

Major General Resources Ltd. v. International Diamond Syndicate Ltd.

Between
Major General Resources Ltd., plaintiff, and
International Diamond Syndicate Ltd., defendant

[2003] B.C.J. No. 1072
2003 BCSC 717
122 A.C.W.S. (3d) 168
Vancouver Registry No. S013517

**British Columbia Supreme Court
Vancouver, British Columbia
Hood J.**

Heard: March 25, 2003.
Judgment: May 7, 2003.
(42 paras.)

Mines and minerals — Mining claims — Ownership — Contracts — Interpretation — Performance or breach — Breach — Termination of contract.

Action by Major General Resources for a declaration that the defendant, International Diamond Syndicate, was in default of its obligations with respect to a mining claim, and that International's options under the claim were terminated. In 1993, Major obtained an interest in the Misty Lake mining claims, pursuant to a joint venture agreement with a third party, SouthernEra Resources. The joint venture agreement set out an area of mutual interest. International exercised an option with Major to partake in an interest in the claim, by paying part of Major's financial obligation. International and Major entered into an agreement in 1995 with respect to the Kidme mining claims, which were partially within the mutual area of interest set out in the 1993 agreement. The 1995 agreement provided International with an option to earn a 40 per cent interest in Major's option to earn a 40 per cent interest in the Kidme claims. Major claimed that International had breached the 1995 agreement, by not making its financial contribution as agreed, and by refusing to execute a further joint venture agreement. Major claimed that as a result, the 1995 agreement was terminated and International was not entitled to any interest. International argued that it was entitled to a reduced interest under the 1993 agreement. It claimed that the 1993 joint venture agreement applied to the Kidme claims, which were partially in its area of mutual interest. SouthernEra's title to the land involved in the Kidme claims was being disputed.

HELD: Action allowed. International had breached its obligations under the 1995 agreement, which was the agreement governing the Kidme claims. The 1993 joint venture agreement did

not yet apply to the Kidme claims. In order for that agreement to apply, title would have to be established, and at present, title was disputed.

Counsel:

D.A. Hobbs, for plaintiff.
L. Gold, for defendant.

¶ 1 **HOOD J.**— The parties are mining exploration and development companies.

¶ 2 The Plaintiff (Major) seeks a declaration that:

- (a) As of March 21, 2001, the Defendant (International) was in default of its obligations to Major to fund expenses in respect of the Kidme Mining Claims (Kidme Claims);
- (b) As a result of International's default under the Kidme option, that option was lawfully terminated by Major on March 21, 2001; and
- (c) International has no further right, title or interest in the Kidme Claims, directly or indirectly, nor in Major's option to acquire an interest in the Kidme Claims.

In the alternative Major seeks an order that:

- (a) Any further or ongoing participation by International in the option with Major in respect of the Kidme Claims is conditional upon International within 7 days from the day of this order, paying by certified or trust cheque to Major or its solicitors the sum of \$51,040.13 representing International's proportionate share of all expenses incurred by Major to SouthernEra in respect of the Kidme Claims to date, and failing such payment, this Honourable Court issue the declaratory relief sought in para. (a), (b), and (c) above; and costs.

¶ 3 The primary issues are the true interpretation to be given to two of the agreements before me, and the question of whether they are related; although consideration of other agreements is necessary as well.

¶ 4 The first agreement is an option or letter agreement dated August 25, 1995 (the Letter Agreement) between Major and International, pertaining to the Kidme Mining Claims.

¶ 5 The second agreement is an option and joint venture agreement, a two part agreement, made some two years earlier, and dated April 15, 1993, between SouthernEra Resources Ltd. (SouthernEra) and Major, and pertaining to the Misty Lake Mining Claims. International subsequently became a vested participant in that agreement, when it exercised an option it had with Major to earn a 40% interest in Major's 40% interest in the Misty Lake Claims, by paying 50% of Major's commitment to spend 2.5 million dollars in exploration and development work on the Program Lands under the option and joint venture agreement.

¶ 6 International's option is contained in an option letter agreement dated June 3, 1993 between Major and International, and which contains SouthernEra's written consent to it. That option makes it clear that its subject matter was the Misty Lake Claims and any other claims "acquired" by International, SouthernEra or Major within the "Area of Mutual Interest" defined in the option and joint venture agreement.

¶ 7 The June 3, 1993 option letter agreement had annexed to it a letter agreement dated April 15, 1993, which was the agreement between SouthernEra and Major pertaining to the Misty Lake Claims. That letter agreement was subsequently superseded, probably in June of 1993, by the option and joint venture agreement which was then back dated to April 15, 1993. The vested interests of the parties in the Misty Lake Claims, and in the option and joint venture agreement, are SouthernEra 60%, Major 24% and International 16%.

¶ 8 It is seen that the option and joint venture agreement dated April 15, 1993 is a two step agreement. It only became a joint venture agreement between Major and SouthernEra when Major fulfilled its financial obligations under the option part of the agreement and exercised its option. Similarly, the agreement only became a joint venture agreement between SouthernEra, Major and International after International performed its financial obligation under its option letter agreement dated June 3, 1993, and exercised the option. Since both Major and International exercised their options, I will refer to the option and joint venture agreement dated April 15, 1993, when appropriate, as the Joint Venture Agreement.

¶ 9 Mr. Hobbs said that the Letter Agreement, like the other "offers to participate" is an option agreement. I agree. It gave International an option to earn a 40% interest in Major's option to earn a 40% interest in the Kidme Claims.

¶ 10 It is Major's position that International is in breach of the Letter Agreement (and I think that this is clearly the case) and that as a result, International has no claim or interest in the Kidme Claims. Not so says Mr. Gold for International. It is International's position that if it is in breach of the Letter Agreement, it does not thereby lose its interest in the Kidme Claims. Rather, its interest therein is diminished pursuant to the provisions of the Joint Venture Agreement of April 15, 1993, pertaining to the Misty Lake Claims. This is so because the Kidme Claims were staked by SouthernEra in the Area of Mutual Interest defined in the Joint Venture Agreement, and that agreement governs the three parties and the Kidme Claims; according to International.

A BRIEF HISTORY

¶ 11 At the risk of repeating myself at times, I will set out as briefly as possible the relevant chronology or history which constitutes my findings as well. In this regard, as Mr. Gold pointed out, the facts are not really in dispute.

¶ 12 On April 15, 1993, Major and SouthernEra entered into a letter agreement regarding the Misty Lake Claims whereby SouthernEra gave Major an option to acquire a 40% joint venture interest in SouthernEra's interest in the Misty Lake Claims. This is the letter agreement which was superseded by the option and joint venture agreement which was backdated to April 15, 1993.

¶ 13 In order to maintain the option in the Misty Lake Claims, and to earn the 40% joint venture interest, Major was required to meet certain conditions, including spending a total of 2.5

million dollars over a three year period for the exploration and development of the Misty Lake Claims.

¶ 14 By the option letter agreement dated June 3, 1993, Major offered to International an option to earn a 40% interest in Major's 40% interest in the Misty Lake Claims. In order to maintain this option and to earn the 16% joint venture interest, International was required to meet certain conditions, including the payment of 50% of Major's commitment to spend the 2.5 million dollars. As I said earlier, the agreement provides that the claims involved were the Misty Lake Claims, and any other claims acquired in the Area of Mutual Interest. The Kidme Claims are primarily within that area, but apparently overtake certain other claims.

¶ 15 Major and International met their conditions required to participate in their Misty Lake Claims options, and exercised their options. As a result a 24% joint venture interest in the Misty Lake Claims vested in Major, and a 16% joint venture interest vested in International.

¶ 16 In August of 1995 SouthernEra agreed to grant Major a further option to earn a 40% interest in the Kidme Claims in return for Major agreeing to fund 40% of all costs incurred by SouthernEra in connection with the Kidme Claims. It seems to me that this option agreement, which was eventually exercised by Major, was necessitated by the fact that title to the Kidme Claims was strongly disputed, and those claims would not be governed by the Joint Venture Agreement unless and until they were legally "acquired" by SouthernEra.

¶ 17 Additionally, the costs or expenses related to the claims would be extraordinary in the sense that they would not simply be the usual costs of staking, but would include the expenses of maintaining the property, and the legal costs involved, until the title dispute was resolved. And finally, there was no guarantee that SouthernEra would succeed. These observations in my view apply equally to the Letter Agreement by which Major granted International the option to earn a 16% joint venture interest.

¶ 18 The Kidme Claims were staked by SouthernEra in April of 1995 in an area described as an "Area of Mutual Interest" in the option and joint venture agreement dated April 15, 1993. It is common ground that SouthernEra is alleged to have overstaked the claims onto Tyler Ground, and that title to the Kidme Claims is hotly disputed and continues to be disputed. There have been numerous proceedings before mining officials such as the Mining Recorder and in the Federal Court, which apparently has remitted the matter back to mining officials for further consideration. In any event, the claims are fairly described as "a high risk, disputed set of claims". This was well known to International at the time that the Letter Agreement was entered into.

¶ 19 In these circumstances, by the Letter Agreement Major granted International an option to earn a 40% joint venture interest in Major's option to earn a 40% interest in the Kidme Claims, on the same funding terms as International had been offered participation in the Misty Lake Claims. By funding 50% of Major's share of the total exploration, legal and development costs, International would earn 40% of Major's share in the Kidme Claims or a 16% joint venture interest.

¶ 20 The Letter Agreement refers to both the Misty Lake Claims and the Kidme Claims. I will set out the portion pertaining to the latter claims, and containing the terms of the option:

As you will recall, SouthernEra has overstaked some of the Tyler ground - the KIDME claims - has sampled the ground and is now processing the samples. The total cost is estimated at \$130,000. SouthernEra has offered the claims to Major General as they are within our area of interest and SouthernEra has agreed to pay the staking costs per the terms of our agreement. Our share of the \$130,000 will only be \$52,000 as SouthernEra has agreed to make the ownership 60% SouthernEra and 40% Major General. Major General is offering the International Diamond Syndicate participation on the same basis as our existing agreement allows ie. 50% of the costs for 40% of the 40%. Crediting the Diamond Syndicate with their share of the staking costs which SouthernEra had billed to us but charging the Syndicate 50% of \$52,000, that is \$26,000, will use up the existing anticipated credit but should not result in any significant amount owing.

This is a high risk venture. SouthernEra will only pursue title if the results are positive however if they do pursue there will be costs. This ground was excluded by Monopros principally because they want to avoid hassles but obviously if there is something there they and everyone else will be interested. There is absolutely no assurance, if we pursue, that we will be successful in getting title. (My emphasis)

If the International Diamond Syndicate do not advise Major General in writing by September 6 of their decision to participate or not to participate, Major General will forthwith withdraw its offer of participation and will exclude these claims and any other claims within Map Sheet 75-N which are not included in the Monopros agreement but which SouthernEra may have staked or which it may stake in the future. The International Diamond Syndicate will then only have a right to participate in the claims which form Schedule "D" of the Monopros - Misty Lake Property agreements. The International Diamond Syndicate are advised that at the present time Major General intends on participating with SouthernEra in the KIDME opportunity.

¶ 21 International's share of the costs as of August 25, 1995, was \$26,000.00, being one-half of the costs then incurred by Major. This was only an estimate as future costs, including those associated with resolving the title dispute, were unknown.

¶ 22 By letter dated September 5, 1995, International advised Major that it planned to participate in the Kidme Project.

¶ 23 Major proceeded to incur expenses and costs with respect to the Kidme Claims and invoiced International for its share of them on a fairly regular basis. International paid \$19,346.61 of the expenses and costs, and then refused to pay any more. International also refused to execute a written joint venture agreement incorporating the terms of the Kidme option which was sent to it by Major on December 4, 1996. At the present time International's outstanding portion of the costs and expenses relating to the Kidme Claims is \$50,618.90.

¶ 24 Finally, on March 21, 2001, Major's solicitor wrote to International stating:

We wrote to you on January 29, 2000 requesting payment to our client, Major

General Resources Ltd., ("Major General"). Major General also responded to your subsequent letter of February 13, 2001. To our knowledge the \$32,597.96 has not been paid.

Please take this letter as the notice of Major General to the Syndicate that any interest that the Syndicate may have had in the Kidme Project as outlined in Major General's August 25, 1995 letter has been terminated as a result of the Syndicate's failure to pay its proportionate share of costs of the joint venture. (My emphasis)

¶ 25 I observe that much was made of the words "joint venture" in this letter by Mr. Gold, as suggesting an acknowledgment by Major that the Kidme Claims and the parties were governed by the Joint Venture Agreement. I am unable to agree that that was the intended use of the words. And it will be seen in any event that it is my view that the Kidme Claims never came under the provisions of the Joint Venture Agreement.

¶ 26 At this point I should deal as well with other suggested defences or positions raised by International. It also relies on a news release dated May 13, 1996, as evidencing the fact that International had an interest in the Kidme Claims. I do not agree. What it says in the release is that the property will be explored by a joint venture between SouthernEra and Major, and that International "can maintain a 40% interest in Major General's portion by contributing 50% of Major General's expenditures." It is common ground that International never fulfilled its obligation to contribute 50% of the expenditures referred to.

¶ 27 International also relies on the joint venture agreement which Major sent to it in December of 1996, and which it refused to sign, as evidencing the fact that International had exercised its option and had acquired a 16% interest in the Kidme Claims. Again, I am unimpressed with the attempted use of this unsigned draft agreement. The agreement would only have been executed if in fact International had fulfilled its financial obligations, was entitled to exercise its option and had exercised its option. Thus it was drafted as if these events had occurred. However, none of them had, and, in particular, International had not paid its proportionate share of the costs and expenses as outlined above.

¶ 28 It may be useful to look at the proposed tri-party joint venture agreement which is entitled "Kidme Claims, Joint Venture Agreement" and the covering letter of December 4, 1996; if for no other reason than that it demonstrates the intentions and understandings of SouthernEra and Major. In the letter it is stated:

Basically this agreement is identical to the present 75N joint venture agreement between SouthernEra and Major General except that we have incorporated the Syndicate in it rather than having a separate agreement.

The 75N joint venture agreement is the option and joint venture agreement dated April 15, 1993, and the Syndicate is International.

¶ 29 It is to be observed that this proposed joint venture agreement is dated May 25, 1995, and has three parties, SouthernEra, Major and International; that it deals with, among other things, International's right to earn a 16% joint venture interest in the Kidme Claims, and the

"Tyler Dispute" which is described as "currently being adjudicated" and "relating to a portion of the property covered by mineral claims staked by Tyler Resources Ltd."

¶ 30 The agreement also acknowledges that if the Kidme Claims are adjusted as a result of a final decision by any Court and so on, the agreement will continue in full force and effect "with the size of the property being adjusted accordingly." And by Clause 1.6 the agreement is stated to embody all the terms of the mutual understandings existing between the parties and with respect to the subject matter of the agreement; that in particular the agreement superseded and replaced all previous written or oral arrangements and so on.

¶ 31 By Clause 2(1) SouthernEra provides representations and warranties pertaining to the properties, save and except for the portion of the properties which is subject to the "Tyler Dispute". Had this joint venture agreement been signed in May of 1995 it seems that the parties' agreements, rights and positions with regard to the Kidme Claims would have been consolidated at that time, regardless of the title dispute.

¶ 32 I return to the defences or positions maintained by International. In his affidavit Mr. Robertson says that in effect he was not fully familiar with these matters at the material times; that he has tried to familiarize himself as best he could from those who were more active and from the documentation which he has been able to locate. However, it appears clear to me from his affidavit, and particularly from his discovery evidence, that by the time that International had expended approximately \$19,000.00 towards its proportionate share of the Kidme expenses and costs, it had a change of heart or a change in control which led to the same result.

¶ 33 Since then it has been International's position that it is foolish to spend money on agreements and legal fees and work programs where the claims are in dispute; and they declined to do so. That may well be the case if it turns out that the claims are worthless. However, that was not the position of International when it entered into the Letter Agreement by which it was granted the option to earn a 16% joint venture interest in the Kidme Claims (whatever that interest might be in the end) by paying its proportionate share of the costs and expenses involved in maintaining the Kidme properties, when it was SouthernEra's obligation to do so, and in advancing or protecting title to the claims. It did not do so and, in my opinion, it never "earned" any interest in the Kidme Claims.

¶ 34 International also complained that Major did not provide it with information about the claims from time to time, and Major says that it stopped providing information because while they were providing information International was not paying its proportionate share of the costs and expenses. I am satisfied that there is no merit in the point in favour of International. I am satisfied as well that International simply decided to maintain the inconsistent position, and continues to do so, that unless and until it receives positive information with regard to the claims, and advice that the title dispute has been resolved in favour of SouthernEra, it is not prepared to pay its proportionate share of the Kidme costs and expenses. This, in my view, as I have already indicated, was a decision which is fatal to International's position.

¶ 35 Finally, I note that in its Outline International's only basis for relief was stated to be "the issues raised by the Notice of Motion are not suitable for disposition under this rule pursuant to 18A (8)(b)(i)", as set out in the defence. In this regard Mr. Gordon did not raise this position or defence during submissions, and I have assumed in the circumstances that both parties want their

differences resolved in these proceedings, and that it has been abandoned. In any event, I am satisfied that the issues between the parties can be appropriately decided by way of a summary trial.

¶ 36 I turn to the only real defence advanced by International, which is that since the Kidme Claims are in the Area of Mutual Interest under the terms of the joint venture agreement dated April 15, 1993, the provisions of that agreement apply to the claims and the parties, with the result that International has an interest in the Kidme Claims which is only diminished, but not extinguished, as a result of its failure to pay its proportionate share of the Kidme costs and expenses.

¶ 37 I need not deal with the specific terms of the joint venture agreement. It is, as I have said, a two part agreement, an option in the first instance until Major exercised the option, and then it became the joint venture agreement governing the Misty Lake Claims and SouthernEra and Major. It is common ground as well that once International exercised its option pertaining to the Misty Lake Claims, by meeting its financial obligations with respect to those claims, it too in effect became a party to the joint venture agreement governing the Misty Lake Claims.

¶ 38 All are agreed that the "Program Lands" under the agreement included not only the Misty Lake Claims, but also any other claims acquired in the designated "Area of Mutual Interest". This would have included the Kidme Claims if the party staking them, SouthernEra, had acquired good legal title to them and could give proper representations and warranties along the lines of those contained in Article 2 of the option and joint venture agreement. However, title to these claims continues to be disputed, and in my view this is the first of two hurdles which International must overcome if it is to succeed.

¶ 39 If SouthernEra should succeed in obtaining good title to the Kidme Claims, then in my view they would be governed by the joint venture agreement as regards SouthernEra and Major, and who would have a vested joint venture interest in them in accordance with their earned 60% and 40% interests; but not as regards International since it has not earned its 16% interest. However, since SouthernEra has not obtained title to the Kidme Claims it is my view that it has not "acquired" the claims and the joint venture agreement does not apply to them. SouthernEra has no title to vest in Major, or in International if it otherwise qualified. That being the case, International's position that it has a 16% interest in the Kidme Claims which is only diluted, and not extinguished, cannot be maintained.

¶ 40 The other hurdle, the primary hurdle, which International cannot get over is its failure to pay its proportionate share of the Kidme Claims costs and expenses. In order to maintain or earn its 16% joint venture interest in the claims, and to exercise its option, International was required to pay its proportionate share of the costs and disbursements. It did not do so and in my view it never became entitled to any interest in the Kidme Claims.

¶ 41 I agree then with Mr. Hobbs' submission that the Letter Agreement has nothing to do with the Joint Venture Agreement dated April 15, 1993 "yet". In order to bring the agreement into play for International, two things must have happened. First, SouthernEra must have obtained clear and undisputed title to the Kidme Claims. And second, International must have paid its proportionate share of the Kidme Claims costs and disbursements, and exercised its option to earn its 16% joint venture interest in the Kidme Claims. Neither event has occurred.

While I suppose the former is still possible, the latter is not; unless Major is prepared to accept International's payment at this late date, although it is not, in law, bound to do so.

¶ 42 In summary, International is in deliberate breach of the Letter Agreement dated August 25, 1995. As a result, Major is entitled to the declaratory relief sought in para. (a), (b) and (c) of para. 2 in these Reasons, and to its costs.

HOOD J.

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