five years before the application was
36 brought. So on any of the facts that are relevant to this matter, and on the law, it is, in
37 my submission, the simplest of -- of cases.

38
39 And just in respect to the adjournment request, again, My Lady -- or Madam Master,
40 there's -- I'm usually sympathetic to some new counsel getting involved. But you may
41 recall from the last time we were here I pointed out to the court that the motion, when

1 filed, was originally returnable on July 4th. At that time, a lawyer from Docken and
2 Company, previous counsel for record in this matter -- not Ms. Johnson (phonetic), but
3 the firm -- appeared, asked for an adjournment to consider whether she -- her firm would
4 act.

5
6 It was adjourned to July 30th. We appeared before Master Laycock. The parties were
7 unrepresented, Ms. Johnson and her firm having said they would not be acting. Master
8 Laycock adjourned it to August 14th peremptorily to be heard. And the plaintiffs were
9 dire -- the plaintiff was directed to obtain counsel.

10
11 On August 14th, we appeared. And at that time, a Mr. Taylor, of Brownlee and
12 Company, showed up, saying his firm had been retained, and asked for an adjournment.
13 And despite the fact of the peremptorily -- peremptory nature of the matter, an
14 adjournment was granted by Master Prowse. And it wasn't seriously opposed by me
15 because there was new local counsel who did show up.

16
17 Then we were in front of you on October 17th, and we know the history of what
18 happened then. On Friday morning I arrived at my office to find the email from
19 Mr. Mistry, the Mumbai lawyer. He hadn't contacted me in his time in Canada. His
20 reference to colleagues in Canada, none of them have contacted me. His reference to
21 being a member of the Canadian Bar Association is interesting, because the Canadian Bar
22 Association doesn't license lawyers. But if he was a lawyer seriously anxious to pursue
23 this matter, he would have been here or had counsel appear on his behalf.

24
25 So my su -- two submissions: One, there's no grounds for an adjournment; and secondly,
26 the case is clear.

27
28 THE MASTER:

29 Thank you. Okay. And it's Mr. Dhillon and
30 Mr. Scott. This action has been ongoing, or at least hanging over all of these defendants'
31 heads since 2005. This application was initially filed in June and returnable in July of
32 this year. Mr. Dhillon, on behalf of Kingsgate, you've requested and obtained multiple
33 adjournments of the special hearing in this application -- in -- in this action. And
34 Mr. Scott has just now gone through the history of that again to refresh the record as to
35 what's happened in the past.

36 The adjournment that I granted last time was on very strict terms. And on that day, I
37 believe that you told me you were -- had already gotten under way of retaining local
38 counsel. You referred to a Mr. Chue (phonetic), I recall. And I granted that adjournment
39 on strict terms, as I say. And one of those terms was this -- was that this matter was
40 going to be peremptorily today.

41

1 Now you purport to have retained counsel in India --

2
3 MR. DHILLON: I'd like to just --

4
5 THE MASTER: -- who is not available today. Sir, please
6 don't --

7
8 MR. DHILLON: Okay.

9
10 THE MASTER: -- interrupt me. You have been given multiple
11 opportunities to retain counsel on a timely basis, and you've not done so. And now I've
12 also been advised today of an application to remove the counsel that has been acting on
13 this matter on behalf of these defendants for over six years. They've been acting since
14 the outset, and now you apply to have them removed.

15
16 And you're also mentioning there's a -- there's a brief reference to continuation of
17 cross-examinations of the defendants. And I'm not sure if you want to continue
18 cross-examining or if you want to examine Mr. Phillips on the affidavit in support of the
19 application. If it's the latter, sir, you're a day late and a dollar short, to say the least.

20
21 I'm not satisfied that it's appropriate or necessary to grant an adjournment. And in my
22 view, this latest request for an adjournment appears to be an attempt to further delay this
23 matter. And I note that the application that's filed this past Friday, when it was brought
24 to my attention, it was filed by yourself, not by any lawyer, returnable on a date that the
25 court is not sitting, not filed together with any new evidence, nor does it spec -- specify
26 the grounds of the relief that you're seeking.

27
28 And I emphasize, as well, Mr. Dhillon, that the application today is about Kingsgate's
29 failure to prosecute its own action. That is what we're hearing today. So the time has
30 come to hear the application on the merits, and I'm going to do so this afternoon. So,
31 Mr. Scott, please make your submissions. And then I will hear from you, Mr. Dhillon.

32
33 MR. SCOTT: My Lady, I -- I think I've made most of my
34 submissions. But the history of the matter is as set out in the affidavit, statement of claim
35 against the multiple defendants filed December 20th, 2005 --

36
37 THE MASTER: Okay.

38
39 MR. SCOTT: -- in respect to events that are alleged to have
40 occurred in 2000 and 20001. The relief sought was a declaration of shareholding options
41 in Kingsgate, accounting for profits of Kingsgate, freezing of assets, replacing directors,

1 and produce financial statements and to disgorge profits. Whether any of those matters
2 have any merit as against any of the other defendants, I make no comment.

3
4 I suggest to you that although we're not here to argue the merits of the statement of
5 claim, it's unlikely that they would apply to any of the lawyers. In any event, a statement
6 of defence alleging all that was filed May 31st, 2006.

7
8 An earlier action had been commenced alleging exactly the same things on behalf of the
9 Paragon Trust. And in that action, an application was brought to strike, affidavits of
10 Messrs. King -- Messrs. Phillips and Knight were filed. They were cross-examined by
11 counsel for over two days. In -- in fact, the record of their cross-examination I think
12 appears in some of the material that the plaintiff has filed in this.

13
14 The two -- when the second action was filed, and indeed a third one by another unrelated
15 party which has been discontinued, when the three matters were outstanding, the -- they
16 were consolidated by order of the court and Justice Clark appointed as case management
17 officer. At that point, there was efforts to convene case management meetings. They
18 were unsuccessful. The application stood. Counsel for the plaintiff ceased to act in 2009.
19 But the -- the last case management meeting was in March of 2007, when an effort was
20 made to find a date when the applications could be heard. And since March, 2007, it's
21 languished.

22
23 2009, counsel got off the record. And that's all that has occurred in the -- the last five
24 years, nothing. Everything that happened was before five years ago. So we're not into
25 the usual debate as to whether a certain step or procedure in this lawsuit is sufficient
26 enough to preserve the time. We're -- we're beyond any matter having occurred.

27
28 We have an affidavit -- or a series of affidavits filed on behalf of the plaintiffs in
29 opposition to this application. And we also have a brief. The brief raises no issue
30 whatsoever in respect to something that is alleged to have occurred in this action. The --
31 with respect, the plaintiff seems to be of the view that if a entire history of Kingsgate
32 involving other parties or whatever they think the subject matter of the lawsuit or of their
33 complaint may be about, if something happens somewhere in the world in relation to that,
34 that's a matter in these proceedings, a totally false and inappropriate legal interpretation.

35
36 The affidavits have no context to them. The brief of argument says they've been invol --
37 in paragraph 5, they've been assisting American authorities. No evidence of what
38 assistance to whom. No evidence of any links to this action. And even if it was
39 established that they were assisting American authorities, it's irrelevant and insufficient to
40 prolong this action.

41

1 The brief also says they've been developing and implementing a strategic litigation plan.
2 Well, a) no evidence of what strategic litigation plan; and, secondly, that's insufficient as
3 a matter of law anyway. They've had plenty of time to do that.
4

5 The brief also refers to conducting research. Again, no evidence of what research and
6 being repetitive, irrelevant, and having nothing to do with the application of our rule. We
7 have a series of affidavits. One by an Erwin Braich (phonetic) refers to some documents
8 stored in Arizona which he can't access, refers to various matters relating to bankruptcy
9 and charges arising out of the bankruptcy in the Unite -- in -- in British Columbia. And
10 then there's unparticularized references to discussions with US official re: Bryant
11 Behrmann -- or Behrmann, who I gather is the other defendant who has been jailed.
12 Again, nothing to do with this lawsuit as a lawsuit.
13

14 If, in the plaintiff's mind, it has something to do with the whole matrix of facts that might
15 be behind all of this, that is insufficient to get around the five-year delay rule. We have
16 in Mr. Braich's affidavit material regarding his bankruptcy in BC and his battles with the
17 trustee, KPMG in British Columbia. He's included material relating to the arrest of
18 Mr. Dhillon, apparently for contempt of court. And attaches to his affidavit the transcripts
19 of a police interview with Mr. Dhillon. Again, no obvious or even real exi -- relationship
20 to this lawsuit.
21

22 Mr. McCormick's (phonetic) affidavit has no text attached to it, and it attaches 63 pages
23 of a hearing in July 2009 before Chief Justice Brenner in British Columbia regarding the
24 bankruptcy of Mr. Braich. The affidavit of Mr. Pierce (phonetic), sworn on July 30th,
25 again has no text, but it includes over a thousand -- over 1,000 pages of material relating
26 to some litigation in the District Court of Nevada. There's a statement of claim and
27 materials related to the bankruptcy of Mr. Braich. There's a Court of Appeal decision
28 involving Mr. -- or proceedings involving Mr. Dhillon and a Mr. Panu (phonetic),
29 whatever that relates to, but certainly not this litigation.
30

31 There's a whole series of emails and blogs of unidentified people; again, not steps in
32 these proceedings. There's another affidavit of Mr. Pierce, sworn on October 5th, which
33 inc -- includes 118 pages of a professional negligence lawsuit brought by a Glenn Walsh
34 (phonetic) against BDO Canada. For the life of me, I have no idea what relationship,
35 even in the twist of mind, that has to this lawsuit.
36

37 So the -- the record's clear. It's not in any way clarified by the voluminous filings that
38 are in front of you. Indeed, the voluminous filings, I submit to you, are -- have been filed
39 simply to try and confuse and confound the matter, not to enlighten anyone. It's a
40 straightforward case, My Lady -- Madam Master.
41

1 THE MASTER: Okay. So I just want to be clear with respect to
2 your position as to the last thing done. And now was it in May that the last case
3 management conference was held?
4

5 MR. SCOTT: The last case management conference, which
6 was in March of 2007 --
7

8 THE MASTER: March, okay.
9

10 MR. SCOTT: -- there was an attempt to set one for May of
11 2007 that didn't materialize.
12

13 THE MASTER: Okay.
14

15 MR. SCOTT: And at that point, no further effort was made by
16 the plaintiff or by any of the defendants --
17

18 THE MASTER: Okay.
19

20 MR. SCOTT: -- to move it forward. The defendants were
21 obviously prepared to let it languish. The defendants chose not -- or the plaintiff chose
22 not to do anything. And then counsel eventually ceased to act.
23

24 THE MASTER: Okay. And at that last case management in
25 March of 2007, there -- they did canvass a number of matters.
26

27 MR. SCOTT: There was some discussion, if I recall, My
28 Lady --
29

30 THE MASTER: Yeah.
31

32 MR. SCOTT: -- or Ma --
33

34 THE MASTER: There was an application to renew a claim that
35 was dismissed, I think, was my recollection of my review of that matter, and other matters
36 were adjourned to be rescheduled but never were.
37

38 MR. SCOTT: Exactly.
39

40 THE MASTER: Okay. I just want to be clear.
41

1 MR. SCOTT: There was no order that resulted from the --
2
3 THE MASTER: Okay.
4
5 MR. SCOTT: -- March --
6
7 THE MASTER: Okay.
8
9 MR. SCOTT: -- meeting.
10
11 THE MASTER: Yeah.
12
13 MR. SCOTT: It was one that --
14
15 THE MASTER: Okay.
16
17 MR. SCOTT: -- what do we have to deal with counsel and
18 how should we --
19
20 THE MASTER: M-hm.
21
22 MR. SCOTT: -- schedule dealing with it.
23
24 THE MASTER: Yeah.
25
26 MR. SCOTT: Thank you.
27
28 THE MASTER: Thank you. Okay, Mr. Dhillon, your turn.
29
30 **Submissions by Mr. Dhillon**
31
32 MR. DHILLON: I'd like to just reiterate that we'll be filing an
33 appeal on this matter. And I'm --
34
35 THE MASTER: Okay, that's your right, sir. We can move on
36 to -- please respond to the application.
37
38 MR. DHILLON: No, I -- I appreciate that. With all due respect,
39 I would like to just have some time to speak because there's things that Mr. Scott has said
40 that are not accurate, so.
41

1 THE MASTER: Yeah, you respond to what Mr. Scott said.
2 That's what you're here to do, sir. Go ahead, please.

3
4 MR. DHILLON: So first off, I'm not an attorney. To knit all
5 this together, an attorney should be present doing it. So that's on the record. This is the
6 first I'm learning from Mr. Scott that the Paragon action has been struck. Although
7 motions have been filed, they've been accepting things. So wherever that is, we'll dig
8 into it.

9
10 THE MASTER: Okay, we're here to deal with action 0501 --

11
12 MR. DHILLON: No.

13
14 THE MASTER: -- 17830.

15
16 MR. DHILLON: No, I understand that. But Mr. Scott brought it
17 up himself, so I should have a chance to respond to those points, at least. He brought it
18 up. I didn't bring it up. I'm just responding to what he said. So that particular part
19 there, as far as retaining counsel, something that was brought up in court today, the
20 difficulty in retaining a firm --

21
22 THE MASTER: Sir --

23
24 MR. DHILLON: No, no, the --

25
26 THE MASTER: No. I have heard from you on your request for
27 an adjournment. I denied it.

28
29 MR. DHILLON: No, I'm not asking for an adjournment. This is
30 very important.

31
32 THE MASTER: I denied it. And we're now talking about the
33 application and --

34
35 MR. DHILLON: It's --

36
37 THE MASTER: -- anything that significantly advances the
38 action toward trial.

39
40 MR. DHILLON: Yes, but --

41

1 THE MASTER: That's what I would like to hear you from on,
2 sir.

3
4 MR. DHILLON: I understand. But that -- that's what I'm trying
5 to say, that in order to have local counsel, as everybody puts it here, I think it should be
6 noted that the tremendous difficulty we have in trying to find a firm --

7
8 THE MASTER: Okay, so you've had a hard time getting
9 counsel. That's --

10
11 MR. DHILLON: Well, not a hard time.

12
13 THE MASTER: -- your explanation.

14
15 MR. DHILLON: This is Gowlings (sic). They're the
16 second-largest firm in Canada. They have a tremendous amount of power. They own
17 everything here, and everybody knows it. I have an affidavit here that lists out all the
18 different conflicts. So for Mr. Scott today to just brush aside this lawyer from India,
19 that's not the right thing to do.

20
21 So leaving that aside, we've paid for this hearing already. There was no prejudice. There
22 is no prejudice to the defendants. This has been hanging over their head. The guy's
23 already lost his job. That was five or six years ago. This last little bit, we've paid our
24 way all the way through. We have been paying -- we paid voluntarily. No one asked me
25 to do that. I voluntarily offered money. I'd offer more today. We're trying to get to the
26 truth.

27
28 So when I said for cross-examinations, that's for both. This application is now been
29 going -- you're going to pronounce an order on an un-cross-examined affidavit, which is
30 the same stuff that happens in BC. And everything here is relevant. Every one of those
31 documents is relevant, because if they weren't, Mr. Scott would have -- definitely have a
32 stronger argument cutting those documents in half. You cannot take a person who went
33 to prison who's a co-defendant and just knock it off as some guy in the United States, and
34 the FBI's involved and the IRS is involved and he's voluntarily a former judge, plead
35 guilty when facing ten years to money laundering, who was in direct contact with the
36 lawyer up in Calgary. That can't just be brushed under the rug.

37
38 As far as the conflict motion goes -- and there was a comment made about, Well, they've
39 been on for six years. Those documents should be read because they should see what
40 happened in those six years and what Fraser Milner has done. BDO Dunwitty
41 (phonetic) -- and he -- Mr. Scott brought that up as a nothing item again. It's a

1 multibillion-dollar tax scandal in Canada where Fraser Milner is counsel. It's Fraser
2 Milner shows up there. Fraser Milner shows up in the bankruptcy. Fraser Milner shows
3 up as the only opinion across Canada that could be found. Fraser Milner shows up with
4 Robert Rusko (phonetic) in the -- in the Portis (phonetic) matter. It's all Fraser Milner,
5 all the time, everywhere.

6
7 So this conflict motion should have been heard before this application was heard today.
8 The cross-examination motion should have been heard before this was heard today. And
9 there was a comment that, as far as the -- that the application is set for a date that the
10 court is not sitting. The court scratched that out and put a date there. They said that's
11 the date that they were available. So I don't understand why they would, in the computer,
12 put something like that on there when the court's not available. That doesn't make any
13 sense to me. And that was filed by -- that was filed by somebody here and then was
14 emailed back to me.

15
16 So for the record, I didn't know it was going to go like this. So I should read into the
17 record what was written to Mr. Scott by opposing counsel because this will fa -- form the
18 foundation of our appeal.

19
20 THE MASTER: When, sir?

21
22 MR. DHILLON: Pardon?

23
24 THE MASTER: What are you proposing to read into the record
25 now?

26
27 MR. DHILLON: I'm reading into the record the email that was
28 passed up to you that you read.

29
30 THE MASTER: Okay, didn't you already read -- read that into
31 the record?

32
33 MR. DHILLON: No. This is a different one.

34
35 THE MASTER: Okay.

36
37 MR. DHILLON: This is the one that was sent to Mr. Scott.

38
39 THE MASTER: Okay.

40
41 MR. DHILLON: So this email was sent, as well, by Jomshed

1 Mistry last week. And it says: (as read)

2
3 Dear Mr. Scott, regarding *Kingsgate Resource -- Resources Inc. Gowling -- v. Gowling Lafleur Henderson LLP et al.* Recently, I
4 was in Canada for two weeks and met with the president and CEO
5 of Kingsgate Resources Inc. I'm ready to inform you that I have
6 been retained by Kingsgate Resources Inc. in the above-noted
7 matter.
8

9
10 I have reviewed over much of the material that have been filed in
11 this matter. And upon my review with my Canadian colleagues,
12 who are part of the legal team, it is clear that this matter will take
13 much longer than the two hours that is currently allotted for it.
14 Further to this, my client is considering filing a motion that will
15 need to be heard prior to the one that is before the court now.
16

17 I'm writing to request an adjournment of the application that is
18 currently before the court to a date that is mutually agreeable, as I
19 am unavailable on December 10th, 2012, at 2 PM.
20

21 I am a practising lawyer in Mumbai, India, and have prior
22 commitments. I am also a member of the Canadian Bar
23 Association. If we can agree on a new date, it will prevent for my
24 clients having to travel to Calgary to request an adjournment in
25 person. Please let me know your thoughts as soon as you can as
26 to what the -- what your availability is in the new year and if
27 you're agreeable to an adjournment by consent. Sincerely,
28 Jomshed Mistry.
29

30 So Mr. Scott acknowledges and he reads from the affidavit of Erwin Braich sworn on
31 October 5th, which was sworn in the Kingsgate Resources Inc. matter. Mr. Braich states
32 that he's with Paragon Trust. He is the trustee of the Paragon Trust and that he has taken
33 significant care, diligence, and has undertaken and participated in a variety of actions
34 that -- with a vast amount of evidence which was obtained in the last few years, all of
35 which relates to the action herein.
36

37 He states that he is unable to get to his notes, the documents, international bank wire
38 receipts, correspondence, and other material relating to this, which are situated in storage
39 space in the State of Arizona. He attaches his exhibit A, the relevant material which has
40 restricted his access to the United States to retrieve all the items set out in paragraph 3:
41 (as read)

1
2 By not having access to the subject material [Mr. Braich states], I
3 am limited and from my memory alone can only -- can only to a
4 certain degree accurately detail the results and findings of
5 investigations that have been ongoing since 2007. I will be able to
6 rely on my -- rely only on the internet and certain websites.
7

8 Mr. Braich further goes on to detail out all of his -- or what he remembers off of his
9 memory: dealings with the Federal Bureau of Investigation, Internal Revenue Service
10 Criminal Division, US Des -- Department of Justice Securities Division, Department of
11 Commerce and Regulation, and others from the Grasswa Group (phonetic).
12

13 Mr. Scott almost refuses to acknowledge that Mr. Behrmann's even a co-defendant in this.
14 In the material before the court, there is material that shows the direct connection to this
15 case. Again, this should be done by an attorney and on an appeal. Everything is on
16 record, and we'll do it then.
17

18 And I reiterate to the court this a multibillion-dollar matter that involves the
19 second-largest law firm in Canada. And much has gone in the background that this court
20 should be aware of and should be made aware of by an attorney properly knitting all the
21 material together. This wasn't just a bunch of material dumped on somebody just to
22 make weight.
23

24 Where did all this come from? Where does that box come from? Where have all these
25 orders come from? How does the Federal Bureau of Investigation get involved? Where
26 does Innerpral (phonetic) fit in? Where does Cesus (phonetic) fit in? How does a man
27 that's a former judge in the United States plead guilty and voluntarily serve six years in a
28 federal penitentiary?
29

30 Paragraph 20 of the affidavit filed by Mr. Braich on October 5th, 2012, states: (as read)
31

32 The intertwined nature and the horrific hostility between the
33 parties involved in both province is -- provinces is amplified by
34 what appears to be assorted conflict of interest between members
35 of the Vancouver office of Fraser Milner Casgrain LLP due to
36 their role and close affiliation with KPMG. Partners in this firm's
37 Vancouver office have repeatedly given only adverse expert legal
38 opinions to my position and that of my lawful creditors.
39

40 The obvious conclusion that leaps out at me is that Gerald --
41 Mr. Gerald Scott must have had pressure mounted on him by his

1 colleagues in Vancouver. A reasonable person could think no
2 different. This hostility is so great that the chief executive officer
3 and president of Kingsgate Resources, Satinder Paulsing (phonetic)
4 Dhillon, was arrested from his residence located in Abbotsford,
5 British Columbia on Friday, July 2nd, 2010.
6

7 Approximately nine police officers showed up with a battering ram
8 at 10:30 AM. While Dhillon was asleep, he was awoken by the
9 officers, handcuffed without having been given the chance to
10 change out of his pajamas, brush his teeth, nor eat or drink
11 anything. He was then driven in handcuffs approximately 45
12 minutes away from where he lived to the Royal Canadian
13 Mounted Police detachment in Surrey, British Columbia.
14

15 And it goes on to detail out how I was fingerprinted and the way I was treated. And
16 again, these are all related. Everybody in Canada knows what's going on. BDO
17 Dunwitty knows what's going on. KPMG knows what's going on. And Gowlings (sic)
18 has been doing a lot that people need to be made aware of. And I'm surprised that the
19 court let this go ahead without even wanting to hear what exactly had happened and is not
20 interested in the least. There was absolutely no prejudice to the other side today.
21

22 Mr. Pierce has filed an affidavit which is on record with the court here. And in the
23 exhibits he shows the connection that Mr. -- the former Chief Justice, now deceased,
24 Donald Brenner, had to Fraser Milner Casgrain. And again, that motion's not -- has not
25 been heard, will not be heard now until this appeal goes ahead, which is just a travesty.
26

27 Fraser Milner Casgrain offers their opinion on insolvency law, which is also attached here.
28 Fraser Milner Casgrain puts an endow -- endowment fund together for Mr. Donald
29 Brenner. Fraser Milner Casgrain goes ahead and provides the only opinion where there is
30 no case law where they could find no one else in Canada (INDISCERNIBLE) in the
31 bankruptcy law which granted retroactive immunity to all the defendants in this horrific
32 bankruptcy proceeding which opposing counsel should be aware of, if they're not.
33

34 And at the last hearing, Mr. Scott -- and I didn't get a chance to comment on this -- stated
35 he didn't know anything about anything of the 5,000 pages. Then he said it would be
36 negligible and he did read through everything. So no one can really make up their mind
37 what's going on. Even in his printed material he makes mistakes that I don't think a
38 person who pretends not to be paying attention but surely should be paying attention
39 would make. So all of that material is on the record. The transcript from that hearing is
40 on the record. Mr. Glenn Walsh is suing BDO Canada (phonetic). Mr. Niddickman
41 (phonetic) is the expert opinion, or one of them. And that's also somebody from Fraser

1 Milner Casgrain.

2

3 It's a file that's been -- it's 13 years old and all roads seem to go through it at all times.
4 All of that is attached -- attached here. CIBC granted a loan to Mr. Glenn Walsh for over \$1
5 billion Canadian to avoid tax. And sometime thereafter, Canada Revenue Agency
6 reassessed. Glenn Walsh sued his own accountant, Mr. Jaz Batalya (phonetic), from
7 Calgary. And in that claim they lay out their scheme to beat the Canadian taxpayer out of
8 millions of dollars. How they pulled it off is beyond us. How this happened on the
9 watch of Mr. Carney (phonetic) is beyond us.

10

11 And Mr. Batalya happens to be one of the inspectors on Mr. Braich's bankruptcy. And
12 Mr. Glenn Walsh happens to be the creditor that petitioned him into bankruptcy. All of
13 that material is laid out here: affidavits from Mr. Batalya, lawyers from Fraser Milner
14 Casgrain doing what they do best. And it goes on and on and on.

15

16 So now we have a situation here where, in British Columbia, we have a file that's 13
17 years old. No cross-examinations were allowed on any affidavit material that was used to
18 pronounce any order over the course of, again, 13 years. Retroactive immunity is granted
19 to all those people. I stand here today, two motions outstanding. And we also have no
20 cross-examination on the affidavit that is going to be relied on today to pronounce this
21 order.

22

23 In the spirit of the law and the way things should be, I think that someone should wake
24 up and see what's going on here. And there's one, actually, exhibit that I forgot to bring
25 up here which I think is of the utmost importance, the fact that it could be pointed to that,
26 in all likelihood, Fraser Milner Casgrain is probably insured by the same people that
27 insures Gowlings (sic).

28

29 So there's a case here that outlines Gowling's involvement with Borden Ladner Gervais
30 and a paper called, "Faithless Fiduciaries." And again, this hearing now will not go ahead
31 until the appeal's heard on this matter. But I would like to highlight a couple of things
32 that I think are important for the record today, seeing as we have the time and we're
33 forced to go ahead. The introduction reads: (as read)

34

35 In the late '80s, a powerhouse of the largest law firms in Canada
36 formed a professional liability insurance company. That was done
37 under the governance of Law -- of the Law Society of Alberta,
38 Canada. At the time, the treasurer of the law soc -- of the society
39 was also a partner and one of the founding members of the
40 company. Over this time, became dominant -- a dominant entity
41 and was being characterized as a cartel.

1
2 For instance, anyone suing one of the law firms of this
3 powerhouse experienced the misfortune of having sued them all.
4 And like all cartels, this powerhouse acted as a secretive, elitist,
5 non-transparent, and anti-competitive manner. Access to justice
6 has developed over the last several years to become the law
7 profession's biggest eyesore. As a problem, (INDISCERNIBLE)
8 can be traced back to the time the cartel was formed.
9

10 This was a watershed moment for the law -- for the law
11 profession. It marked the time when the practice and
12 administration of the law became a business for many lawyers and
13 their firms.
14

15 THE MASTER:

Mr. Braich -- or Mr. Dhillon, this is in evidence

16 before the court, correct?
17

18 MR. DHILLON:

Yes, it is.
19

20 THE MASTER:

Okay. Are you planning to read the entire

21 article?
22

23 MR. DHILLON:

Not the whole thing. But I -- seeing as I have

24 the time, I think I should put this into the record.
25

26 THE MASTER:

Okay, sir, we have time to hear your relevant

27 submissions. Can you please move on to respond, please, and help me understand your
28 position?
29

30 MR. DHILLON:

Okay. My position is that if we step back far

31 enough from it, I stand before you as a president of a mining company. The
32 second-largest law firm in Canada has been sued by us. I stand here without counsel.
33 There were a few adjournments that were granted. We paid for this hearing today before
34 the court ordered us to pay for anything.
35

36 Mr. Scott came up. He glossed over everything. He's going to retire next year, and this
37 file's gone. I'm bringing to the court's attention the FBI, the IRS, Criminal
38 Investigations, 7,000 or 5,000-plus pages of inter-connectivity. And in the interest of
39 justice, I don't see how we got to this point, where I'm going ahead and doing all this.
40 I'm not a lawyer. I don't have -- I'm being charged with contempt of court in another
41 province. I've been arrested by the police.

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So what I'm saying is that all I have is the truth and the law to rely on and what I'm reading to you here, because nobody wants to hear about any of the background facts about anything. It's just narrow, narrow, narrow. I'm talking about the worst bankruptcy. "Mangled" is the word that comes to mind, but no one wants to hear about that. How is it not connected? It's all connected. We've got it all sitting in these documents that's it's all connected. Fraser Milner has throughout been on the opposing side. The last six years, it's clear to see what they've done.

So I don't see how justice is served by me putting all of this together. Now, if I do, do it in my nonprofessional way, I keep getting cut off. I don't see what the problem is with what I'm saying. This is a serious matter. It's a multibillion-dollar matter, a matter that would bust up Gowlings (sic) completely. There would be no firm left. We're never going to get any justice from a Canadian courtroom. I've been at this since I was in my 20s. I came here. I was born here when my parents came to this country, because they have law in this country.

Over the course of a decade and three years, I've learned that it doesn't matter. It's who has the power and the things that they are able to do. I can come in here and get upset. I can get cut off by the judge. I can be arrested by the RCMP. I can spend millions of dollars on legal fees. I can go through entire bankruptcy as a creditor and not have one cross-examined affidavit. I can come to Calgary and have assets stolen from here, and still nobody wants to give anybody their say.

To have a lawyer -- and I want to read you what Mr. Scott just brushes aside as just some guy that wrote an email, because Mr. Scott surely is going to understand today -- 35 years old. It's not going anywhere. We'll appeal it. Then we'll go the appeal court after that. This isn't about the money anymore. We've learned to live without that. We've learned to make our own money elsewhere.

Somebody gets \$500 stolen from him, it's a problem. I grew up in this country picking berries, earning money 25 cents at a time. If you look someone in the eye on the berry farm when you're 5 years old or 15 years old, you shake their hand, you make a promise, you keep it or die trying. Then I went to business school. Then I got a job at the bank. And then I go and lend some money. Then I rely on the laws of this country, and I get kicked around from courtroom to courtroom --

THE MASTER:

Okay.

MR. DHILLON:

-- province to province.

1 THE MASTER: Mr. Dhillon --
2

3 MR. DHILLON: So I want to read this into the record.
4

5 THE MASTER: Mr. Dhillon --
6

7 MR. DHILLON: This is --
8

9 THE MASTER: -- I'm going to stop you now, and please
10 listen. This is my courtroom. And I am in control of the procedure of this courtroom.
11 And I have given you a great deal of latitude to respond to the application, to explain how
12 it is that something has taken place in the -- in a five-year period, because I've got
13 evidence of a gap.
14

15 I don't see it. And I would -- this is your opportunity to try to explain. And I've given
16 you a great deal of latitude, sir. And --
17

18 MR. DHILLON: I appreciate the latitude, but I don't expect it.
19 You can cut me off and send me home right now. I've been through too much to
20 really --
21

22 THE MASTER: Sir, the -- the question is why --
23

24 MR. DHILLON: No, the question today --
25

26 THE MASTER: -- Kingsgate has not done anything to
27 significantly advance the action, according to the evidence of court -- before the court.
28 This is what Mr. Scott's position is. You are here to respond to that.
29

30 MR. DHILLON: And I am saying that I am not qualified to
31 respond to that.
32

33 THE MASTER: Okay. Well, sir, we've already gone over that.
34 You've -- you've made your position abundantly clear. It's on the record.
35

36 MR. DHILLON: Then we'll just have to deal with it in the
37 appeal court.
38

39 THE MASTER: Okay. That is absolutely your right, sir.
40

41 MR. DHILLON: I still think I should have been able to read into

1 the record. But if it's on the record, then we can use it then.

2

3 THE MASTER: Okay. Have a seat, sir, if you're done.

4

5 MR. DHILLON: Pardon?

6

7 THE MASTER: Have -- have a seat, sir, then, if you're finished.

8

9 MR. DHILLON: Well, just give me a second. I don't know if
10 I'm finished with . . .

11

12 THE MASTER: Okay.

13

14 MR. DHILLON: Well, in closing, I'd like to just say that, for the
15 record, we did pay for this before we got here. And we'd be willing to pay if they
16 voluntarily withdraw their motion and just -- it'll help get the truth out. So with that, I
17 think I'm done.

18

19 THE MASTER: Thank you, sir. Anything new that you must
20 respond to --

21

22 MR. SCOTT: Just --

23

24 THE MASTER: -- Mr. Scott?

25

26 MR. SCOTT: -- one thing, Madam Master. We've had read
27 into the email which was sent to me by Mr. Mistry which arrived at, I think, 2:42 or
28 something like that on Thursday night or Friday morning. For what it is worth, indulge
29 me very briefly to read my reply, which I think --

30

31 THE MASTER: All right.

32

33 MR. SCOTT: -- you have in front of you --

34

35 THE MASTER: Okay.

36

37 MR. SCOTT: -- but it's not part of the record. I sent this
38 at -- early in the morning of Friday morning after I got into the office, 8:40 I think it
39 shows on the email itself, addressed to Mr. Mistry at the email address I had for him: (as
40 read)

41

1 While I appreciate your personal position, and I would normally
2 be prepared to extend reasonable professional courtesies, I cannot
3 agree to an adjournment in the circumstances of this matter. The
4 application was initially returnable on July 4th, 2012. Since then,
5 there have been four appearances in court, two with law firms
6 involved, seeking adjournments. The court granted these, although
7 on two occasions the application was to be scheduled on a
8 peremptory basis.

9
10 The last appearance before Master Mason was on October 17th,
11 2012. And at that time, she directed the hearing for December
12 10th, with clear directions respecting the submission of any
13 additional material; none has been received. This adjournment
14 request simply continues a pattern which I submit that the court
15 will find unacceptable. Your client has had many weeks, indeed
16 months, to obtain counsel and prepare its position. The latest
17 last-minute request for but another adjournment is an abuse of the
18 court process, and I will strongly oppose it.

19
20 And then I went on gratuitously, I guess, to say this: (as read)

21
22 Without expecting to debate the merits of your application, I
23 submit to you that it is a simple one based on unassailable
24 principles. The rules of court are clear, as is the case law. The
25 relevant facts can be presented in less than a half an hour. Yours,
26 (INDISCERNIBLE).

27
28 So enough said. They've had -- they had more than five years to move the action
29 forward if they wanted to. They didn't. They've had six months now, or almost six
30 months, for this application and have a had a chance to get counsel. So the complaint
31 that someone is not giving them an opportunity is without meaning.

32
33 THE MASTER: Thank you. And you're rising again?

34
35 MR. DHILLON: Just on what he said on his own email. He just
36 says, "Without expecting to debate the merit," it's of our application, not yours. And that
37 point, he hadn't even seen our application. That's all.

38
39 **Reasons for Judgment**

40
41 THE MASTER: Okay, thank you. Kingsgate Resources Inc.

1 commenced this action December 20th, 2005, against its directors, officers, lawyers,
2 subsidiaries, as well as other corporations and individuals. The claim alleges that various
3 of the defendants were involved in an unauthorized and illegal transfer of King --
4 Kingsgate's interest in a gold mine in Ghana.

5
6 There are further allegations relating to other misappropriated corporate assets and
7 opportunities involving a variety of natural resources, as well as self-dealing unauthorized
8 issuance of the shares, breach of fiduciary duty, breach of duties of care and conspiracy.
9 The prayer for relief includes declarations, accounting, interim and permanent injunctions,
10 revocation of shares, replacement of directors, and damages.

11
12 Defences were filed, and a number of interlocutory applications were brought. Some
13 cross-examinations of these lawyers involved as applicants in this matter took place.
14 Justice Clark was appointed as case management justice in February 2007, and this action
15 was consolidated with two others.

16
17 Service and renewal orders were made in master's chambers in the spring of 2007. And
18 one of those renewal orders was unsuccessfully challenged as per Master Hanebury's oral
19 reasons delivered April 16th, 2007.

20
21 The parties last appeared before Justice Clark in March 2007. Many matters were
22 canvassed. An application to renew the statement of claim of one of the actions was
23 dismissed, and other matters were adjourned and have yet to be determined. The action
24 then appears to have stalled. On April 1st, 2009, counsel for Kingsgate filed a notice --
25 notice of ceasing to act.

26
27 Two of the individual lawyer defendants, Ken Phillips and Terry Knight, and the law
28 firms named, Ballem Macinness LLP and Gowling Lafleur Henderson LLP, filed this
29 application June 6th, 2012, to dismiss the action for long delay pursuant to rule 15.4. In
30 *Trout Lake Store Inc. v. Canadian Imperial Bank of Commerce*, 2003 ABCA 259 330 AR
31 379, the Court of Appeal confirmed that completed steps required by the rules, completed
32 procedural steps con -- contemplated by the rules, and any other thing which is not a
33 procedural step, including things done by the defendant, may materially advance an
34 action.

35
36 In order to determine whether the action is materially advanced, the court must examine
37 the thing in the light of the purpose of the rule. The purpose of rule 15.4 and its
38 predecessor, rule 244.1, has received much judicial comment. The upshot is that the rule
39 is intended to maintain a reasonable and fair pace to litigation.

40
41 More recently, the Court of Appeal emphasized in *Phillips v. Sowan*, 2007 ABCA 101,

1 that a functional approach is required for applications to dismiss for long delay. The
2 question is whether the particular action taken during the relevant period genuinely
3 furthers the litigation in a meaningful way, at paragraph 5. In that case, the plaintiff had
4 prepared an economic report relevant to the issue of assessment of personal injury
5 damages as well as gathered medical reports. Only damages remained at issue, and
6 opposing counsel was aware of some of those ongoing efforts.

7
8 The Court of Appeal concluded that in the context of the particular litigation at issue, the
9 action taken could be seen as materially advancing the action. Advancing the action is
10 not enough. It must be a significant advancement in order to avoid the result of the rule.
11 See, for example, Fruman, J. A.'s (phonetic) reasons in *Morash v. Alberta* (phonetic),
12 2000 ABCA 24, at paragraph 13, in relation to the requirement under former rule 244.1 of
13 material advancement.

14
15 Kingsgate agrees that the procedure card supports the assertion that nothing has been done
16 since May of 2007 to significantly advance the action but asserts that the procedure card
17 is not determinative. Kingsgate relies, firstly, on an affidavit sworn by Erwin Braich
18 October 5th, 2012, and submits that this affidavit demonstrates that things have been done
19 to advance the action within the five-year period preceding the filing of the application.

20
21 Mr. Braich deposes that he is the trustee of the Paragon Trust, the majority shareholder of
22 Kingsgate. He says he undertook and has participated in a variety of actions and deeds
23 whereby a vast amount of evidence was obtained in the past few years, all of which
24 relates to the herein litigation.

25
26 He goes on to state that detailed notes, many documents, including bank wire receipts,
27 much correspondence, and other material relating to the above referred actions and deeds
28 are situated in a storage unit in Arizona. Mr. Braich believes he's restricted from entering
29 the United States so cannot retrieve these materials. The materials are not available for
30 the court's review.

31
32 Mr. Braich recounts from memory the results and findings of investigations that have been
33 ongoing since 2007. In summary, these are commencement of discussions in 2007 with
34 officers and agents of various American law enforcement agencies. The investigation
35 stemmed from complaints made by investors relating to the sales of unregistered securities
36 by persons, including one of the named defendants, Bryant Behrmann. Behrmann was a
37 defendant in the civil action filed April 5th, 2007, in Atlanta, Georgia.

38
39 Mr. Braich states that: (as read)

40
41 From reviewing the website for the Grasswa Group, I recall that

1 approximately 45 million US funds was fraudulently taken from
2 more than 10 investors in a scheme to generate huge returns.

3
4 Mr. Braich further recalls that Mr. Behrmann was a director, officer, or promoter of Gold
5 Coast Resources Inc., also a named defendant in this action. Mr. Braich learned from
6 various investigators that much of the proceeds of this 45 million was wired to the
7 companies as set out in this litigation. He states that his: (as read)

8
9 Assistance to the American authorities in tracing the funds were
10 very deliberate, taken to advance this litigation.

11
12 And that's a quote. Mr. Braich states that Mr. Behrmann has pled guilty to criminal
13 activity and accepted a six-year sentence approved and sanctioned by US District Judge
14 Anna J. Brown. An action plan was deployed with the assistance of Darryl Lloyd
15 (phonetic), who collected a great deal of information from individuals, including two of
16 the named defendants. Mr. Braich and Mr. Lloyd were able to piece together and
17 reassemble many of the original mining concessions in Ghana which originally were the
18 lawful property of Kingsgate Resources Inc.

19
20 Mr. Braich also deposed to his personal bankruptcy proceedings and the arrest of such
21 Satinder Paulsing Dhillon in July 2010, apparently in relation to Mr. Braich's bankruptcy.
22 Mr. Braich implies Mr. Dhillon's arrest was at the behest of the trustee of his estate.
23 Nothing in this portion of Mr. Braich's affidavit describes a thing done that significantly
24 advanced this action toward trial.

25
26 A transcript of a July 2009 proceeding in Mr. Braich's bankruptcy is attached to an
27 affidavit sworn by Michael (phonetic) McCormick October 5th, 2012. He states he is an
28 advisor to Kingsgate and purports to have knowledge of the facts contained herein. This
29 affidavit, similarly, does not describe a thing done that significantly advanced this action
30 toward trial.

31
32 There are also affidavits from Emmet (phonetic) Pierce, sworn July 30th and October 5th,
33 2012, that state that many documents relevant to this lawsuit are attached. These
34 affidavits do not indicate any details whatsoever that might be probative of the issues on
35 this application, for example, as to when the documents were gathered or how they relate
36 to the material advancement of this action.

37
38 The results of Mr. Braich's investigations have generated some documentation that is at
39 least arguably relevant to Kingsgate's action and may assist in the preparation of its case -
40 specifically, the piecing together of some of the original mining concessions. However,
41 this is only a summary and the actual materials are not before the court. This is not, in

1 my view, sufficient to constitute significant advancement of the action as required as
2 pursuant to the Court of Appeal decision in *Morash* in Alberta.

3
4 As to the American investigations, it is not clear from Mr. Braich's affidavit how these
5 relate to this action. The documentary results of the investigations are not available to
6 possibly assist in this regard. I cannot conclude that these efforts serve to significantly
7 advance the action toward trial.

8
9 In any event, there is no evidence that Kingsgate disclosed that it was undertaking these
10 investigations to the defendants or provided them with the results so as to engage them
11 and move the litigation toward trial. Rather, Mr. Braich made a deliberate choice not to
12 disclose these investigation efforts to the defendants. At paragraph 15 of his affidavit he
13 disposed -- deposes that, quote: (as read)

14
15 It was clearly made known to me that I should not alert any of the
16 co-defendants in the Kingsgate action while the American agencies
17 and officials were conducting their investigation.

18
19 Rule 15.4 is clear and mandatory. The evidence before the court demonstrates that
20 nothing has been done to significantly advance the action in the five-year period -- or in a
21 five-year period. The action against the applicants is dismissed. And I do reserve the
22 ability to review any transcript that is ordered in order to correct any errors and amplify
23 my reasons as may be necessary.

24
25 Mr. Scott, costs?

26
27 **Submissions by Mr. Scott (Costs)**

28
29 MR. SCOTT: My Lady, the only issue I have at the moment
30 is as to costs.

31
32 THE MASTER: M-hm.

33
34 MR. SCOTT: You will recall that we were awarded and have
35 indeed been paid \$5,000 in throwaway costs for the previous adjour --

36
37 THE MASTER: That's in the past.

38
39 MR. SCOTT: That's the past.

40
41 THE MASTER: Yes.

1
2 MR. SCOTT: We now have a dismissal of the lawsuit. I have
3 not prepared a --
4
5 THE MASTER: It's -- and it's also against the applicants, of
6 whom you're acting for, right?
7
8 MR. SCOTT: Yes.
9
10 THE MASTER: That's who the application was brought on
11 behalf of.
12
13 MR. SCOTT: Yes. And so we have a dismissal of a lawsuit.
14
15 THE MASTER: M-hm, m-hm.
16
17 MR. SCOTT: And under the rules of court, there are certain
18 steps --
19
20 THE MASTER: Yes.
21
22 MR. SCOTT: -- we -- that we'd be entitled to
23 (INDISCERNIBLE) taxable cost.
24
25 THE MASTER: Right.
26
27 MR. SCOTT: I think it's -- I have here some notes. It's
28 \$3,500 for the commencement of the action.
29
30 THE MASTER: Okay.
31
32 MR. SCOTT: For special contested applications such as this, I
33 think it's \$1,500.
34
35 THE MASTER: Okay.
36
37 MR. SCOTT: The other steps that were taken are complicated
38 a little bit because they were in conjunction with the Paragon Trust matter. As a matter
39 of fact, the cross-examinations on affidavits to which I referred were in Paragon Trust --
40
41 THE MASTER: M-hm.

1
2 MR. SCOTT: -- not in this. So --
3
4 THE MASTER: M-hm.
5
6 MR. SCOTT: -- I -- I'd be comfortable, to avoid all of us
7 going through taxable co -- or through the taxation, to accept 50 -- \$5,000 additional costs
8 in -- for the dismissal of the application -- or of the action and for this successful
9 application. I think that's generous. If I went back to five, six, seven years ago for the
10 appearances in front of the various judges, I'm sure that could add up to a lot more. But
11 I'd rather deal with it now as \$5,000 all inclusive as the costs of --
12
13 THE MASTER: And you --
14
15 MR. SCOTT: -- arising from this order.
16
17 THE MASTER: Okay. And you still have -- you still got
18 \$5,000 in your trust account?
19
20 MR. SCOTT: I've -- (INDISCERNIBLE) have ten.
21
22 THE MASTER: Okay.
23
24 MR. SCOTT: I'm -- I'm --
25
26 THE MASTER: Okay.
27
28 MR. SCOTT: -- generous enough to give some back.
29
30 THE MASTER: You've got ten in your trust. And --
31
32 MR. SCOTT: I do now, yes.
33
34 THE MASTER: And you're willing to accept -- you're -- you're
35 submitting --
36
37 MR. SCOTT: Five would be appropriate.
38
39 THE MASTER: -- an entitlement to \$5,000?
40
41 MR. SCOTT: Yes.

1
2 THE MASTER: All right.
3
4 MR. SCOTT: And I -- I have an order prepared with a por --
5 portion for the costs left blank --
6
7 THE MASTER: M-hm. Okay.
8
9 MR. SCOTT: -- but . . .
10
11 THE MASTER: So we'll give Mr. Dhillon an opportunity to
12 look at that. And then you can make submissions as to costs on behalf of Kingsgate.
13
14 MR. SCOTT: It's fairly simple, Madam Master. It deems
15 service good and sufficient, which is sort of redundant at this stage because we've been
16 through a hearing. It's paragraph 2 simply dismisses the application for a long delay, and
17 paragraph 3 just awards costs in a blank amount. By having you sign it today, if we
18 could --
19
20 THE MASTER: M-hm.
21
22 MR. SCOTT: -- and if it works --
23
24 THE MASTER: Yeah.
25
26 MR. SCOTT: -- it saves the problem of communicating back
27 and forth and --
28
29 THE MASTER: Yeah.
30
31 MR. SCOTT: -- getting the order approved. But --
32
33 THE MASTER: Yeah.
34
35 MR. SCOTT: -- I'll leave that to any submissions by
36 Mr. Dhillon.
37
38 MR. DHILLON: If I could just have a minute. I'm looking for
39 one order here.
40
41 THE MASTER: You're looking for what, sir?

1
2 MR. DHILLON: I'm looking for an order.
3
4 THE MASTER: Okay. And there's a gentleman approaching
5 you. I'm not sure who that is.
6
7 THE MASTER: Sir, who are you?
8
9 MR. PIERCE: Emmet Pierce. Sorry.
10
11 THE MASTER: Okay, I'm -- I'm hoping that you're looking at
12 the order that's presented that I just granted and the form of order that Mr. Scott suggests
13 reflects the order that I have just given.
14
15 MR. DHILLON: Yeah.
16
17 THE MASTER: That is the order that I would like your
18 comments on, sir.
19
20 MR. DHILLON: Yeah, no, I -- I appreciate that. And . . .
21 Does -- his cost estimate seems fair. I just wanted to bring up that there was another
22 order that was pronounced in July of 2006. And I don't know if you remember that one.
23
24 MR. SCOTT: I think.
25
26 MR. DHILLON: Do you have it there? That -- that's where,
27 what was it, Paragon was awarded some costs. But then it was supposed to be --
28
29 THE MASTER: In this action, sir? Is it in 0501?
30
31 MR. SCOTT: No, it's not.
32
33 MR. DHILLON: Oh, sorry, yeah. No, you know what --
34
35 THE MASTER: 17830, okay.
36
37 MR. DHILLON: Okay, yeah, we'll have to deal with that
38 separately then.
39
40 THE MASTER: Okay. So Mr. Scott has been -- is -- is only
41 asking for \$5,000 in costs, sir. What are your submissions?

1

2 **Submissions by Mr. Dhillon (Costs)**

3

4 MR. DHILLON: Is that normal? I don't even know. It seems
5 fair.

6

7 THE MASTER: He may well have asked for more.

8

9 MR. DHILLON: Yeah, I understand that. So, I mean, it doesn't
10 matter at this point. We're --

11

12 THE MASTER: All right.

13

14 MR. DHILLON: There's still a long way to go yet, but, yeah,
15 sure.

16

17 THE MASTER: Okay. And, Mr. Scott, I presume you'd like
18 that payable by transfer from the -- your trust account?

19

20 MR. SCOTT: Yes.

21

22 THE MASTER: Okay.

23

24 MR. SCOTT: I should have --

25

26 THE MASTER: All right.

27

28 MR. SCOTT: -- inserted that. Thank you.

29

30 **Ruling (Costs)**

31

32 THE MASTER: Okay, what I've done is I've taken out
33 paragraph 1, because we don't need to address service. You know, we've addressed a
34 long history of this matter. And it came as no surprise to anyone that we were hearing
35 this matter today. And, of course, Mr. Dhillon is here representing Kingsgate. So
36 paragraph 1 is the dismissal of the action, and paragraph 2 is an award of \$5,000 in costs
37 payable by transfer from the trust account of counsel for these defendants. Okay. So I've
38 signed the order. It's ready to be entered.

39

40 MR. SCOTT: Thank you. I'll see to it that it's entered and
41 served.

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THE MASTER:

And served. All right. Thank you.

MR. SCOTT:

Thank you, Master.

PROCEEDINGS CONCLUDED

1 Certificate of Record

2

3 I, Shaeleigh Lucas, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench, held in courtroom 903, at Calgar -- Calgary,
5 Alberta, at the -- on the 10th day of December, 2012, and I was the court official in
6 charge of the sound-recording machine.

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1 Certificate of Transcript

2

3 I, Pam Rusinko, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript of
7 the contents of the record, and

8

9 (b) the Certificate of Record for these proceedings was included orally on the record and
10 is transcribed in this transcript.

11

12

13

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14

Pam Rusinko, Transcriber

15

Order No. 1445-13-1

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36 Lines: 1638

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39 File Locator: 469fd2e268c711e28e480017a4770810

40 Digital Fingerprint: ca858c0c67b7a9e45bf0d90db5239627c174830b56e7e5b0e01b7e65c081d7a4

41

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Title Page Characters:	858
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