



NO. S-227894
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
GREAT PANTHER MINING LIMITED

PETITIONER

NOTICE OF APPLICATION

NAME OF APPLICANT: Great Panther Mining Limited ("**Petitioner**")

TO: Service List, attached hereto as **Schedule "A"**

TAKE NOTICE that an application will be made by the Petitioner to the Honourable Justice Walker at the courthouse at 800 Smithe Street, Vancouver, British Columbia, **on October 21, 2022 at 10:00 a.m.**, for the order set out in Part 1 below.

PART 1: ORDER(S) SOUGHT

1. An order striking portions of the affidavit #1 of Paul Healey made October 12, 2022 and the affidavit #2 of Paul Healey made October 18, 2022 (collectively the "**Healey Affidavits**") on grounds that they contain:

- (a) inadmissible arguments, legal conclusions, speculation and opinions; and
- (b) inadmissible hearsay.

PART 2: FACTUAL BASIS

Great Panther's Proceeding

1. The factual background to this proceeding (the "**CCAA Proceedings**") set out in greater detail in the Petition and other materials filed herein.

2. The Petitioner's application heard on October 14, 2022 related to the granting of an amended and restated initial order, and an extension of the stay of proceedings (the "**ARIO Application**"). The application to be heard on October 21, 2022 (the "**Extension Application**"), is to, among other things, extend the stay of proceedings, with the aim of initiating a sales and investment solicitation process in the near future.
3. This Notice of Application is submitted in connection with and further to GPML's Notice of Application for the Extension Application.
4. In the afternoon of October 13, 2022, Asahi Refining Canada Ltd. ("**Asahi**") filed Healey Affidavit #1 in these proceedings. Healey Affidavit #1 was tendered in support of Asahi's Notice of Application filed October 13, 2022 (the "**Asahi Application**") seeking, among other relief, the lifting of the stay of proceedings ordered pursuant to the Initial Order pronounced by the Honourable Justice Walker on October 4, 2022, as extended, and authorization for Asahi to file a bankruptcy petition with respect to GPML.

Healey Affidavit #1

5. In Healey Affidavit #1, Mr. Healey describes himself as simply "the Global Head of Refining Sales and a Director of Asahi Refining Canada Ltd." The Healey Affidavits adduce no evidence of Mr. Healey's qualifications, at all.
6. Large parts of Healey Affidavit #1 contain argument, conclusions, subjective opinions and inadmissible hearsay.
7. For example, Healey Affidavit #1 contains the following statements:

9 For the reasons set out below, Asahi is of the view that GPM is no longer acting in the best interests of its creditors (but rather for its equity holders) and, accordingly, Asahi has lost complete confidence in management of GPM and is not supportive of GPM's restructuring initiatives or any plan of arrangement and compromise that GPM might present to its creditors. In particular, Asahi is extremely concerned about the use of the remaining cash on hand to fund a sale process for its Brazilian gold mining operations (the "Tuscano Mine") ... based on speculative projections and with an unknown chance of success at generating any value..."

18 Asahi has no confidence that such returns to Mina Tucano's shareholders will ever materialize, and as such is not prepared to support GPM using the available cash, being the only real realization asset, to fund this experiment led by GPM's management.

20 "...I am of the view that the risk of receiving nothing under the Petitioner's proposed restructuring initiatives and/or sales process is very high" where only GPM's management and restricting professionals are likely to be paid.

21 "...However, very little weight should be given to book value..."

21 "...Accordingly, it is expected that the Tucano Mine will sell for significantly less than GPM's attributable book value of USD 143.2 million"

38 "A call took place on or about August 23, 2022 during which Fernando... appeared confused as to which model Asahi was relying on and, when Asahi questioned Fernando..."

41 "This information was remarkably different than the information provided by GPM to Asahi on August 23"

42 "...Asahi noted the following meaningful discrepancies:..."

43 "In just three days the information made available by GPM had gone from quite positive to very negative"

54 "The existing assets of GPM will need to be expended, leaving the creditors of GPM with nothing but a hope that the gamble set out in the Sales Model will pay off"

54 "... This gamble appears largely driven to return value to GPM's equity holders... such risks and costs to be solely borne by the creditors"

55 "Asahi sees little potential in the sale process..."

55 "The following are some of Asahi's additional concerns [- opinion evidence dressed up as concerns]"

56 "I am of the view that the risk of receiving nothing... is very high"

59 "For the reasons stated above, Asahi has determined that it is far better for the creditors of GPM to petition GPM into bankruptcy and liquidate the remaining realizable assets to partially satisfy GPM's debts. ... However, this is a far smaller risk than betting on the success of the highly speculative, hopelessly optimistic Sales Model ... which will likely see no recovery to GPM's creditors"

60 "The information delivered by GPM to Asahi to date has been unreliable, and cannot be relied on by this Court to make a determination as to the viability of GPM's proposed restructuring initiatives..." [60]

8. At the hearing on October 14, 2022, counsel for the Petitioner objected to the contents of Healey Affidavit #1.

9. On October 18, 2022, Mr. Healey then affirmed Healey Affidavit #2, which was served in support of Asahi's position in these proceedings.

10. Notwithstanding the objections made to Healey Affidavit #1 in court on October 14, 2022, Healey Affidavit #2 is identical in content, word for word to Healey Affidavit #1, including all of the above extracts from Healey Affidavit #1 - the only change being redactions noted in certain of the exhibits.

PART 3: LEGAL BASIS

1. The Healey Affidavits are objectionable and inadmissible. They contain argument, conclusions, subjective opinions, hearsay and speculation.

2. The Healey Affidavits are a collection of clearly inadmissible statements. They are largely improper argument in the guise of evidence.

3. The Healey Affidavits do not belong in a court of law.

4. The purpose of an affidavit is to supply relevant fact evidence — without gloss, argument, or commentary — that will assist the court in deciding the issues before it. Arguments, legal conclusions, and opinions (unless offered by a qualified expert or relating to a matter that does not require specialized knowledge¹) “have no place in any affidavit”² and “serve only to increase the depth of the court file and to confuse the fact finding exercise”.³

5. Notwithstanding this bedrock rule, the Healey Affidavits are riddled with inadmissible arguments, legal conclusions and opinions.

6. An assortment of some of these inadmissible statements is set out above.

Court's Power to Strike Affidavits

7. Rule 9-5(1) provides as follows:

¹ *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42, 138 D.L.R. (3d) 202.

² *R. v. D.M.G.*, 2011 ONCA 343 at para. 74. See also *Canada (Attorney General) v. Quadri*, 2010 FCA 47 at para. 18.

³ *Chamberlain v. School District #36 (Surrey)*, 1998 CanLII 6723 at para. 28, rev'd 2000 BCCA 519, rev'd 2002 SCC 86 (no appeal was taken from the evidentiary issue).

Rule 9-5 — Striking Pleadings

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

8. Improper affidavits are a waste of this Court's time and the parties' resources. They abuse the court's process.⁴

9. The Court's power and authority to strike improper affidavits was reviewed in the recent decision *Paynter v. School District No. 61*:

[61] Rule 9-5(1)(b) of the *Rules* empowers a court to strike out the whole or any part of a pleading, petition or other document on the ground that it is unnecessary, scandalous, frivolous or vexatious.

[62] Affidavit evidence that is not probative of a fact put in issue by the parties is an "unnecessary" document under Rule 9-5(1)(b) (see *6180 Fraser Holdings Inc. v. Ali*, 2012 BCSC 247 at para. 41).

[63] Further, R. 22-2(12) provides that, subject to subrule (13), an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial. This applies in the case of a petition where a final order is being sought (see *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 2554 at paras. 6–7).

[64] Similarly, affidavits must not include opinions, argument or legal conclusions (see *British Columbia Investment Management Corporation*, at para. 7).

⁴ *Evans Forest Products Ltd. v. British Columbia (Chief Forester)*, 1995 CarswellBC 3021 at para. 3 (S.C. Chambers); *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, 1999 CanLII 5860 at para. 47 (S.C. Chambers).

[65] As such, an affidavit containing improper or inadmissible content may be struck under either R. 9-5(1)(b) or R. 22-2(12) (see *Lang v. Lapp*, 2015 BCSC 1838 at para. 34).

[66] Practically speaking, where an application to strike is heard at the same time as the petition on its merits, the struck portions of the impugned affidavit(s) are given no weight by the court (see *McMahon v. Harper*, 2017 BCSC 2328 at para. 108).⁵ [emphasis added]

10. Similarly, in *Tasci (Re)*, this Court held that affidavits should not include opinions (except in the case of qualified experts), arguments, legal conclusions or speculation:

[53] The applicants assert that the affidavit filed by Mr. Sommerey to the extent that is “all but inadmissible” could not substantially support the making of the Order because the evidence in the affidavit is comprised of inadmissible hearsay, argument, speculation and conclusions.

[54] Those assertions are contained in extensive and often repetitive submissions concerning not only the contents of the affidavit as a whole but also that of each paragraph.

[55] Unfortunately, affidavits containing inadmissible evidence regularly find their way into chambers applications.

[56] Although the Court has the power to strike inadmissible evidence, in many instances chambers hearings must proceed with little time for detailed analysis of the affidavit material filed. Argument about admissibility is on many occasions not addressed by counsel, and does not often become the subject of formal rulings.

[57] However, notwithstanding a proliferation of inadmissible evidence in affidavits, problems associated with such affidavits are usually addressed by the practicalities and exigencies of decision making by giving offending evidence no weight. See: *McMahon v. Harper*, 2017 BCSC 2328 [*McMahon*].

[58] Such exigencies and practical solutions do not, however, excuse a failure by litigants to adhere to the rules of evidence.

[59] Lawyers have professional obligations as evidentiary gatekeepers that are not reduced when a lawyer acts on his own behalf as a litigant.

[60] Affidavits should be confined to relevant facts within the knowledge of the affiant. Affidavits should not include opinions (except in the case of qualified experts), argument or legal conclusions. See: *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2016 BCSC 2554 at para. 7.

⁵ 2022 BCSC 1671 at paras. 61–66.

[61] Speculation is also not admissible: *McMahon* at para. 110.
[Emphasis added]⁶

Inadmissible Opinion Evidence

11. Opinion evidence is presumptively inadmissible,⁷ meaning witnesses may testify only to facts within their knowledge and may not give opinion evidence, which is an inference, deduction, impression or conclusion from these facts.⁸ It is the trier of fact's responsibility to draw inferences from a particular observation, not the witness's.⁹

12. In *Chamberlain v. School District #36 (Surrey)*, this Court set out these well familiar rules of evidence:

[28] In general, opinion evidence is not admissible except when authored by an expert witness. Nor is it proper to submit argument in the guise of evidence. Personal opinions or a deponent's reactions to events generally should not be included in affidavits; argument on issues from deponents serves only to increase the depth of the court file and to confuse the fact finding exercise. To the extent that objection is taken to inclusion of argument or opinion from persons not qualified as expert, the objection is valid and those portions of affidavits have been disregarded. [Emphasis added]¹⁰

13. The Healey Affidavits are full of inadmissible opinion evidence.

Legal Arguments and Conclusions are Inadmissible

14. An affidavit must not contain argument or attempt to tell the Court what to think. Such an affidavit is improper and should be struck.¹¹

⁶ 2020 BCSC 1438 at paras. 53–61.

⁷ *R. v. Abbey*, [1982] 2 S.C.R. 24 at page 42, 138 D.L.R. (3d) 202.

⁸ *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 14; *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 514 at para. 35.

⁹ *Cambie Surgeries Corporation*, *supra* at para. 35. The Healey Affidavits do not come within either exception being (1) the "lay opinion exception", where the evidence is "a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly" (*Graat v. The Queen*, [1982] 2 S.C.R. 819 at 841, 144 D.L.R. (3d) 267), but where "scientific, technical, or specialized evidence is not necessary" (*Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 514 at para. 36, emphasis added) or (2) in evidence tendered by an expert, which may include opinion evidence. Expert evidence must meet the requirements of admissibility set out in Rules 11-2 and 11-6 of the *Supreme Court Civil Rules*.

¹⁰ *Chamberlain*, *supra* at para 28.

¹¹ *Chamberlain supra* at para 28; *T.A.W. v. S.R.W.*, 2013 BCSC 907 at paras. 19–20.

15. Legal conclusions or arguments in affidavit evidence are inadmissible.¹² It is the role of counsel, not witnesses, to provide arguments.¹³

16. The Healey Affidavits contain inadmissible legal arguments and conclusions.

Speculative Evidence is Inadmissible

17. Speculations are not admissible evidence.¹⁴ They provide an insufficient evidentiary basis from which to draw conclusions.

18. The Healey Affidavits are replete with inadmissible speculation.

Unattributed Hearsay Evidence is Inadmissible

19. Pursuant to Rule 22-2(12) an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at trial, subject only to Rule 22-2(13).

20. Rule 22-2(13) provides that an affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if (a) the source of the information and belief is given, and (b) the affidavit is made in respect of an application that does not seek a final order or leave of the court is obtained.

21. An affidavit cannot include hearsay, even on an interlocutory matter, unless the source of the hearsay is stated. An affidavit that relies on unattributed hearsay may be “worthless”.¹⁵

22. Paragraphs 55 (c) and (d) do not identify the source of Mr. Healey’s information and belief (“Manucci Law” is not a person) and therefore cannot be saved by subrule (13) and should be struck for all purposes.

Conclusion and Relief Sought

23. The repeated failure to observe bedrock rules of evidence reflects a fundamental misapprehension of the purpose of a fact affidavit: to supply relevant and reliable fact evidence

¹² *British Columbia Investment Management Corp. v. Canada (Attorney General)*, 2016 BCSC 2554 at para. 7.

¹³ *Cambie Surgeries Corporation*, *supra* at para. 74.

¹⁴ *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837 at paras. 70, 86, 104, 108, 144, 151.

¹⁵ *Meier v. Canadian Broadcasting Corp.*, 1981 CanLII 644 at para. 4 (S.C.); *L.M.U. v. R.L.U.*, 2004 BCSC 95 at paras. 22–23, 35–36.

— without gloss, argument or commentary — that will assist the court in deciding the issues before it. This fundamental misapprehension manifests itself in arguments that belong in a submission, legal conclusions that belong in a judgment, opinions that belong in an expert report, statements by third parties that belong in affidavits from *them* and irrelevant or otherwise inadmissible information that does not belong before this Court at all.

24. In this case, the abuse of process perpetrated is exacerbated by the fact that, after objection to Healey Affidavit #1 was made in Court, Asahi proceeded tender exactly the same affidavit, word for word, in Healey Affidavit #2.

25. In sum, the Healey Affidavits are objectionable and inadmissible. They contain argument, conclusions, subjective opinions, speculation and inadmissible hearsay and should be struck.

PART 4: MATERIAL TO BE RELIED ON

1. Rules 9-5 and 22-2 of the *Supreme Court Civil Rules*;
2. Affidavit #1 of Paul Healey, made October 12, 2022;
3. Affidavit #2 of Paul Healey, made October 18, 2022; and
4. Such further and other materials as counsel may advise and this Honourable Court may permit.

The applicant estimates that the application will take 1 hour.

This matter is not within the jurisdiction of a master. This matter is scheduled to be heard by the Honourable Mr Justice Walker.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an Application Response in Form 33
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and

- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following
- (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

DATED: October 19, 2022



Signature of Lawyer for the Petitioner
McCarthy Tétrault LLP
(H. Lance Williams)

To be completed by the court only:

Order made

in the terms requested in paragraphs
of Part 1 of this Notice of Application

with the following variations and additional terms:

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DATED: _____ Signature of Judge
 Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- none of the above

SCHEDULE "A"

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SERVICE LIST

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<p>Fasken Martineau DuMoulin LLP Suite 2900 – 550 Burrard Street Vancouver, BC V6C 0A3</p> <p>Attention: Kibben Jackson Rebecca Barclay Nguinambaye</p> <p>Tel: (604) 631-4786</p> <p>Email: kjackson@fasken.com rnguinambaye@fasken.com</p> <p><i>Counsel for the Monitor</i></p>	<p>Torys LLP 79 Wellington Street West 30th Floor (deliveries) / 33rd Floor (reception) Box 270, TD South Tower Toronto, ON M5K 1N2</p> <p>Attention: David Bish</p> <p>Tel: (416) 865-7353</p> <p>Email: dbish@torys.com</p> <p><i>Counsel for Directors of Great Panther Mining Limited</i></p>

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